**Human Resource and Personnel Matters Workshop**

*Wednesday, October 9, 2019*

**Wyndham Hotel – Silver City Rooms 5-7**

**North Little Rock, AR**

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**9:00 a.m. – 9:05 a.m.**  
*Welcome and Opening Remarks*  
Mayor Harold Perrin, League President  
City of Jonesboro  
Whitnee V. Bullerwell, Deputy Director  
Arkansas Municipal League

**9:05 a.m. – 9:30 a.m.**  
*If You Can Define It – You Can Enforce It*  
Tracey Pew, Director of Human Resources  
Arkansas Municipal League

**9:30 a.m. – 10:15 a.m.**  
*Americans with Disabilities Act: Title I and How it Affects Your Employees*  
Amanda LaFever, Litigation Counsel  
Arkansas Municipal League

**10:15 a.m. – 11:00 a.m.**  
*Fair Labor Standards Act (FLSA)*  
John Wilkerson, General Counsel  
Arkansas Municipal League

**11:00 a.m. – 11:45 p.m.**  
*Family Medical Leave Act (FMLA)*  
John Wilkerson, General Counsel  
Arkansas Municipal League

**11:45 a.m. – 12:15 p.m.**  
*Lunch*

**12:15 p.m. – 1:15 p.m.**  
*Are You EEOC Compliant?*  
John Wilkerson, General Counsel  
Arkansas Municipal League  
Tracey Pew, Director of Human Resources  
Arkansas Municipal League  
David Baxter, General Manager of Health/Safety and Operations  
Arkansas Municipal League

**1:15 p.m. – 2:15 p.m.**  
*Drug Testing: CDL, Non-CDL, Random Testing, and Safety Sensitive Positions*  
Jeff Sims, President  
a’Test Consultants

**2:15 p.m. – 3:15 p.m.**  
*Medical Marijuana Cards And Their Effect on the Workplace*  
Jeff Sims, President  
a’Test Consultants
3:15 p.m. – 3:30 p.m.  Question and Answer  
Jeff Sims, President  
a’Test Consultants  
Tracey Pew, Director of Human Resources  
Arkansas Municipal League  
Amanda LaFever, Litigation Counsel  
Arkansas Municipal League  
John Wilkerson, General Counsel  
Arkansas Municipal League  
David Baxter, General Manager of  
Health/Safety and Operations  
Arkansas Municipal League  

3:30 p.m.  Concluding Remarks  
Whitnee V. Bullerwell, Deputy Director  
Arkansas Municipal League
IF YOU CAN DEFINE IT, YOU CAN ENFORCE IT

Arkansas Municipal League
2019 Human Resource & Personnel Matters Workshop
EMPLOYEE HANDBOOKS: DOES YOUR CITY NEED ONE?

YES!

An employee handbook is an effective way to communicate policies, procedures and work rules to employees. It can be used to:

- Orient new employees to your organization’s culture;
- Maintain consistency among managers and supervisors;
- Minimize misunderstandings over workplace policies;
- Support disciplinary actions and avoid charges of unlawful discrimination; and
- Outline employee benefits.
TWO POLICIES TO CONSIDER

CIVILITY AND ANTI-BULLYING
WORKPLACE CIVILITY

• Incivility in the workplace has become a common problem and it is increasing at an alarming rate.
• Most people in an HR role can attest to the fact that employee conflict almost always arises from incivility in one form or another. HR professionals spend hours a week managing conflict.
• Somewhere along the way, we have forgotten the manners that most of us were taught as children.
Are you a model of civility? Ask yourself these questions:

• Do I always say please and thank you?
• Do I use email when face-to-face is needed?
• Do I take too much credit for collaborative work?
• Do I email or text during meetings?
• Do I leave a meeting to accept phone calls?
• Am I on time?
• Do I talk down to others?
• Do I delay access to information or resources?
• Do I pass the blame when I’ve contributed to a mistake?
• Do I listen?
• Do I take advantage of others?
• Do I interrupt or talk over others?
• Do I demand rather than request?
• Do I take the time to get to know my employees?
The impact of rude behavior in the workplace is significant. One recent study (paywall) found:

- 78% of people who experience uncivil behavior from their colleagues become less committed to the organization.
- 66% suffer a decline in overall performance.
- 47% deliberately spend less time at work.
- 25% take their frustrations out on customers.

As a municipality, are these impacts that you are willing to absorb as the cost of doing business?
• Civility is a collection of positive behaviors that produce feelings of respect, dignity and trust. Civility should be a priority for every workplace.

• Civility begins at the top. People in a leadership position should set the standard and model the behavior.

• Consider including a code of civility/policy in your employee handbook. If you can define it, you can enforce it.

• Consistently adhere to your policy, coach the standard and make civility a part of your organization’s core values.
The following contains the (organization name) code of civility that includes our conduct toward each other, or members and guests, and the public who visit our offices:

• We greet and acknowledge each other;
• We say please and thank you;
• We treat each other equally and with respect, no matter the conditions;
• We welcome feedback from each other;
• We are approachable;
• We are direct, sensitive and honest;
• We acknowledge the contributions of others;
• We respect each other’s time and commitments; and
• We address incivility when it occurs.
Bullying vs. Harassment -

• Bullying behaviors are not technically unlawful – but can and should be addressed.

• Bullying is generally defined as unwelcome behavior that occurs over a period of time and is meant to harm someone who feels powerless to respond.

• Verbal bullying includes teasing and threatening to cause harm. Social bullying in the workplace might happen by leaving someone out of a meeting or publicly reprimanding someone.

• Bullying is actionable under federal law only when the basis for it is tied to a protected category such as race, national origin, religion, sex or age.
How Does Bullying Affect Your Workplace?

A 2017 survey by the Workplace Bullying Institute estimated that 61% of U.S. employees were aware of abusive conduct in the workplace, 19% have experienced it and other 19% have witnessed it.

Bullies create a morale problem in the workplace.

Low morale can lead to employee dissatisfaction, low productivity, absenteeism and turnover.

If the bully is a manager or supervisor who is mean to everyone (an equal opportunity bully) the issue is compounded.

Everything has a value – from productivity to the cost of training and replacing an employee. When bullying is allowed to go unchecked, not only does the victim suffer, but your organization does too!
WILL BULLYING EVER BECOME ILLEGAL?

- In the absence of federal legislation prohibiting bullying, several states are considering legislation that would provide some protection.

- According to the Healthy Workplace Campaign, legislatures in 29 states have introduced workplace anti-bullying bills in recent years.

- Arkansas has adopted legislation that addresses cyberbullying, student bullying, and is working on legislation to require preventative training.
WHAT CAN BE DONE AT A MUNICIPAL LEVEL?

Adopt clear, written anti-bullying policies – and enforce them. Remember, if you can define it, you can enforce it.

Foster an organization culture that prioritizes inclusion and does not tolerate bullying.

Conduct bystander intervention training which empowers co-workers to intervene when they witness bullying or harassing behavior.

Conduct workplace civility training, which may reduce the likelihood that bullying will occur by promoting respect and understanding. (AML has an excellent “Achieving Respect and Understanding in the Arkansas Municipal Workplace” program that David Baxter would be happy to bring to your city.)

Institute clear reporting and investigating procedures so that employees know how and where to report incidents – and consistently follow the procedures.
The purpose of this policy is to communicate to all employees, including supervisors, managers and executives, that [City/Entity Name] will not in any instance tolerate bullying behavior. Employees found in violation of this policy will be disciplined, up to and including termination.

Definition

[City/Entity Name] defines bullying as repeated, health-harming mistreatment of one or more people by one or more perpetrators. It is abusive conduct that includes:

- Threatening, humiliating or intimidating behaviors.
- Work interference/sabotage that prevents work from getting done.
- Verbal abuse.
- Such behavior violates [City/Entity Name]’s [standards of conduct/employment policies], which clearly state that all employees will be treated with dignity and respect.

Examples

City/Entity Name] considers the following types of behavior examples of bullying:

- **Verbal bullying.** Slandering, ridiculing or maligning a person or his or her family; persistent name-calling that is hurtful, insulting or humiliating; using a person as the butt of jokes; abusive and offensive remarks.
- **Physical bullying.** Pushing, shoving, kicking, poking, tripping, assault or threat of physical assault, damage to a person’s work area or property.
- **Gesture bullying.** Nonverbal gestures that can convey threatening messages.
- **Exclusion.** Socially or physically excluding or disregarding a person in work-related activities.
• SHRM Resources and Tools - www.shrm.org.
• Other commercial software packages and tools that can be found online.
• AML recommends that city officials and city attorneys conduct no less than an annual review of all items in the handbook.
• If you adopt a personnel handbook, failing to follow and enforce its guidelines may result in legal liability. For this reason, AML suggests that the handbook adopted by your city be as simple and concise as possible.
• Before you adopt your handbook, ask your city attorney to review to ensure it complies with federal and state laws.
• Policies are of no use if city employees, supervisors, department heads and officials are not advised of them. For this reason, an acknowledgement should be used to ensure that every employee receives, reads and keeps a copy of the policies.
QUESTIONS????
• Tracey L. Cline-Pew, SPHR, SHRM-SCP
• Director of Human Resources
• Arkansas Municipal League
• tpew@arml.org
• 501-978-6111
Americans with Disabilities Act: Title I and How it Affects Your Employees

Presented by: Amanda LaFever, Litigation Counsel
ADA, A Brief History

• Rooted in section 504 of the Rehabilitation Act

• July 26, 1990: Congress enacted the Americans with Disabilities Act & signed into law by President George H. Bush


• Consists of 5 titles
  • Title I: Employment
  • Title II: Public Services
  • Title III: Public Accommodations and Services Operated by Private Entities
  • Title IV: Telecommunications
  • Title V: Miscellaneous Provisions
40 million people
12.6% of the civilian non-institutionalized population

- Children
- Adults
- Parents
- Vets
- Elderly
- Accident victims
- Arkansas one of the top 5 in US @ 17%
Title I
• Prohibits local governments from discriminating against qualified individuals with disabilities in
  ✓ job application procedures,
  ✓ hiring,
  ✓ firing,
  ✓ advancement,
  ✓ compensation,
  ✓ job training, and
  ✓ other terms, conditions, and privileges of employment.

• Regulated and enforced by the U.S. Equal Employment Opportunity Commission.
To be protected, you must be a qualified individual with a disability.
Disability

- a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- a record of such impairment; or
- being regarded as having such an impairment.

Major Life Activities

A person is considered an individual with a disability when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. Examples include caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Mental Impairment

- any mental or psychological disorder such as ... emotional or mental illness
Qualified Individual

An individual who

With or without reasonable accommodation

Can perform the essential functions of the position
Essential Functions of the Position

- It is a function that, if removed, would alter the job.
- It is a function that cannot be performed by another employee.
- It is a function that is specialized.

Marginal functions are those job duties that an employee may perform but which are not essential to the position.
Reasonable Accommodation

• Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities.

• Accommodations vary depending upon the needs of the individual applicant or employee.

• Not all people with disabilities (or even all people with the same disability) will require the same accommodation.
## Reasonable Accommodation

<p>| Make existing facilities used by employees readily accessible to and usable by persons with disabilities. | Restructure the job, modify work schedules, or reassign to a vacant position. | Acquire or modify equipment or devices, adjust or modify examinations, training materials, or policies, and provide qualified readers or interpreters. |</p>
<table>
<thead>
<tr>
<th>Reasonable Accommodation Examples</th>
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<tbody>
<tr>
<td>An employee with cancer may need leave to have radiation or chemotherapy treatments.</td>
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<tr>
<td>A blind employee may need someone to read information posted on a bulletin board.</td>
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<tr>
<td>An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels.</td>
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<tr>
<td>A deaf applicant may need a sign language interpreter during the job interview.</td>
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</tbody>
</table>
NO Reasonable Accommodation

Undue Hardship

Lower Quality

Did Not Ask
Undue Hardship

An action requiring significant difficulty or expense when considered in light of factors such as

✓ An employer’s size, including number, type, and locations of other facilities,
✓ The nature and cost of the accommodation,
✓ The overall financial resources available, and
✓ the nature and structure of its operation, including the operation’s composition, and the structure and function of its employees.
If an employer believes that a medical condition is causing a performance or conduct problem, it may ask the employee how to solve the problem and if the employee needs a reasonable accommodation.

Once a reasonable accommodation is requested, the employer and the individual should discuss the individual’s needs and identify the appropriate reasonable accommodation.
Avoiding Lawsuits

1. Know and understand the rights provided to persons with disabilities by the ADA.

2. Treat all employees with the same fairness and provide opportunities equally to all persons, including those with disabilities.

3. Consult legal counsel or an ADA specialist before making any personal decisions regarding persons with disabilities.

4. Document legitimate business reasons for any personnel actions taken against or for any employee.
BUUUUUUUUTTTTTTTT.
A representative case.
Problems & Examples
RESOURCES

WEBSITES
- WWW.ADA.GOV
- WWW.ADATA.ORG
- WWW.ADAEMPLOYMENTCOURSE.ORG
- WWW.DISABILITYRIGHTSCOURSE.ORG
- WWW.ASKJAN.ORG
- WWW.DOL.GOV
- WWW.YOUTUBE.COM

PUBLICATIONS
- The League Handbook
- ADA Title I Regulations

PEOPLE
- ADA Information Line: 800-514-0301
- ADA National Netword: 800-949-4232
- League Inquiry Hotline 501-537-3797
  lawinquiry@arml.org
Fair Labor Standards Act (FLSA)
Basics of FLSA

- Distinguishes between covered (non-exempt) and excluded (exempt) employees
- Establishes minimum wage & overtime standards
- Establishes overtime threshold (40 hours/week)
- Mandates certain record-keeping requirements
The Big Requirements
Minimum Wage

Minimum Wage Under the FLSA

- The federal minimum wage is $7.25/hour.

Arkansas Minimum Wage

- As of January 1, 2019, the minimum wage in Arkansas is $9.25/hour.
- On January 1, 2020, it will be raised to $10.00/hour.
- On January 1, 2021, it will again be raised to $11.00/hour.

29 U.S.C.A. § 206

Ark. Code Ann. § 11-4-210
The FLSA imposes a 40 hour work week.

The employer may choose any seven day period, as long as it's consistent. Generally, a workweek beginning and ending at 5pm on Friday is appropriate.

29 C.F.R. § 778.104.

If a nonexempt employee works more than 40 compensable hours a week, they must be given one of two things:

(1) One and a half times their regular hourly rate for each hour over 40, or

(2) Compensatory time off for at the rate of one and a half hours for each hour over 40
Maximum Hours for Police

- Uniformed employees, however, including firemen and police officers, may be given up to a 28-day work period.

- A uniformed employee is one who:
  - (1) is a member of a body of officers and subordinates who are empowered to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes,
  - (2) who has the power to arrest, and
  - (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study in the field of policework.

29 C.F.R. § 553.211
Compensable Hours

- So, what are “compensable hours”?
- Probably not that >
- Work hours are compensable if:
  - Time is controlled or required by the employer, and
  - The time significantly benefits the employer. See Whalen v. United States, 93 Fed. Cl. 579, 605–06 (2010).
- Pay for holidays, vacations, sick time, jury duty, etc., do not count as hours worked. 29 C.F.R. § 778.102

Employees do not have to be paid for “on-call” time unless their activities are overly restricted.

Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits constitutes compensable hours of work. 29 C.F.R. § 553.221.

Courts look at the facts of each case when considering whether certain hours were on-call, and a number of factors, including:

1. Whether there was an on-premises living requirement
2. How much the employee is geographically restricted
3. The frequency of calls
4. Whether there is a fixed time for response
5. Whether the on-call employee could easily trade on-call responsibilities
6. Whether use of a pager or cell phone could ease restrictions
7. Whether the employee had actually engaged in personal activities during call-in time

On-Call Hours

Be wary of phrases like:

- “You can’t leave town because we need you on call”
- “Wear your uniform always in case we call you in”
- “You’ve got to come in on 10 minutes notice”

Too many of these will turn on-call hours into billable hours.

Many problems with on-call hours can be avoided by ensuring employees have access to cell phones or pagers.
Travel or preparation for work are compensable if they “are an integral part of and are essential to the principal activities of the employees”


An activity is not integral and indispensable to an employee’s principal activities unless it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform those activities.

- Integrity Staffing Sols., Inc. v. Busk, 574 U.S. 27 (2014)

For example, a chemical worker who cannot perform his job without putting on protective gear would be performing work that is essential and compensable while donning the gear. 29 C.F.R. § 790.8.
Normal travel from home to work is not worktime.

However, emergency travel to work in an on-call situation could be. 29 C.F.R. § 785.36

Time spent going to special work assignments in other cities would also be compensable. 29 CFR § 785.37

Regular time to work would be deducted.

Travel as part of a normal workday or between work-sites is worktime.
Training and Lectures

- Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met:
  - it is outside normal hours,
  - it is in fact voluntary,
  - not directly job related, and
  - no productive work is performed while at attendance.

29 C.F.R. § 785.27.
Uniforms

Under the Arkansas Minimum Wage Act, donning and doffing uniforms are compensable hours, unless it specifically provides otherwise in a collective bargaining agreement.

To minimize donning and doffing complaints, it is best to have employees get prepared at the station as part of their on-the-clock duties.
A federal court in Arkansas has found that a police officer’s hours were compensable when he fed, watered, exercised, groomed, cleaned, cleaned living areas of, trained, arranged veterinary care for, and provided home medical care for, assigned police dogs during off-the-clock time.

Gun-cleaning was also considered compensable, because the department received a significant benefit from the operation of the officer’s guns.

Overtime

- If an employee receives more than the “maximum” hours, usually this means overtime pay.
  - The employee is paid 1.5 times his or her regular rate for every hour over the maximum.

29 U.S.C. § 207

- There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek. The Act does not require any special pay for work on Saturdays, Sundays, holidays, or regular days of rest.
Determining Overtime for Salaried Employees

- In the case of a salaried employee receiving overtime compensation, the **hourly rate** must still be determined.
  - Divide the amount of the employee’s weekly salary by the number of hours the salary is intended to compensate.
  - Example: An employee has a salary of $350, paid weekly, and it is agreed that it is meant to compensate a regular workweek of 35 hours, the hourly rate is $10.
    - So, for the first 40 hours, the employee would be owed $10, but for every hour beyond that, $15.
The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.

If there is a delay, payment for overtime is okay if it is as soon as is reasonably necessary to compute and arrange for payment.

“In no event may payment be delayed beyond the next payday after such computation can be made.”

29 C.F.R. § 778.106
Comp Time

- Public agencies can offer compensatory time off instead of overtime, at the same rate: 1.5 hours for each hour worked over the maximum.

- Comp time can be offered ONLY if it is listed in the agreement between employer and employee. 29 U.S.C. § 207(o)(2)(A)(ii).

- An employee can request the use of “comp time” at any time; the employer is obligated to allow the use of that “comp time” within a reasonable time unless by doing so, it would disrupt the operations of the employers. 29 U.S.C. § 207(o)(5)(B).
Comp Time Limitations

- An employer can require an employee to use comp time. See *Christensen v. Harris County*, 529 U.S. 576, 585 (2000).
  - The Court described Harris County’s policy as follows: “The employees’ supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee’s stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times.” This was okay.

- Do not eliminate unused comp time without paying the employee for that overtime!
Paying Accrued Comp Time After Termination of Employment

- Payment of “comp time” at termination is time-and-a-half at a wage equaling the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher. 29 U.S.C. § 207(o)(4).

- Because unused comp time must be paid at the time of termination, it is advised to “pay as you go.” Compensate employees for their unused comp time at the end of each year, or mandate that the employees use their comp time at your discretion.
Working But Not Reporting Hours

- Sometimes, workers don't report their hours like they should.

- Usually, an employer is not liable for paying its employees for overtime accrued for working outside of normal working hours.

- However, an employer is responsible for overtime accrued for an employee’s work if the employer knew or should have known about the work.
  - Basically, if a normal employer in their position would have known about the work they are on the hook for it.
Record Keeping (29 C.F.R. § 516.6)

- Employers are required to keep records regarding employees and their compensation.
- Primary sources of this information must be kept for three years
  - These include payroll records, work certificates, collective bargaining agreements, individual employment contracts, and sales records.
- Supplementary records must be kept for two years
  - These include time cards, production cards, wage rate tables, piece-rate schedules, and work-time schedules.
- For more information about what records to keep, visit https://www.dol.gov/general/topic/wages/wagesrecordkeeping
Equal Pay

- Men and women must be given equal pay for jobs which are “substantially equal.”

- Differences in pay are okay if based on a factor other than sex, such as seniority, merit, or quality or quantity of production
  - However, it is on the employer to prove pay differences are because of a factor other than sex
FLSA Retaliation

FLSA prohibits employers from discriminating against any employee because the employee:

- provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State *information relating to any violation* of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment made by this title);

- **testified or is about to testify** in a proceeding concerning such violation;

- **assisted or participated**, or is about to assist or participate, in such a proceeding; or

- **objected to, or refused to participate in**, any activity, policy, practice, or assigned task that the employee (or other such person) **reasonably believed to be in violation** of any provision of this title (or amendment), or any order, rule, regulation, standard, or ban under this title (or amendment).

In short, if someone claims they are owed pay or is speaking out against the Department for a possible violation of these rules:

- Don’t cut overtime, change their position, reprimand them, etc.
- Treat them as similar to before as you can, even if it hurts.
  - Lawsuits also hurt.

The spirit of the law is that all employees should be treated fairly.
Exemptions
Exemptions for Uniformed Employees

- There is an exemption for police and fire departments that have less than 5 employees, including chiefs. 29 U.S.C. § 213(b)(20).
  - Part-time Employees are considered employees.
  - Employees who are on leave and not working are also considered employees. 29 C.F.R. § 553.200(b).
  - Volunteer firefighters and auxiliary police officers are “volunteers” and are not treated as employees.
- This means that if your city employs 4 or less police officers at your department, the city does not have to pay overtime.
  - However, the minimum wage still applies.
Executive Employees:  
29 C.F.R. § 541.100

- (1) Compensated on a salary basis at a rate of not less than $684 per week ($455 per week until January 1, 2020);
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

EXAMPLES: Police Chiefs, Fire Chiefs, and Department Heads
“Primary duty” essentially means that the employee spends the majority of their time doing those activities.

In *Auer v. Robbins*, 65 F.3d 702, 713 (8th Cir. 1995), police sergeants St. Louis were found to be “executive employees” because they were compensated at a higher salary range than their subordinates and “management” was laid out as a sergeant’s responsibility in the department handbook.

One way to show a supposed executive's recommendations are given particular weight is to show that their input carries more weight than an hourly employee. *Madden v. Lumber One Home Ctr., Inc.*, 745 F.3d 899, 906 (8th Cir. 2014).
Administrative Employees: 29 C.F.R. § 541.200

(1) Compensated on a salary or fee basis at a rate of not less than $684 per week ($455 per week until January 1, 2020);

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

EXAMPLES: HR Director, Computer/Systems Administrator, Financial Officer
Administrative Employees

- In *Shockley v. City of Newport News*, 997 F.2d 18, 28 (4th Cir. 1993), an officer with a position entitled “Ethics and Standards Lieutenant” was found to be an administrative employee because she spent her work time investigating complaints against other officers, accumulating data, and making recommendations to department policy.

- In *Beauford v. ActionLink*, LLC, 781 F.3d 396, 405 (8th Cir. 2015), the Court found that brand advocates for an electronics company were not administrative employees because they followed well-established scripts without exercising their own discretion. They were also strictly supervised and frequently reported to supervisors.
Professional Employees:
29 C.F.R. § 541.300

- (1) Compensated on a salary or fee basis at a rate of not less than $684 per week ($455 per week until January 1, 2020); and
- (2) Whose primary duty is the performance of work:
  - (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
  - (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

EXAMPLES: City Engineer, Wastewater Professionals, Planning Directors, City Attorneys
One federal court has found that Houston EMTs were not professionals under the exemption because the position did not require a college degree and required only 200 hours of training. *Vela v. City of Houston*, 276 F.3d 659, 675 (5th Cir. 2001).

“The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.” 29 C.F.R. § 541.301.

Police academy would probably not be enough, but something like dog handler training or bomb squad would be a closer call.
The FLSA usually does not apply to individuals who are:

- elected state or local officials
- people on the "personal staff" of elected officials
- advisers to elected officials
- those appointed by an elected official to perform **policymaking** functions

None of these may apply to employees of state or local legislative libraries. They are always “employees” under the FLSA.

29 U.S.C. § 203
Public Officials: Personal Staff and Advisers

- Personal staff of elected officials include those who
  - are under the direct supervision of the elected official who selected them and
  - have regular contact with the official
- Staff who serve as immediate advisers for elected officials on constitutional or legal matters are also exempted.
Public Officials: Policymaking Employees

- Employees appointed by an elected official who actually formulate policy
  - Appointed members of the state cabinet and directors of city and county boards and commissions would fall outside the FLSA
Moonlighting Provisions

Law enforcement or firefighters who perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer during their off-duty hours do not have those work hours combined together for purposes of overtime compensation.

This applies when:

- The special detail work is performed solely at the employee's option, and
- the two employers are in fact separate and independent

29 C.F.R. § 553.227
Holiday Compensation for City Officers

- All law enforcement officers, regardless of their titles (e.g. city marshal) and employed by cities of the first or second class or incorporated towns shall be compensated for all legal holidays established by the governing body of the municipality.

- Compensation will be based on the law enforcement officer’s daily rate of pay and in addition to the regular pay schedule. Compensation can be included in the officer’s base pay.

- Compensation should be either prorated and paid during the regular payroll periods or paid in one lump sum each year on a date in December decided by the municipality.


- Law enforcement officers, regardless of titles and employed by any municipality shall accumulate sick leave at the rate of 20 working days per year beginning one year after the date of employment.
  - “Law enforcement officers” does not include radio operators or jailers. Only people who are involved in the investigation, prevention, citation, or detection of crime.

- If an officer is still employed by the police department, the officer is entitled to sick leave even if the officer is unable to work for several months. Op. Att’y Gen. 2008-094.

- If unused, sick leave shall accumulate to a maximum of sixty (60) days unless the city or town allows a greater amount by ordinance not to exceed ninety (90) days, except to compute years of service for retirement purposes.

- Time off for an illness or injury may be charged against accumulated sick leave only on days the officer is scheduled to work.

- Upon death or retirement, whichever happens first, any police officer who has unused accumulated sick leave shall be paid for the sick leave at the regular rate of pay in effect at the time of retirement or death.

  - Officers who leave employment for any reason other than retirement or death will forfeit their unused sick leave. Attorney General Opinion 98-182.
What Can You Do?

- The best option is to pay your employees what is owed to them as soon as possible.
- Use job descriptions wisely. They aren’t determinative, but they carry influence with courts when deciding who is exempted.
  - Also make sure that officers are working within the parameters of their job descriptions, and update as needed.
What Can You Do?

- Audit payroll practices occasionally, and pay attention to any inconsistencies in overtime reporting.
- Making sure that any deductions are appropriate.
- Train management employees on the issues.
- Consult a knowledgeable source, such as a city attorney, before making any significant changes to wage and hour policy.
THE FMLA: And Other Spooky Stories in October

JOHN WILKERSON
GENERAL COUNSEL
jwilkerson@arml.org
FAMILY MEDICAL LEAVE ACT (FMLA)
WHY DO WE HAVE THE FMLA?

- (1) to balance the demands of the workplace with the needs of families;
- (2) to entitle employees to take reasonable leave for medical reasons;
- (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
- (4) minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons; and
- (5) to promote the goal of equal employment opportunity for women and men.
FAMILY MEDICAL LEAVE ACT

Posting Requirement, there is one!

https://www.dol.gov/whd/fmla/posters.htm

POSTING REQUIREMENT

• All covered employers are required to display and keep displayed a poster prepared by the Department of Labor summarizing the major provisions of The Family and Medical Leave Act (FMLA) and telling employees how to file a complaint. The poster must be displayed in a conspicuous place where employees and applicants for employment can see it. A poster must be displayed at all locations even if there are no eligible employees.

  • Located at: www.dol.gov/esa/whd/
HANDBOOK
REQUIREMENT

If an employer is covered by FMLA and has any FMLA eligible employees it shall publish in writing a general notice that the employer recognizes and honors FMLA leave along with general statements of FMLA leave rights of the employee.
WHO IS COVERED

Employers: Local Governments. 29 C.F.R. § 825.104(a).

Employees:
- 12 months of employment;
- Worked at least 1,250 hours within the prior 12 months (keep accurate time records!) - 29 C.F.R. § 785.6 (no definition of ‘work’)
- Employer has 50 or more employees within 75 miles of employee’s job site
- See 29 C.F.R. § 825.110 (for employee coverage generally);
IS THE EMPLOYEE ENTITLED TO LEAVE?

**Reasons for leave:** 29 C.F.R. § 825.112(a)

- Birth of child or care for a newborn;
- Placement with employee of adoptive or foster child;
- Spouse, child or parent is on active duty (or notified) and causes a “qualified exigency” to occur;
- Care for an injured or ill armed services member in the line of duty (see later slide);
- Employee has “serious health condition” that causes employee to be unable to perform functions of the job;
- Employee’s spouse, son, daughter or parent has “serious health condition”.
SERIOUS HEALTH CONDITION

The most common serious health conditions:

1) conditions requiring an overnight stay in a hospital or other medical care facility;

2) conditions that incapacitate you or your family member (for example, unable to work or attend school) for more than three consecutive days and require ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);

3) chronic conditions that cause occasional periods when you or your family member are incapacitated and require treatment by a health care provider at least twice a year;

4) pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).
• **This includes** follow ups regardless of whether the follow up is inpatient care, as well as days prior to the first inpatient setting. 29 C.F.R. § 825.113(b).

• **This also includes** continuing treatment by health care provider. 29 C.F.R. 7 825.113(c).
**SERIOUS HEALTH CONDITION**

- “Continuing treatment…includes any one or more of the following”: 29 C.F.R. § 825.115.
  - Period of incapacity and treatment for more than 3 consecutive days
  - Period of incapacity due to pregnancy
  - Period of incapacity due to a chronic serious health condition (periodic visits of at least twice a year, continues over an extended period of time, etc.)
  - Period of incapacity that is permanent or long-term (may not need active treatment, i.e.: Alzheimer's)
  - Any absences to receive multiple treatments (includes periods of recovery, i.e.: chemo, physical therapy etc.)
MILITARY FAMILY LEAVE

Leave for specified reasons related to certain military deployments.

26 weeks of FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness suffered in the line of duty on active duty. 29 C.F.R. § 825.127(b).
EXPANDING A FAMILY

• Leave for the birth of a child and to bond with the newborn child

• For the placement of a child for adoption or foster care and to bond with that child
  • Men and women have the same right

• Must be taken within one year of the child’s birth or placement

• Must be taken as a continuous block of leave unless the employer agrees to allow intermittent leave
THE RULE OF “12”

• Employees entitled to 12 weeks of **unpaid** leave in a 12 month period. **29 C.F.R. § 825.200(a)**.

• Can be intermittent. **29 C.F.R. § 825.200(c)**.
CONCURRENT LEAVE

• Under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer’s applicable paid leave policy. The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA. If the employee does not choose to substitute applicable accrued paid leave, the employer may require the employee to do so.
INTERMITTENT LEAVE

- Only the amount of leave actually taken may be counted toward the employee's leave entitlement.

- If an employee normally works 40 hours a week takes off eight hours, the employee would use one-fifth (1/5) of a week of FMLA leave.

- If a full-time employee who would otherwise work eight hour days works four-hour days under a reduced leave schedule, the employee would use one-half (½) week of FMLA leave.
What Notice should the Employee Provide?

- Caveat: all employee notice requirements may be waived by the employer. 29 C.F.R. § 825.304(e).
- 29 C.F.R. § 825.302(a) – Foreseeable Leave – Requires:
  - 30 days advance notice if:
    - Expected birth or placement for adoption/foster care,
    - Planned medical treatment for serious health condition of employee or family member (employee is obligated to work with employer so as not to disrupt operations)
    - Planned medical treatment for the serious injury or illness of a covered service member
    - In event employee fails to notify, the employer may ask why the employee failed to meet deadline
What Notice should the Employee Provide?

- 29 CFR 825.302(b) – Foreseeable Leave – Con’t:
  - If 30 days isn’t practicable then notice as soon as is practicable (generally the same day or next business day)
  - If the leave is qualified exigency based, notice must be given as soon as practicable, even if its in advance of 30 days
  - Notice need only be given one time but must advise employer should leave logistics change in as practicable manner as possible (i.e.: spouse with terminal cancer but actual leave dates unknown)
WHAT NOTICE SHOULD THE EMPLOYEE PROVIDE?

- 29 C.F.R. § 825.303(a) – *Unforeseeable Leave* – Requires:
  
  ➢ Notice as soon as is practicable under the particular circumstances of the case and that notice must meet all employer required notice provisions (i.e.: calling of immediate supervisor and mayors office etc.)
WHAT DOES AS SOON AS PRACTICABLE MEAN?

Employee called in, then did not contact employer until 32 days later. Employee stated that they came out of “incapacitating” depression a week before the contact.

* Bosley v. Cargill Meat Sols. Corp.*, 705 F.3d 777, 783 (8th Cir. 2013)
SOME THINGS TO REMEMBER ABOUT EMPLOYEE NOTICES……

- Notice need not specify the FMLA
- Notice can be done verbally
- Initially notice may only contain minimal information (remember the term “when practicable”)
- Make sure you review 29 C.F.R. §§ 825.302(c) & 303(c) for a more complete description of content of employee notices.
WHAT NOTICE SHOULD THE EMPLOYER PROVIDE?

• Employers should notify w/in 1 or 2 days after receiving employee’s notice (eligibility notice)

*If the employer says that you are not eligible, it has to state at least one reason why you are not eligible (for example, you have not worked for the employer for a total of 12 months)*

**NEXT**

• That the leave will be counted as FMLA leave and rights;
  • Any requirement of providing medical certification, 29 C.F.R. §§ 825.305-308;
• Employees right to use accrued paid leave, or employers decision to use accrued paid leave
  • Any requirement that the employee make co-premium payments on health coverage;
  • Any requirement to present fitness for duty certification before job restoration;
The FMLA Leave Process

This flowchart provides general information to walk you through your initial request for FMLA leave step by step, and help you navigate the sometimes complicated FMLA process.

Please note, it is ESSENTIAL for you to be familiar with your employer's leave policy. There are several instances throughout the FMLA leave process where you will need to comply with BOTH the FMLA regulations AND your employer's leave policy.

**START HERE**

**STEP 1**
You must notify your employer when you need leave. Please see page 7.

**STEP 2**
Your employer must notify you whether you are eligible for FMLA leave within five business days. Please see page 8.

**STEP 3**
Your employer must provide you with your FMLA rights and responsibilities, as well as any request for certification. Please see page 8. If certification is not requested, please see page 12.

**STOP**
You must provide a completed certification to your employer within 15 calendar days. Please see page 12.

**STEP 4**
Your employer must notify you whether your leave has been designated as FMLA within five business days. Please see page 8.

**STEP 5**
Your leave is FMLA-protected. There are employee responsibilities while out on FMLA leave. Please see page 8.

**STEP 6**
When you return to work, your employer must return you to your same or nearly identical job. Please see page 14.

**STOP**
Your leave is not FMLA-protected. You may request leave again in the future. Please see page 12.

**YOUR RESPONSIBILITY**

**YOUR EMPLOYER'S RESPONSIBILITY**
Certification at a Glance

STEP 1
Your employer must notify you if a certification is required.

STEP 2
You must provide a completed certification to your employer within 15 days.

STEP 3
Your employer must designate your leave if it is FMLA-protected.

YOUR EMPLOYER MAY REQUIRE YOU TO:

- Correct any deficiencies in your certification identified by your employer within seven days.
- Obtain a 2nd medical opinion if your employer doubts the validity of your certification.
- Obtain a 3rd medical opinion if the 1st and 2nd opinions differ.

YOUR EMPLOYER MAY DENY FMLA LEAVE IF YOU FAIL TO PROVIDE A REQUESTED CERTIFICATION.

YOUR RESPONSIBILITY

YOUR EMPLOYER’S RESPONSIBILITY
FMLA LEAVE IS OVER...NOW WHAT?

• “General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

• An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.” 29 C.F.R. § 825.214.
FMLA LEAVE IS OVER…NOW WHAT?

Employer must maintain health benefits, but can require employee to continue paying share of premiums if portion was required prior to leave. 29 C.F.R. § 825.209(a).

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).
What to do when the employee returns?

- **Equivalent Benefits:** 29 C.F.R. § 825.215(d).
  - Benefits must be resumed in the same manner and at the same levels as provided when the leave began.
  - An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.
  - With respect to pension and retirement plans, any period of unpaid FMLA is not a break in service for vesting and eligibility to participate.
  - They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken.
  - An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.
What to do when the employee returns?

- **Equivalent Pay**: 29 C.F.R. § 825.215(c).
  - An employee is entitled to any unconditional pay increases, 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, made to employees.
What to do when the employee returns?

- **Equivalent terms and conditions of employment**: 29 C.F.R. § 825.215(e)

  - The employee must be reinstated to the same or a geographically proximate worksite,
  
  - The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule,
  
  - The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments,
  
  - FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position.
• Key Employees Certain key employees may not be guaranteed reinstatement to their positions following FMLA leave.

• A key employee is defined as a salaried, FMLA-eligible employee who is among the highest paid 10 percent of all the employees working for the employer within 75 miles of the employee’s worksite.
Courts have recognized three types of claims arising under two subsections of the FMLA dealing with prohibited acts, 29 U.S.C. § 2615(a)(1), (a)(2):

(1) “entitlement” or “interference” claims;

(2) “retaliation” claims; and

(3) “discrimination” claims.
PLENTY OF HELP

www.dol.gov/whd/fmla/


Are You EEOC Compliant?
Title VII of the Civil Rights Act of 1964

Title VII currently makes it unlawful for an employer to:

1. fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin; or

2. limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

What Does it Do?
Who Does it Apply to?

* Federal anti-discrimination law only covers workplaces with at least 15 employees. However, the Arkansas Civil Rights Act goes further than the federal law. A.C.A §16-123-102(5) extends coverage to workplaces employing at least 9 employees.
The Arkansas Civil Rights Act of 1993

A.C.A. § 16-123-107(a): The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or presence of any sensory, mental, or physical disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

• (1) The right to obtain and hold employment without discrimination;
• (2) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
• (3) The right to engage in property transactions without discrimination;
• (4) The right to engage in credit and other contractual transactions without discrimination; and
• (5) The right to vote and participate fully in the political process

When interpreting the Arkansas Civil Rights Act, courts will look to the federal civil rights law. Island v. Buena Vista Resort, 352 Ark. 548, 557, 103 S.W.3d 671, 675-76 (2003); See also Henderson v. Simmons Foods Inc., 217 F.3d 612 (8th Cir. 2000).
Prohibits retaliation against those who opposed any act or practice made unlawful by the ACRA.

Prohibits discrimination for reasons similar to Title VII and the ADA.
<table>
<thead>
<tr>
<th>Types of Discrimination</th>
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</thead>
<tbody>
<tr>
<td><strong>Disparate Treatment</strong></td>
</tr>
<tr>
<td>• Disparate Treatment is intentional discrimination on the part of the employer</td>
</tr>
<tr>
<td>• This occurs where employment decisions are motivated by race, color, sex, religion, etc.</td>
</tr>
<tr>
<td><strong>Disparate Impact</strong></td>
</tr>
<tr>
<td>• Disparate Impact occurs as a result of a neutral employment rule that negatively effects a member of a protected class.</td>
</tr>
<tr>
<td>• Ex: An employer requires applicants to lift a certain amount of weight before they are considered for employment. This requirement will only be upheld if lifting a certain amount of weight is a necessary element of the job.</td>
</tr>
<tr>
<td><strong>Mixed Motive Discrimination</strong></td>
</tr>
<tr>
<td>• Mixed motive discrimination occurs where membership in the protected group is shown, by the employee to have been “a reason” for the employment action being challenged.</td>
</tr>
<tr>
<td>• Mixed motive cases can be defended where the employer shows that there was some legitimate non-discriminatory reason, that was the prevailing or predominant reason for the challenged employment action.</td>
</tr>
<tr>
<td><strong>Creation of a Hostile Work Environment</strong></td>
</tr>
<tr>
<td>• A hostile work environment occurs when unwelcome conduct unreasonably interferes with an employee’s work performance or created an intimidating work environment.</td>
</tr>
<tr>
<td><strong>Retaliation</strong></td>
</tr>
<tr>
<td>• Employees have a right to be free from retaliation by their employers for their opposition to discrimination or their participation in an EEOC proceeding by filing a charge, testifying, assisting, or otherwise participating in an agency proceeding.</td>
</tr>
</tbody>
</table>
The issue must involve an adverse employment action causing the individual an injury (i.e., pay decrease, firing, demotion, etc.)

There must be a LINK between the city’s use of the protected basis and the adverse action.
Elements of a Title VII Violation

The City is always given an opportunity to show it didn’t violate the law.

*If the City* shows a legitimate reason for the adverse employment action then the employee must show additional evidence.

*The employee* given the opportunity to show that the reason the City has given for the employment action is false and discrimination is the real reason.
It is unlawful to discriminate against any employee or applicant for employment because of an individual’s race or color in regards to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. 42 U.S.C.A. § 2000-2.

Although race and color are often considered the same thing, they are not completely synonymous. The EEOC and Courts have commonly understood the meaning of the word color to be pigmentation, complexion, or skin shade or tone. Thus, color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person.
Unlawful Practices

Soliciting applications only from sources in which all or most potential workers are of the same race or color;

Requiring applicants to have a certain educational background that is not important for job performance or business needs;

Testing applicants for knowledge, skills or abilities that are not important for job performance or business needs.

Using ethnic slurs, racial “jokes,” offensive or derogatory comments, or other verbal or physical conduct if the conduct creates an intimidating, hostile, or offensive working environment, or interferes with the individual’s work performance.
More Unlawful Practices

Retaliation against employees for their opposition to discrimination or their participation in an EEOC proceeding;

Segregating or physically isolating employees from other employees or from customer contact;

Title VII also prohibits assigning primarily minorities to predominantly minority establishments or geographic areas.
Sex Discrimination Under Title VII

• It is unlawful to discriminate against any employee or applicant for employment because of an individual's sex in regards to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. 42 U.S.C.A. § 2000-2.
Title VII prohibits discrimination based on sex. Sex means a person's gender, not his or her sexual orientation.

It also includes pregnancy, childbirth, and related medical conditions.

However, harassment does not have to be of a sexual nature in order to be prohibited, i.e. harassing a woman by making offensive comments about women in general.

Both a victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.
Examples of unlawful practices include:

- Sexual harassment or unwelcome sexual advances;
- Requests for sexual favors;
- Other verbal or physical harassment of a sexual nature;
- Employment policies that apply to everyone but have a negative impact on people of a certain sex and is not job related or necessary to the operation of the business.
Legal Does NOT Mean Acceptable

Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

However, just because offhand comments and teasing might not rise to the level of legal liability, it does not mean you should engage in offensive behavior.

Treating employees and co-workers with respect is vital to the efficient operation of business and you should always strive to create a positive environment for those you work with.
A hostile work environment occurs when unwelcome conduct unreasonably interferes with an employee’s work performance or created an intimidating work environment.

For harassment to be actionable under Title VII the offensive conduct must be sufficiently severe or pervasive to alter the conditions of the victims employment and create a hostile working environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993).

*Harris* requires that the environment be both objectively and subjectively offensive.
• There is no bright line test that can be used to show if an environment is hostile, however, the Court has listed several factors that can show a hostile work environment: *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).
  - Frequency of the discriminatory conduct;
  - Severity of the conduct;
  - Whether it is physically threatening or humiliating, or a mere offensive utterance;
  - And whether it unreasonably interferes with an employee’s work performance.

Factors Showing a Hostile Environment
• **Hostile Environment**

• Making unwelcome sexual advances or

• Other conduct of a sexual nature with the purpose of, or that creates the effect of,

• Unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Factors Showing a Hostile Environment
If a supervisor creates a hostile work environment then the City is much more likely to be liable.

The City *might* succeed if it can show it acted reasonably; and

The plaintiff failed to take advantage of a city policy to take corrective measures.

- (Notify the right people, file a complaint, etc).

Hostile Work Environment
Hostile Work Environment: Reminders

You MUST have some process to provide for corrective measures if an employee complains of harassment.

If the harasser is not a supervisor, the victim can still recover if the employer was negligent in correcting or trying to remedy the co-worker’s harassing behavior.
• An employee was faced with repeated insults including “ni**er,” “dumb ni**er,” “boy,” and other offensive remarks daily. These remarks led the employee to quit. He then claimed wrongful termination based on race.

• The court stated that “a constructive discharge occurs when an employer deliberately renders the employee’s working conditions intolerable, thereby forcing the employee to quit.” Brannum v. Missouri Dept. of Corrections, 518 F.3d 542 (8th Cir., 2008).

• The defendant argued that the remarks made to the employee were “just jokes.” Jones, 564 F.Supp.2d 863, at 869. The court stated that “the use of the word ni**er even in jest can be evidence of racial antipathy. Id.

• Based on the reasons above, the court determined that there were genuine issues of material fact concerning whether the employee was subjected to a racially hostile work environment.

Employees have a right to be free from retaliation by their employers for their opposition to discrimination or their participation in an EEOC proceeding by filing a charge, testifying, assisting, or otherwise participating in an agency proceeding.

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C.A. § 2000e-3(a).
There are many statutes/laws that prohibit retaliation

**Generally,** To establish a prima facie case of retaliation a *Plaintiff must show that:*

1) Employee does something protected by statute or constitution; and
2) They are given discipline including but not limited to being terminated.
It is key to remember that when an employee files a complaint, lawsuit, or requests protections, they are not doing something wrong.

These actions by an employee are frustrating but they shouldn’t result in punishment;

Even when you think you can get away with it.
How to Avoid Liability
Employee Evaluations/Performance Reviews

- Yearly/monthly reviews
- Who should review?
- Forms
Employee Name: ___________________________  Job Title: ___________________________

Department: ___________________________  Date of Evaluation: ____________

PERFORMANCE FACTORS: Exceeds Expectation (E), Meets Expectation (M) and Needs Improvement (NI)  Not Applicable (NA)

| QUANTITY OF WORK | Accurate and complete work, meets deadlines. | E  | M  | NI | NA |
| KNOWLEDGE OF JOB | Job knowledge, skills, training, and experience. | E  | M  | NI | NA |
| INITIATIVE | Initiative, creativity, problem solving, and improvement. | E  | M  | NI | NA |
| PERSONAL RELATIONS | Positive relations with co-workers and supervisors. | E  | M  | NI | NA |
| DEPENDABILITY | Reliability, punctuality, and meeting of deadlines. | E  | M  | NI | NA |
| CUSTOMER FOCUS | Customer service, attitude, and understanding. | E  | M  | NI | NA |

OVERALL RATING: ____________

EMPLOYEE STRENGTHS:

1. 
2. 
3. 

PERFORMANCE AREAS NEEDING IMPROVEMENT (NI) ARE:

1. 
2. 
3. 

DEVELOPMENT PLAN – action plan steps to improve performance on areas needing improvement and/or specific performance goals and objectives:

1. 
2. 
3. 
### Keep in Mind

1. **Purpose of evaluation** is to let the employee know how they are doing and if there is anything they can improve on.

2. **Be specific** and provide examples.

3. **Don’t wait** until evaluation to bring up all issues over the last year, address issues as they occur.

4. **Include good/not all negative**.

5. **Allow feedback/comments from employee**.

6. **Listen and don’t assume** they are being defensive.
Common reasons for adverse employment action:

- Absenteeism, policy violations, insubordination, safety violations

3 criteria to consider when deciding where to begin the process of progressive discipline:

- The severity of the offense
- The employee’s past record—both positive and negative
- The length of time the employee has spend in the city’s service
- Absenteeism, policy violations, insubordination, safety violations

Choose disciplinary action best suited to the incident

Provides proof of the logic and equity of personnel decisions in order to substantiate actions
Examples of Disciplinary Actions

- Verbal and written warnings
- Suspension
- Performance Improvement Plan (PIP)
- Demotion
- Transfer to another department
- Termination
### How to Administer Disciplinary Action

<table>
<thead>
<tr>
<th>Describe</th>
<th>Listen</th>
<th>Give</th>
</tr>
</thead>
</table>
| Briefly describe the facts of the incident  
- Do not use judgmental language  
- Emphasize that your purpose is to solve the problem or help employee improve his/her performance | Listen to the employee’s side of the story  
- Show the employee you are open to their perspective  
- Defuse defensiveness they may feel  
- Reduces risk they can change their story down the line | Give your point of view about the problem  
- Find points you can agree on  
- Explain how their performance has impacted others and why it matters |
Do it promptly while memory is fresh. If worth remembering, worth writing down.

Ignore minor issues, focus on important incidents and behaviors that reflect on employee job performance and conduct.

Stick with facts
• Ex: can record about chronic lateness, but don’t record opinions about personal characteristics that may cause employee to be late.
Terminating the Employee

- Get to the point
- Don’t argue
- Give the real reasons for termination (don’t throw in every shortcoming—provide only reasons you can defend)
- Give the employee an exit interview
None of these should be a reason for termination

<table>
<thead>
<tr>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race, color, sex, national origin, genetic background</td>
</tr>
<tr>
<td>Religion</td>
</tr>
<tr>
<td>Pregnancy</td>
</tr>
<tr>
<td>Age (above 40)</td>
</tr>
<tr>
<td>Physical or mental disability</td>
</tr>
<tr>
<td>Military</td>
</tr>
<tr>
<td>Political activity or opinion</td>
</tr>
<tr>
<td>Involvement with workers’ compensation proceedings</td>
</tr>
<tr>
<td>Whistle blowing</td>
</tr>
<tr>
<td>Retaliation</td>
</tr>
<tr>
<td>Speaking on matters of public concern or other exercise of constitutional or legal rights</td>
</tr>
<tr>
<td>Unequal treatment under the law without a rational basis</td>
</tr>
</tbody>
</table>
Tips for Avoiding Liability

• Be consistent. Apply adverse employment action evenly and fairly to all employees.
• Promptly investigate all complaints and documents.
• Establish clear, written behavioral standards—employees should know what can lead to discipline and termination.
• Use disciplinary system and document each step.
• Investigate facts before you act.
• ARML Publications for Free
  • https://www.arml.org/services/publications/publications-for-free
• Understanding Municipal Personnel Law and Suggestions for Avoiding Lawsuits
• Sample Personnel Handbook
Gender, Race, and Respect in the Workplace!

"Anybody Can Hate. Hate is Easy...Living Side by Side with Compassion, Tolerance and Respect Takes Real Courage."

Jeffrey A. White
What really are our differences?

Why do we have such a hard time accepting others for who they are?

How can we understand and respect others better?
### 100 Yard Dash of Life

**Directions:** Please read each statement and as they apply to you, mark **YES** or **NO**:

<table>
<thead>
<tr>
<th>Statement</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>I was born an American.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Both of my parents were actively involved in my childhood.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I had access to private education.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I had access to a free educational tutor growing up.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>When I was growing up I never had to help mom or dad with the bills.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I have a college education that someone else paid for.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I never worried about where my next meal was coming from when I was growing up.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I was born without any mental or physical condition that kept me from being viewed as the same as most people around me.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement</td>
<td>Score</td>
<td></td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>-------</td>
<td></td>
</tr>
<tr>
<td>I had a stable childhood and my parents were well connected to people in the community who had powerful positions and / or lots of money.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I had good medical and dental care growing up.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I have been told by others that I have “celebrity” good looks.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I have an IQ score of 140 or better.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Totals:**
Each Yes is worth 5 yards, No is worth 0 yards
• Every one of these statements have nothing to do with anything that you have done or any decisions that you have made. In the 100 yard dash of life, where you started in the race depended not on you but on the advantages or disadvantages you were given through the genetic lottery.

• As humans, we have an extremely hard time seeing things from the perspective of someone else when they don’t have the same advantages as we do. We often don’t want to recognize we have been given advantages and we don’t realize how much of a head start we may have been given in the race of life.

• The reality is that we all have some advantages and disadvantages.

• It is true, we all must run our own race, but the key to respecting and understanding others is knowing the race really never starts out fair. We can do this by taking the time to become aware of how our advantages have given us a head start in the race of life.

• Taking the high road is realizing when we find our American dream, win the race of life and come out on top that it would be extremely foolish of us to not consider how our advantages have helped us get ahead.

• Taking the high road is also about being empathetic by trying to take the time to understand other people’s story and consider how their disadvantages may have not given them a head start in the 100 yard dash of life.
• Each city department has its own unique way of serving its citizens.

• But all employees share in the responsibility of representing their city with exceptional, quality service.

• Showing fair and equal treatment to each other and to the citizens you serve, regardless of identities, is leadership.

• In order to provide quality service and fair treatment, we must first understand what diversity is and what it really means.

• It is against the LAW to discriminate!
"To be one, to be united is a great thing. But to respect the right to be different is maybe even greater." -- Bono
“Diversity: the art of thinking independently together.”
Malcolm Stevenson Forbes

* Different
* Being different together
* Being yourself
* Mutual respect for qualities and experiences that are different from our own.
Examples of Diversity

- Race
- Religious Status
- Income
- Sex/Gender
- Cuisine
- Age
- Education
- Job Type
- Music Enjoyed
- Social Status
- Ideas
- Language
- Marital Status
- Ability/Disability/Special ability

The Individual
I am sure everyone knows (some of you may have even lived it) the impact that race has on our country, state, and communities.

We have learned about it from our past and see it now in the present. To fully understand how race effects our communities and workplace, we need to know what race is. Race is a group of populations that share some biological characteristics. These populations differ from other groups of populations according to these characteristics. Unfortunately, skin color, one of our most visible physical features, has long been used to divide people into categories. However, it is much more rational to view race through the scientific lens as a biological event.
Anthropologists have theorized that variations in human skin are pigment adaptive traits that correlate closely to geography and the sun’s ultraviolet radiation.

To illustrate how this can vary, someone of African descent may be the same skin shade as someone of Asian descent. Someone of Asian descent may be the same shade as someone of European descent.

Where does one race end and another begin? In essence, race is an arbitrary and meaningless concept and if there ever was any such thing as race, there has been so much constant crisscrossing of genes for the last 500,000 years that it would have lost all meaning anyway.
Your DNA tells the story of who you are and how you're connected to populations around the world. Trace your heritage through the centuries and uncover clues about where your ancestors lived and when.

David

<table>
<thead>
<tr>
<th>Heritage</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>European</td>
<td>100%</td>
</tr>
<tr>
<td>British &amp; Irish</td>
<td>59.1%</td>
</tr>
<tr>
<td>United Kingdom, Ireland</td>
<td></td>
</tr>
<tr>
<td>French &amp; German</td>
<td>23.3%</td>
</tr>
<tr>
<td>Iberian</td>
<td>1.2%</td>
</tr>
<tr>
<td>Broadly Northwestern European</td>
<td>15.1%</td>
</tr>
<tr>
<td>Broadly Southern European</td>
<td>0.4%</td>
</tr>
</tbody>
</table>
Despite the Civil Rights Act of 1964 passage half a century ago, racial discrimination in the workplace is still a problem.

Because physical characteristics, such as skin color, hair, gender, height, and weight, are among the first things we notice about others, it is human nature to place people in categories based off of what we see on the outside.

Developing assumptions and stereotypes about the world around us and others in which we have contact are a natural human psychological survival response.

Although it is natural to categorize people based off of our initial perceptions of their physical traits, this can also lead to a breakdown of relations between groups who look different than us.
* Understanding gender and sex is critical for enabling respect in a diverse workforce. To grasp the density and make sense of these differences, it is much more effective to view gender and sex through the critical-thinking lens as a genetic and social event.

* Sex and gender are two separate measures.
* Sex refers to biological differences, primarily chromosomes, hormonal profiles, internal, and external sex organs.
* Sex determination is a result of random gene selection; we had no choice. Gender on the other hand is the state of being male or female.
* Gender describes the characteristics that a society or culture delineates as masculine or feminine. In other words, gender is culturally and socially constructed.
You see, we all have grown up with other races and other genders around us and we are sort of ok with that.

But if we didn’t grow up around someone who was of a different sexual orientation or someone who was transgendered, we really don’t have a mental anchor of that human difference, so we don’t know how to react to it.

For many of us, it is outside our cultural programming and understanding. This is why, so many of the LBGT folks are still having such a hard time in our society, it is a diversity that many don’t take the time to understand and are not ready for.
Think about this, between 3-10% of our population, any population, is lesbian, bisexual, gay or transgendered. They have always existed in every culture, but they are the minority, because the majority of people are straight.

So this is why they are easily discriminated against.

Imagine for a minute that you had a child born with both male and female genitals (Ambiguous genitalia, 1-4500 births). What would you do? Would you wait till they were 10 years old to have surgery done, so that you can make sure the gender in their head matched their reproductive organs?
*Gender and race, because they are easy and visible differences, have been the primary ways of organizing human beings into superior and inferior groups since the beginning of time.*
Strength lies in differences, not in similarities.

Stephen R. Covey
When you judge another
you do not define them
you define yourself.

* Why do we judge groups by their very worst examples?
* Yet we expect to be judged by our best intentions?
Why do we have such a hard time accepting people for who they are?

• Did you know that it is human tendency to translate “different from me” into “less than me”?
“If one uses the moral standards of one culture to judge another culture, that other culture will invariably appear to be morally inferior.”
Culture is:
* Collection of all the features of a group of people.
* The features that define groups of people can vary but most often it is:
  • Language
  • Cuisine
  • Arts
  • Religion
  • Music
  • Social habits, values, beliefs
  • Ways of communicating

* In other words culture is how people have learned to respond to the problems that arise in their life.
* Culture exerts a powerful influence on everyone, everyday!

* Psychologists believe we are culturally programmed by the age of three!

* No one is culture free. We all _see_ and _interpret_ the world around us through our own cultural lens.

* When we understand the powerful influence that culture has on us, we can _understand and respect_ others better. We know they are influenced just as much by their own cultural programming.
Although education is expensive, ignorance cost us so much more.

In fact, ignorance is the main problem when it comes to inclusion, diversity and respecting and understanding those who are different from us.
When you and I interact with others, do we rely more on our thinking ability or our emotions?
The most important and most difficult part of Respecting and Understanding other people starts with our thinking ability.

* What kind of thinker are you?

* Most people believe that they are rational, unbiased and reasonable thinkers.
  * Truth is we all make more decisions based off of emotion than we do off of reason.

* Humans spend more time rationalizing (attempt to find excuses for why we believe what we believe) than we spend on being rational (basing what we believe off facts and logic).

* That is why it is important that we drastically increase our critical thinking skills! I want you to think like a good detective or scientist would.
Throughout history, some of the greatest minds and bravest hearts have worked to create understanding and respect by including those who looked, thought and acted differently than they did.
William Penn (1644-1718)

• He was a founding father of the province of Pennsylvania that became the U.S. state of Pennsylvania.
• His democratic principles that he set forth served as an inspiration for the United States Constitution.
• He championed for religious tolerance, inclusion and diversity.
• Consequently, All faiths were welcomed in Pennsylvania:
  • In fact, all faiths were encouraged to take part in both social and economic life in Pennsylvania.

Pennsylvania, from the beginning and by Penn’s design was a complex society of people of different ethnic, racial and economic backgrounds. This model of diversity became the basis for the American “melting pot”.

Great thinkers have always believed that men and women of different cultures could live in peace.

* The great philosopher Socrates once said: "I am not an Athenian, nor a Greek, but a citizen of the world."

* Martin Luther King, JR exclaimed, "We may have all come on different ships, but we're in the same boat now."

* The ideology that people with differences can coexist in peace has been only a partially attainable goal.
* America was founded on the principles of justice, equality and inclusion.

* America is a diverse society dedicated to inclusive participation in our democracy and our laws.

* Our social policies have evolved and continue over time to reflect this commitment.

* Although we have made progress, I think we still have a way to go!
How Our Interaction with Others is Shaped
* Assumptions, stereotypes and bias are normal parts of the human thought process.

* A stereotype is a simplified assumption about a group based on prior expectations.

* Stereotypes can be:
  * positive “Women are warm and nurturing"; or
  * negative “Teenagers are lazy"

Stereotypes are simply shortcuts that our brains take to make recognition easier. Often preventing us from critical thinking.
Question Your Assumptions
Bias is preference for or against a view, a thing, a person or group compared with another.

Bias is learned implicitly within cultural contexts.

Bias is a “survival skill” that is essentially our “danger detector”.

Our ability to perceive bias in others is actually pretty good.

Our ability to perceive bias in ourselves is generally terrible (why can’t people just be like me?).

Bias can result in the unfair treatment of others because they look, think, or act different from us.
7H15 M3554G3
53RV35 7O PROV3
HOW OUR M1ND5 C4N
DO 4M4Z1NG 7H1NG5!
1MPR3551V3 7H1NG3!
1N 7H3 B3G1NN1NG
17 WA5 H4RD BU7
Y0UR M1ND 1S
R34D1NG 17
4U70M471C4LLY
W17H 0U7 3V3N
7H1NK1NG 4B0U7 17,
B3 PROUD! 0NLY
C3R741N P39PL3 C4N
R3AD 7H15.
* Given just a little information, we fill in the gaps with assumptions.

* It is impossible for anyone to be bias free.

* Inclusion and diversity isn’t about changing values or eradicating bias.

* The goal should be to recognize bias, intervene when and where it interferes with personal, professional, and organizational effectiveness and productivity.

* Essentially, It is about managing bias and thus managing our behavior.
* Left unchecked bias can result in something more detrimental to our society:
  * Prejudice
  * Discrimination
  * Hate; and
  * Violence.
Hate/Violence

Discrimination

Prejudice

Assumptions/Stereotypes/Bias

Beliefs/Attitudes

Categorize

Awareness
How can we understand and respect others better?
When did you realize that discretion is the better part of valor?

“I don’t have to agree with you to like you or respect you.”
Anthony Bourdain
Thinking is difficult
That’s why most people judge
* Human nature is **judgmental** by default.

* At the most basic level, judgement is nothing more than a survival skill.

* In fact, most of us are programmed to follow our emotional impulses of judgment, anger and irritation.

* Being Judgmental relieves us of the hard work of trying to understand something or someone that is unfamiliar.

* It also gives us the pleasurable sensation of being right and others being wrong.
Be curious, not judgmental.

Walt Whitman
“When the enemy occupies high ground, do not confront him. If he attacks downhill, do not oppose him.”
Occupy the High Ground
* Our perception is literally our reality and this applies to how we see others!

* Remember, the only control you have over other people is your own actions and reactions!
Learn to accept people for WHO THEY ARE, not who you want them to be!
“If we cannot end now our differences, at least we can help make the world safe for diversity. For, in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children's future. And we are all mortal.”

John F. Kennedy
A successful relationship consists of two things. Finding Similarities and respecting the differences.
We often fail to consider multiple points of view, especially those viewpoints with which we disagree. Why? Because to consider those viewpoints might threaten our identity, require us to change our viewpoint based on new evidence or cause us to give up some beliefs or goals we want to maintain.

“If you have an apple and I have an apple and we exchange apples then you and I will still each have one apple. But if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas”

George Bernard Shaw
• Understanding how **POWER** affects human nature. Understanding this sharpens our sense of justice.
• It is not in our nature to share power.
• We group people into superior and inferior categories based on cultural characteristics such as race, gender, religion, sexual orientation and disease and disability.
• This has been used and seen throughout history.
• Often, this has led to the majority culture violating the basic human rights of minority cultures.

“I don't want to be surrounded by 'yes men'. I want people who'll disagree with me even if it costs them their jobs.”

Samuel Goldwyn
NEARLY ALL MEN CAN STAND ADVERSITY, BUT IF YOU WANT TO TEST A MAN'S CHARACTER, GIVE HIM POWER.

--- ABRAHAM LINCOLN ---
* **Empathy** (capacity to understand or feel what another person is experiencing from within the other person's frame of reference) has been identified as the **most important component** in respecting and understanding others.

* To fully respect, admire and accept other people for who they are. Regardless, of their identities we have to truly become empathetic.

* **Compassion and empathy** are traits of a fully evolved human being and a hallmark of a self-actualized society.

“You never really understand a person until you consider things from his point of view.”

Harper Lee
Respect and Understanding in a Jar
Contact Information

David S. Baxter
Arkansas Municipal League
501-374-3484 Ext. 110
FAX: 501-374-0541
dbaxter@arml.org
www.arml.org
www.greatcitiesgreatstate.com
Adapted from Impact of Cultural Diversity on Law Enforcement, http://wps.pearsoncustom.com/wps/media/objects/4173/4273671/Ch01.pdf


http://www.coedu.usf.edu/zalaquett/hoy/culture.html

Images Credit: All images courtesy of yahoo images.


The Myriad Benefits of Diversity in the Workplace: [https://www.entrepreneur.com/article/240550](https://www.entrepreneur.com/article/240550)


Anti-Bullying Policy

October 2019
The purpose of this policy is to communicate to all employees, including supervisors, managers and executives, that [City/Entity Name] will not \textit{in any instance} tolerate bullying behavior. Employees found in violation of this policy will be disciplined, up to and including termination.

\textit{Definition}

[City/Entity Name] defines bullying as repeated, health-harming mistreatment of one or more people by one or more perpetrators. It is abusive conduct that includes:

- Threatening, humiliating or intimidating behaviors.
- Work interference/sabotage that prevents work from getting done.
- Verbal abuse.
- Such behavior violates [City/Entity Name]'s [standards of conduct/employment policies], which clearly state that all employees will be treated with dignity and respect.

\textit{Examples}

[City/Entity Name] considers the following types of behavior examples of bullying:

- \textbf{Verbal bullying.} Slandering, ridiculing or maligning a person or his or her family; persistent name-calling that is hurtful, insulting or humiliating; using a person as the butt of jokes; abusive and offensive remarks.
- \textbf{Physical bullying.} Pushing, shoving, kicking, poking, tripping, assault or threat of physical assault, damage to a person's work area or property.
- \textbf{Gesture bullying.} Nonverbal gestures that can convey threatening messages.
- \textbf{Exclusion.} Socially or physically excluding or disregarding a person in work-related activities.

In addition, the following examples may constitute or contribute to evidence of bullying in the workplace:

- Persistent singling out of one person.
- Shouting or raising one's voice at an individual in public or in private.
- Using obscene or intimidating gestures.
- Not allowing the person to speak or express himself or herself (i.e., ignoring or interrupting).
- Personal insults and use of offensive nicknames.
- Public humiliation in any form.
- Constant criticism on matters unrelated or minimally related to the person's job performance or description.
- Public reprimands.
- Repeatedly accusing someone of errors that cannot be documented.
- Deliberately interfering with mail and other communications.
- Spreading rumors and gossip regarding individuals.
- Encouraging others to disregard a supervisor's instructions.
• Manipulating the ability of someone to do his or her work (e.g., overloading, underloading, withholding information, setting deadlines that cannot be met, giving deliberately ambiguous instructions).
• Assigning menial tasks not in keeping with the normal responsibilities of the job.
• Taking credit for another person’s ideas.
• Refusing reasonable requests for leave in the absence of work-related reasons not to grant leave.
• Deliberately excluding an individual or isolating him or her from work-related activities, such as meetings.
• Unwanted physical contact, physical abuse or threats of abuse to an individual or an individual’s property (defacing or marking up property).

Individuals who feel they have experienced bullying should report this to their supervisor or to Human Resources before the conduct becomes severe or pervasive. All employees are strongly encouraged to report any bullying conduct they experience or witness as soon as possible to allow [City/Entity Name] to take appropriate action.
Discussion Topics

- Components of a Drug-Free Workplace
- Random Testing Legal Decisions
- CDL vs Non CDL
- Reasons for Testing
- Drugs of Abuse
- What is the Process for a Drug Test?
- FMCSA Clearinghouse
Six Key Components for Success

A comprehensive drug-free workplace program includes:

- Policy/Ordinance
- Job description
- Supervisor training
- Employee education
- Employee assistance
- Drug & alcohol testing
Two SCOTUS Drug Testing Legal Decisions

"The Court held that no warrant, probable cause, or even individualized suspicion is required for mandatory drug testing of certain classes of railroad and public employees. In each case, “special needs beyond the normal need for law enforcement” were identified as justifying the drug testing."

- **National Treasury Employees Union v. Von Raab**
The governmental interests underlying the Customs Service’s screening program were also termed “compelling”: to ensure that persons entrusted with a firearm and the possible use of deadly force not suffer from drug-induced impairment of perception and judgment, and that “front-line [drug] interdiction personnel [be] physically fit, and have unimpeachable integrity and judgment.”

- **Skinner v. Railway Labor Executives’ Ass’n**
Found a “compelling” governmental interest in testing the railroad employees without any showing of individualized suspicion, since operation of trains by anyone impaired by drugs “can cause great human loss before any signs of impairment become noticeable.”
Omnibus Transportation Employee Testing Act of 1991

- Mandatory for transportation safety sensitive positions
- Created the Office of Drug and Alcohol Policy Compliance, in the Secretary of Transportation
- Guidance for drug and alcohol testing procedures published in the federal register, 49 CFR Part 40
- Steps enacted to follow HHS scientific guidance
U.S. DOT Modes Impacted by 49 CFR Part 40

- FMCSA, 49 CFR Part 382
- FAA
- FRA
- FTA
- PHMSA, 49 CFR Part 199
- USGC

You must comply with the OST AND each mode you are regulated
Employer Responsibilities

- Responsible for all rule requirements
- Responsible for ensuring Service Agents meets all qualifications – expect SA Compliance
- For new employees, obtain previous 2* years of testing information (30 days, if feasible)
- As previous employer, provide 2 years of testing information
- Provide list of SAPs to all testing positive (even pre employment)

* 3 years FMCSA/5 years FAA
DOT Safety Sensitive Positions

- Aviation
  Flight Crew Members, Flight Attendants, Air Traffic Controllers
- Federal Motor Carrier
  Trucker Drivers, School Bus Drivers (may be FTA as well)
- Rail
  Engine, Train, Signal Services, Dispatchers, Operators
- Mass Transit
  Subway/Bus Vehicle Operators, Controllers, All Maintenance Workers
- Pipeline
  Operations, Maintenance, Emergency Response Personnel, Some International Workers
- DHS/USCG
  Maritime operations (now part of the Office of Homeland Security)
Covered CDL Positions

- CDL employees can only consist of:
  - Employees performing safety sensitive functions
  - CGVW of 26,001 or greater
  - 16 Passengers including the driver
  - Hazmat

- PHMSA employees (not CDL but U.S. DOT mandated)
  - Employees that can perform emergency response and repair of a natural gas accidents
  - Dispatchers
  - Construction and maintenance
Non-CDL Positions

- Who can be included?
  - Safety Sensitive Positions (SCOTUS)
    ex: Heavy equipment operators, utility workers, firefighters, police officers, EMS, lifeguards
  - Security Sensitive Positions
    ex: Dispatchers, access to critical sensitive information, daycare workers

- NO ELECTED OFFICIALS!
When to Test?

Traditionally...
- pre-employment
- post-accident
- reasonable suspicion
- Random
- Return to duty
- Follow up
American with Disabilities Act

- January 23, 1990
- ADA
- Prohibition of discrimination based on disability
- Section 104 - Illegal use of drug & alcohol excludes applicant or employee currently engaging in illegal use of drugs
- Alcoholic - Protected if can perform job
Family and Medical Leave Act

- August 5, 1993
- Up to 12 weeks unpaid, job-protected leave in 12 month period
- May be taken for substance abuse
- Care for family member
Federally Mandated Test

The primary drugs of abuse

- Marijuana Metabolite
- Cocaine
- Opioids
- Amphetamines
- Phencyclidine (PCP)
Drug and Alcohol Testing

- Separate DOT and non-Federal testing
- DOT vs. non-DOT Tests
- Federal supersedes state and local law
- DOT test comes first
- No additional testing on DOT specimen
- No non-DOT tests on Federal Testing Forms
- Do not disregard DOT result based on non-DOT test
Process of a Drug Test

- Specimen Collection
- Analysis at an HHS Certified Laboratory
- Review by a Medical Review Officer
- Reporting to the Designated Employer Representative
Drug and Alcohol Testing

- Ensure split specimen requests are honored
- Pre-employment alcohol – allowed –
- Drug test consent forms – PROHIBITED
- Ensure that observed collections take place as required
- No personnel action for cancelled tests
“Insufficient Quantity” Procedure

- Urge employee to drink up to 40 ounces of liquid
- 3-hour time limit
- Refusal to drink is **not** refusal to test
- Refusal to make an attempt to provide –
  - Discontinue test

DER must work with the MRO to determine if a physiological reason exist
Direct Observation

Required to conduct direct observation for:
- Return-to-duty test
- Follow-up tests

**NEVER automatically do direct observed test on:**
- Random
- Pre-employment
- Post-accident
- Reasonable suspicion

**Unless directed by MRO**
Refusal to Take Drug Test

- Donor fails to:
  - Appear or remain at site
  - Provide urine specimen when required
  - Permit directly observed or monitored collection
  - To take a 2nd test as directed
  - Provide sufficient urine (with no medical explanation)
  - Undergo medical evaluation
  - Cooperate with testing process
Alcohol Testing

- Breath
  By certified breath alcohol technician (BAT)
- Evidential Breath Tester (EBT) must meet NHTSA requirements for precision and accuracy
- Saliva Testing is allowed by a certified screening test technician, but confirmations must be performed by breath
DOT Alcohol Prohibited Conduct

- Testing Positive for Alcohol
- Using Alcohol On the Job
- Using Alcohol Within 4 Hours of Safety Sensitive Duty (8 Hours Flight Crew)
- Using Alcohol After an Accident (Unless Involvement Discounted or Test <.020)
- Refusing to Test
Refusal - Alcohol Test

Donor Fails To:

- Appear in timely manner
- Remain on-site until completion
- Provide sufficient saliva or breath & no medical reason
- Undergo required medical exam
- To sign ATF (Step 2)
- Cooperate with any testing procedures
Enforcing DOT Rules

- Verified Positive Drug Test Result (or Adulterated, or Substituted Result) and Alcohol $\geq 0.04$
- Immediately remove employee from DOT-covered “safety-sensitive” position
- Alcohol result (0.02-0.039) Temporary removal from DOT covered position (see Modal rules for hours)
- Must ensure RTD process is complete
Substance Abuse Professional Evaluation

- No seeking additional evaluation(s) “No SAP Shopping”
- No one can change a SAP’s evaluation
- SAP may modify recommendations based on new information
SAP Responsibilities

- Face-to-face clinical assessment and evaluation
- Refer to appropriate program
- Face-to-face follow-up evaluation
- Recommendations for continuing education and/or treatment
- Follow-up testing plan
- Report directly to employer
SAP Employer Responsibilities

- For Safety Sensitive Employees and Applicants
- A List of SAPs readily available to the employee and acceptable to the employer
- Name / Address/ Phone Numbers
- DOT is silent on who pays the SAP
- Must ensure employee complies prior to return to DOT covered position
The New FMCSA Driver Clearinghouse

- A secure online database that gives employers and anyone authorized real-time info about CDL and CLP holders drug and alcohol program violations
- Effective January 6, 2020
- Use of the drivers license number with state is REQUIRED on the CCF
- Drivers will be required to log into the Clearinghouse and provide electronic consent
- No consent, no search, no safety sensitive duties
# Roles Within the Clearinghouse

<table>
<thead>
<tr>
<th>Driver</th>
<th>Employer</th>
<th>Consortium/Third-Party Administrator (C/TPA)</th>
<th>Medical Review Officer (MRO)</th>
<th>Substance Abuse Professional (SAP)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Register as user beginning Fall 2019</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
</tr>
<tr>
<td>Manage assistants (optional)</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
</tr>
<tr>
<td>Select C/TPA*</td>
<td>✔️</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Request driver consent for queries</td>
<td>✔️</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consent to full query requests</td>
<td>✔️</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Query driver violation information</td>
<td>✔️</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Report drug and alcohol program violations</td>
<td>✔️</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Select SAP †</td>
<td>✔️</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Report on RTD initial assessment, eligibility for RTD testing</td>
<td>✔️</td>
<td></td>
<td></td>
<td>✔️</td>
</tr>
<tr>
<td>Report on RTD and follow-up testing</td>
<td>✔️</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Clearinghouse, Driver Consent Example

FMCSA does not require that motor carrier employers subject to the Agency’s drug and alcohol use and testing regulations in 49 CFR Part 382 use this sample format to obtain an employee’s consent to conduct a limited query of the Drug and Alcohol Clearinghouse. Employers may, however, use or adapt the content as they see fit.

Sample Format: General Consent for Limited Queries of the Federal Motor Carrier Safety Administration (FMCSA) Drug and Alcohol Clearinghouse

I, (Driver Name), hereby provide consent to (Company Name) to conduct a limited query of the FMCSA Commercial Driver’s License Drug and Alcohol Clearinghouse (Clearinghouse) to determine whether drug or alcohol violation information about me exists in the Clearinghouse. (Employers and employees may also wish to include the terms of the consent. For example, is the driver consenting to a single limited query or multiple limited queries? If the driver consents to multiple limited queries, will those queries be conducted over a fixed period of time or for the duration of employment? Is the number of limited queries specific or unlimited? The scope of this consent would be determined by the employer and the employee.)

I understand that if the limited query conducted by (Company Name) indicates that drug or alcohol violation information about me exists in the Clearinghouse, FMCSA will not disclose that information to (Company Name) without first obtaining additional specific consent from me.

I further understand that if I refuse to provide consent for (Company Name) to conduct a limited query of the Clearinghouse, (Company Name) must prohibit me from performing safety-sensitive functions, including driving a commercial motor vehicle, as required by FMCSA’s drug and alcohol program regulations.

______________________________  ______________________
Employee Signature                Date
# Two Types of Queries

<table>
<thead>
<tr>
<th>Query Type</th>
<th>Reason for Query</th>
<th>Consent Requirements</th>
<th>Consent Responses and Required Actions</th>
<th>Query Results and Required Actions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LIMITED QUERY</strong></td>
<td>Annual check on currently-employed driver OR Ad hoc/periodic check on driver</td>
<td>Outside the Clearinghouse May be electronic or wet signature Limited consent form must specify time range</td>
<td>Consent refused • Query cannot be conducted • Driver removed from safety-sensitive functions Consent provided • Retain via paper or electronically in driver’s qualification file • Request limited query in the Clearinghouse</td>
<td>No records found in the Clearinghouse for queried driver • No action required Records found in the Clearinghouse for queried driver; full query needed • Full query must be conducted for violation and/or return-to-duty (RTD) details to be released • If full query is not conducted within 24 hours, driver is removed from safety-sensitive functions, including operating a CMV</td>
</tr>
<tr>
<td><strong>FULL QUERY</strong></td>
<td>Pre-employment check on prospective driver OR Limited query returned records found for queried driver OR Ad hoc/periodic check on driver</td>
<td>Electronically within the Clearinghouse, for each full query for individual driver</td>
<td>Consent refused • Employer notified of refused consent • Query cannot be conducted • Driver cannot perform/removed from safety-sensitive functions Consent provided • Query conducted • Full violation and/or RTD details released, if any</td>
<td>Prohibited • If driver has a violation and no negative RTD test result, driver is removed from safety-sensitive functions Not Prohibited • If a driver has no violations, or a violation and a negative RTD test result, no action required</td>
</tr>
</tbody>
</table>
Questions?

Jeff Sims, CSAPA
President
Xpert Diagnostics, Inc.
425 West Broadway
North Little Rock, AR USA 72114
xpertdiagnostics.com
j.sims@xpertdiagnostics.com
(800) 837-8648
Medical Marijuana Cards and Their Effect on the Workplace

Jeff Sims, CSAPA
President
Overview

- The Arkansas Medical Marijuana Amendment
- Who has a MMJ Card?
- Impairment and Safety-sensitive Concerns
- CBD and Industrial Hemp
The States Where It's Legal To Smoke Marijuana
Laws on recreational and medical marijuana use in the U.S.*

- **Legalized for recreational & medical use**
- **Medical use only**

**Legalized recreational marijuana**
- Alaska
- California
- Colorado
- District of Columbia
- Maine
- Massachusetts
- Michigan
- Nevada
- Oregon
- Vermont
- Washington

* As of March 8, 2019. Some states not highlighted allow limited medical marijuana access

Source: National Conference of State Legislatures
Arkansas Medical Marijuana Amendment
Employment Protections

* Creates broad civil and criminal protections
  * Qualifying Patients and Designated Caregivers “shall not be subject to arrest, prosecution, or penalty in any manner or denied any right or privilege, including without limitation a civil penalty or disciplinary action by a business, occupational, or professional licensing board for the medical use of marijuana in accordance with this [law] . . .”

* Creates a rebuttable presumption of lawful activity
  * Qualifying patients and designated caregivers are “presumed to be lawfully engaged in the Medical Use of Cannabis in accordance with this chapter” if in actual possession of a lawfully issued card and a legal amount of Cannabis.
    * Presumption can be rebutted by evidence that conduct related to marijuana was not for the purpose of medical treatment.
    * Medical use and possession is restricted to 2.5 oz. usable marijuana per qualifying patient or designated caregiver.
Employment Protections (cont.)

* Prohibits employment discrimination

* “An employer shall not discriminate against an individual in hiring, termination, or any term or condition of employment, or otherwise penalize an individual, based upon the individual’s past or present status as a Qualifying Patient or Designated Caregiver.”
Employment Protections (cont.)

* In order to take adverse employment action, the employer must have proof of the employee’s public/workplace use OR proof of being “under the influence.”
  * “This amendment does not permit any person to:
    * Undertake any task **under the influence** of marijuana when doing so would constitute negligence or professional malpractice;
    * Possess, smoke, or otherwise engage in the use of marijuana;
      * On a school bus;
      * On the ground of a daycare center, preschool, primary or secondary school, college or university;
      * At a drug or alcohol treatment facility;
      * At a community or recreation center;
      * In a correctional facility;
      * On any form of **public transportation**;
      * Or in a **public place**;

NOTE: The Amendment does not define “under the influence” or “public place.”
Employment Protections (cont.)

* “This amendment does not permit any person to:
  * Operate, navigate or be in actual physical control of any motor vehicle, aircraft, motorized watercraft or any other vehicle drawn by power other than muscular power while under the influence of marijuana.”

* “This amendment does not require:
  * A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana unless federal law requires reimbursement;
  * An employer to accommodate the ingestion of marijuana in a workplace or an employee working under the influence of marijuana;
  * An individual or establishment in lawful possession of property to allow a guest, client, customer, or other visitor to use marijuana on or in that property;
  * An individual or establishment in lawful possession of property to admit a guest, client, customer, or other visitor who is inebriated as a result of his or her medical use of marijuana;

  NOTE: “Inebriated” is not defined by the Amendment.
**Employment Bills Passed by the Assembly**

- **ACT 479 of 2017**

- An act to amend Arkansas Constitution, Amendment 98, also known as the "Arkansas Medical Marijuana Amendment of 2016" regarding the Arkansas National Guard and the United States military; and for other purposes.

- This does not allow members of the Arkansas National Guard or the United States military to be a qualifying patient of caregiver. It also prevents marijuana use on any property under the control of the Arkansas National Guard or the United States military.
Employment Bills Passed by the Assembly

* **ACT 593 of 2017**

- An Act to Amend Arkansas Constitution, Amendment 98, also known as the "Arkansas Medical Marijuana Amendment of 2016" regarding employee protections and employee safety; and for other purposes.
- This includes workplace and employer protections to maintain a drug-free workplace policy which addresses safety sensitive positions, placing employees on leave, or suspending/termination of employment.

* **ACT 594 of 2017**

- An Act to Amend Arkansas Constitution, Amendment 98, also known as the "Arkansas Medical Marijuana Amendment of 2016" regarding expiration dates of licenses for dispensaries and cultivation facilities and the expiration dates for registry identification 12 cards for dispensary agents and cultivation agents; and for other purposes.
- A license that is initially issued between January 1 and July 1 may have the licensing fees up to fifty percent (50%) prorated and refunded as determined by the commission. It also changes the licensing expiration dates to coincide with the State's end of year date of June 30th and renewable on July 1st.
Currently, over 23,832 Approved Medical Marijuana ID Cards Issued as of September 27, 2019

Leading condition, intractable pain > 6 months

In the 2018 enrollment period:

<table>
<thead>
<tr>
<th>Status</th>
<th>Patient</th>
<th>Caregiver</th>
</tr>
</thead>
<tbody>
<tr>
<td>Submitted</td>
<td>5,599</td>
<td>80</td>
</tr>
<tr>
<td>Approved</td>
<td>5,459</td>
<td>58</td>
</tr>
</tbody>
</table>

Source: Arkansas Department of Health
## Arkansas Patient Demographics

<table>
<thead>
<tr>
<th>Gender</th>
<th>Count</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>2,816</td>
<td>51.6</td>
</tr>
<tr>
<td>Female</td>
<td>2,643</td>
<td>48.4</td>
</tr>
<tr>
<td>Total</td>
<td>5,459</td>
<td>100.0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Age-Group</th>
<th>Count</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 to 24 years</td>
<td>114</td>
<td>2.1</td>
</tr>
<tr>
<td>25 to 44 years</td>
<td>1,518</td>
<td>27.8</td>
</tr>
<tr>
<td>45 to 64 years</td>
<td>2,930</td>
<td>53.7</td>
</tr>
<tr>
<td>≥65 years</td>
<td>897</td>
<td>16.4</td>
</tr>
<tr>
<td>Total</td>
<td>5,459</td>
<td>100.0</td>
</tr>
</tbody>
</table>
Cards Issued per Condition

Source: Arkansas Department of Health 2018
Marijuana is still illegal under federal law (Schedule I drug)
2016: Drug Enforcement Administration (DEA) denied petition to reschedule; agreed to increase access for research
August 2018: DEA announced proposal to significantly increase amount permitted for research in 2019
Medical or recreational marijuana is NOT a legitimate medical explanation under U.S. Department of Transportation (DOT) drug testing
February 2019: medical marijuana program protections renewed until September 30, 2019
Safety Concerns
Post-accident positivity in the general U.S. workforce outpaces other testing reasons including pre-employment.

On September 18, The Quest Diagnostics Drug Testing Index™ industry analysis of general U.S. workforce urine drug test results shows year-over-year double-digit increases in workplace drug positivity in six of the 17 sectors reported.
Impact of Safety

Positivity Rates by Testing Category
Urine Drug Tests

Source: Quest Diagnostics DTI 2018
Workforce Drug Testing Positive Clims to Highest Rate Since 2004

Source: Quest Diagnostics DTI 2018
Impact of Safety

Positivity Rates by Testing Reason
Urine Drug Tests – For Federally Mandated, Safety-Sensitive Workforce

Source: Quest Diagnostics DTI 2018
Impact of Safety - U.S. DOT Drug Testing Data

Lab Reported U.S. DOT Drug Testing Data 2009-2016
Number Positive Results [for each calendar year]

<table>
<thead>
<tr>
<th>Year</th>
<th>PCP</th>
<th>OPI</th>
<th>COC</th>
<th>AMP</th>
<th>THC</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016</td>
<td>1,132</td>
<td>12,116</td>
<td>14,939</td>
<td>35,421</td>
<td>44,388</td>
</tr>
<tr>
<td>2015</td>
<td>1,265</td>
<td>14,925</td>
<td>15,513</td>
<td>37,619</td>
<td>47,782</td>
</tr>
<tr>
<td>2014</td>
<td>1,295</td>
<td>13,446</td>
<td>14,909</td>
<td>34,830</td>
<td>47,524</td>
</tr>
<tr>
<td>2013</td>
<td>1,196</td>
<td>12,346</td>
<td>15,643</td>
<td>31,864</td>
<td>44,814</td>
</tr>
<tr>
<td>2012</td>
<td>1,334</td>
<td>10,066</td>
<td>15,731</td>
<td>27,889</td>
<td>42,312</td>
</tr>
<tr>
<td>2011</td>
<td>1,271</td>
<td>10,281</td>
<td>18,378</td>
<td>24,306</td>
<td>41,191</td>
</tr>
<tr>
<td>2010</td>
<td>1,313</td>
<td>9,365</td>
<td>12,076</td>
<td>15,339</td>
<td>40,193</td>
</tr>
<tr>
<td>2009</td>
<td>1,326</td>
<td>9,987</td>
<td>12,915</td>
<td>14,92</td>
<td>39,445</td>
</tr>
</tbody>
</table>

Legend:
- PCP
- OPI
- COC
- AMP
- THC
Impact on Safety - U.S. DOT Drug Testing Data

Lab Reported U.S. DOT Drug Testing Data 2009-2016
Positive Rate [based on total test results for each year]
Identifying Impairment
Trichomes
Marijuana Effects

- Short term memory loss
- Depth perception issues
- Dreamy, relaxed feeling
- Increased senses of sight, smell, taste, and hearing – leads up to excessive smoking and “munchies”
- Hallucinations
- Anxiety
- Impaired muscle coordination
Marijuana Observed Behaviors

- Rapid, loud talking
- Sleepiness
- Lack of motivation
- Reduced concentration
- Reduced inhibitions
- Sexual dysfunction
- Giggly, ridiculous conversation
* Record all actions and behaviors
* Include statements or pertinent facts
* State time, date, location
* List witnesses

---

**REASONABLE SUSPICION DOCUMENTATION**

**Note:** Prepare this form every time a driver is suspected of drug and/or alcohol use by physical, behavioral, speech, or performance indicators that constitute a major change in the driver’s appearance, behavior, and/or performance of his/her job-related duties, which is the basis for performing a “reasonable suspicion” drug and/or alcohol test.

**Driver’s name:**

**Date of observation:**

**Time of observation:** from ______ a.m./p.m. to ______ a.m./p.m.

**Location:**

**Observed behavior (Check all that apply):**

**PHYSICAL INDICATORS:**
- dilated pupils
- constricted pupils
- drowsiness
- cold sweats
- tremors
- excessive yawning
- rapid breathing
- dizziness

**BEHAVIORAL INDICATORS:**
- chronic redness of eyes
- chronic nasal problems
- odor of marijuana
- odor of alcohol
- noticeable weight loss
- loss of appetite
- ravenous appetite
- unsteady walk/stumbling
- depression
- anxiety
- moodiness
- irritability
- alienation
- agitation
- combativeness
- restlessness
- panic reactions
- euphoria
- neglect of personal hygiene

**SPEECH INDICATORS:**
- thick
- rapid
- slurred
- incoherent
- excessively talkative
- unable to concentrate
- errors in judgment
- impaired reasoning

**PERFORMANCE INDICATORS:**
- drug test
- alcohol test
- both drug and alcohol test

To the best of my knowledge and belief, this report represents the physical, behavioral, speech, or performance indicators of the above-named driver, observed by me and upon which I base my decision to require said driver to submit to a reasonable suspicion.

The above behavior has been witnessed by:

**Signature of supervisor or company official**

**Signature of supervisor or company official**

**Date**

**Date**

---

file://\Atest01\webresources\REASONABLE_SUSPICION_DOCUMENTATION.htm

x pert

Diagnostics
CBD and Industrial Hemp
Today's legal marijuana comes in many forms:
in candy, in snacks
in food for breakfast, lunch or dinner
in drinks
in waxes - inhaled - vaped - dabbed
in drops - absorbed - inhaled
in capsules - swallowed
in plants - smoked

Marijuana Harmless? Think Again
MarijuanaHarmlessThinkAgain.org
Cannabis (Marijuana)

- Contains over 421 different chemical compounds, including 61 cannabinoids
- Delta-9-tetrahydrocannabinol (THC), the primary psychoactive analyte, is found in the plant’s flowering or fruity tops, leaves and resin.
- CB1 and CB2 receptors in the brain have been mapped. Found that the distribution of the high-affinity, stereoselective and pharmacologically distinct brain receptors is anatomically selective.
Hemp Farm Bill 2018

- Removes cannabis sativa from Schedule I if less than or equal to 0.3% THC by dry weight.
- Plans go to USDA for:
  - THC testing procedures and inspections
  - Bookkeeping procedures to track land for cultivation
  - Plans for disposal of hemp plants with too much THC
- Bans people with drug felonies in the last 10 years from cultivation
- Guarantees that hemp and hemp products can be moved from state to state and imported and exported the same as any other crop.
**SEC. 297A. DEFINITIONS**

“(1) HEMP.—The term ‘hemp’ means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

If the THC content is greater than 0.3% dry weight, the plants must be destroyed and not used in hemp/CBD products.

CBD concentrations in the 1%-4% range in normal marijuana.

CBD cultured strains with a 20:1 ratio of CBD:THC.
What is Cannabidiol [kənəb̪i dī ˈd̪ɛə əwɛl] or CBD?

* One of at least 113 active cannabinoids identified in cannabis
* Major cannabinoid, accounting for up to 40% of the plant's extract
* Being explored for a wide scope of potential medical applications
* Non-psychoactive and appears to counteract the effects of THC
* Appears to lack interference with several psychomotor learning and psychological functions
Component Uses

TRENDS in Pharmacological Sciences
What are CBD Ingestion Risks?

- Recent reports of vaping injury (THC and nicotine) to lungs of teenagers. Is it the drug or solution?
  - Severe breathing problems "He was not breathing on his own at all yesterday. His heart was weak. They weren’t sure he was going to make it."
  - Responded to steroid treatment and were released without the need for supplemental oxygen at home.
  - The vaping solvents may be very dangerous when pyrolyzed and causing long term lung damage.
- In mice, hepatotoxicity gene expression arrays revealed that CBD differentially regulated more than 50 genes, many related to oxidative stress responses, lipid metabolism pathways, and drug metabolizing enzymes.
- Clear signs of liver toxicity with elevated liver enzymes.
  * Molecules 2019, 24(9), 1694; https://doi.org/10.3390/molecules24091694
The passage of the Farm Bill by Congress has created the CBD market for the use of hemp.

CBD products are everywhere and endless with entrepreneurs and celebrities creating their own brands.

Grocery stores, pharmacy chains, big box stores, malls all carry a variety of products.

Sales by 2024 are projected to be $15 billion in revenue and some expect CBD sales to exceed those of marijuana.
Reasonable cause training for supervisors and employees is a must in our wild west of new marijuana laws.

CBD content is highly variable between products and the THC as an impurity is not controlled effectively due to costs of purification. One study found 69% of 84 CBD products were inconsistent with labeled concentration with THC up to 6.4 mg/mL.

Until the CBD industry is under strict regulatory control for product purity, the donor is under a “Buyers Beware” for the foreseeable future.

Federal studies are happening to gain information as to the metabolism and impact regarding potential positive test results.

HHS and DOT do not allow CBD to be an alternative ingestion for a positive marijuana results. What is in your Non-Regulated testing policy?
Questions?

Jeff Sims, CSAPA
President
Xpert Diagnostics, Inc.
425 West Broadway
North Little Rock, AR USA 72114
xpertdiagnostics.com
j.sims@xpertdiagnostics.com
(800) 837-8648
Cybersecurity and Computer Maintenance
IT in a Box guards against cyberattacks by keeping your computers patched, protected, and healthy. Includes always-on monitoring and alerting for issues, enterprise-class antivirus protection, automated computer maintenance, and ongoing software patching to keep you secure.

24x7 Helpdesk
IT in a Box’s U.S. based helpdesk provides cities both remote and onsite support. You will talk to senior IT engineers with many years of experience supporting municipal staff and applications. Available 24x7x365, our helpdesk supports your municipal staff in the office, working from home, and on the road.

Data Backup and Disaster Recovery
Onsite data backup for quick recovery after events like a server failure. Unlimited offsite data backup for worst-case scenario recovery after a major incident like a natural disaster. Real-time monitoring to quickly address data backup issues and quarterly testing to verify your disaster recovery.

Records / Document Management and Email
Software and policies to protect your city records, documents, and email. Reliably archive, retain, access, and delete information according to your record retention schedules—and we even help you process Open Records Requests. Also includes Microsoft Office Professional Plus and city email with 50GB of mailbox storage for each user.

Video Archiving
No more buying additional expensive storage for video. We provide unlimited offsite video storage to meet state record retention policies. As your squad car and body camera video continue to grow at a rapid pace, your storage costs do not change.

Our GUARANTEE
> Love IT. If we don’t meet your expectations, then cancel the service!
> Flat monthly fee. No hourly charges. Predictable!
> No upfront project fees. Onboarding, equipment, and setup included!
> Flexible. Increase or decrease your number of users any time!
> Proven. Tailored for cities!

Policy and Compliance
We help you adopt best practices and policies that address information security risks and assist with Legislative Audit compliance. By making sure your staff is knowledgeable and prepared, we help your city comply with the law and lessen your risk of falling victim to the latest external and internal threats.

Website
We provide you a modern website with a custom design that will reflect your community well online. To save you time, submit your website updates to us and we will post them for you.

Vendor Management and Procurement
No more frustrating calls with vendors. We’ve got it! Issues with your software or hardware vendor? Call us for support. Need a new computer? Call us and we’ll procure it.

Dave Mims | 770.670.6940 x110
davemims@sophicity.com
www.sophicity.com

Chris Hartley | 501.978.6106
chartley@arml.org
www.arml.org
### IT in a Box Gold

Features & benefits include:
- Cybersecurity & Computer Maintenance
- 24x7 Helpdesk (onsite & remote)
- Data Backup & Disaster Recovery
- Records/Document Management, Email, & Microsoft Office
- Video Archiving
- Policy & Compliance
- Website
- Vendor Management and Procurement

#### Example: 2 PCs

<table>
<thead>
<tr>
<th>List price</th>
<th>Onboarding</th>
<th>Monthly Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>$2,000</td>
<td></td>
<td>$515</td>
</tr>
</tbody>
</table>

**AML members SAVE 52% the first year!**

<table>
<thead>
<tr>
<th>List price</th>
<th>Onboarding</th>
<th>Monthly Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>FREE</td>
<td></td>
<td>$249</td>
</tr>
</tbody>
</table>

#### Example: 5 PCs & 1 Server

<table>
<thead>
<tr>
<th>List price</th>
<th>Onboarding</th>
<th>Monthly Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1,000</td>
<td></td>
<td>$1,033</td>
</tr>
</tbody>
</table>

**AML members SAVE 37% the first year!**

<table>
<thead>
<tr>
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</tr>
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<tbody>
<tr>
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#### Example: 10 PCs & 3 Servers

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<tbody>
<tr>
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**AML members SAVE 30% the first year!**

<table>
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<tr>
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<tr>
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<td>$1,352</td>
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</tbody>
</table>

### IT in a Box Silver

Features & benefits include:
- Cybersecurity & Computer Maintenance
- 24x7 Helpdesk (remote)
- Data Backup & Disaster Recovery
- Vendor Management and Procurement

#### Example: 2 PCs

<table>
<thead>
<tr>
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<tbody>
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**AML members SAVE 52% the first year!**

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#### Example: 5 PCs & 1 Server

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**AML members SAVE 34% the first year!**

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#### Example: 10 PCs & 3 Servers

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**AML members SAVE 27% the first year!**

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</table>

### IT in a Box Bronze

Features & benefits include:
- Cybersecurity & Computer Maintenance
- Data Backup & Disaster Recovery

#### Example: 2 PCs

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**AML members SAVE 65% the first year!**

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#### Example: 5 PCs & 1 Server

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<tbody>
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**AML members SAVE 42% the first year!**

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#### Example: 10 PCs & 3 Servers

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</thead>
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**AML members SAVE 30% the first year!**

<table>
<thead>
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<tbody>
<tr>
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<td>$580</td>
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</table>
THE FAIR LABOR STANDARDS ACT
“21 THINGS YOU SHOULD KNOW”

All Employees

1. The minimum wage in Arkansas is $8.50 per hour for the year 2018. “Beginning January 1, 2019, every employer shall pay each of his or her employees wages at the rate of not less than nine dollars and twenty-five cents ($9.25) per hour, beginning January 1, 2020 the rate of not less than ten dollars ($10.00) per hour and beginning January 1, 2021 the rate of not less than eleven dollars ($11.00) per hour except as otherwise provided in this subchapter.” (A.C.A. § 11-4-210(a)(2)).

   Note: The federal minimum wage for covered, non-exempt employees is $7.25 per hour. However, states are entitled to set a higher minimum wage. Accordingly, the higher Arkansas wage rates are applicable.

2. Overtime or compensatory time must be paid at time and one-half of the employee’s regularly hourly rate (29 U.S.C. § 207(a)(1)). Even if the employee receives a salary, overtime or compensatory time must be granted unless the employee is exempt as explained below.

   Employers cannot avoid paying overtime or compensatory time by averaging hours over several workweeks. The FLSA requires that each workweek stand alone (29 C.F.R. § 778.104). (But see chart below for information on uniformed employee shifts).

3. If an employee volunteers to substitute shifts with another employee after first obtaining the employer’s approval and works more than the maximum hours for a given work period as a result of the switch, his employer is not responsible for paying the additional overtime (29 C.F.R. § 533.31(a)). The regulations state that this may occur “only if employees’ decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or ‘trade time’ with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.” (29 C.F.R. § 533.31(b)).

   Employers are not required to maintain a record of time traded and there is no specific period of time in which the shift must be paid back (see 29 C.F.R. § 533.31). Therefore, the employee’s paycheck for that period would not reflect the switch in additional hours or overtime pay (29 C.F.R. § 553.31).

4. Employees do not have to be paid for “on-call” time unless their activities are overly restricted (29 C.F.R. § 785.17). On-call time should not be counted as compensable unless the employee is required to remain at or near the employer’s premises or otherwise cannot use his or her time freely (29 C.F.R. § 785.17). Providing electronic pagers or cell phones to employees can solve many on-call time problems.
Exempt Employees

5. Elected municipal officials, their personal staffs, persons appointed by elected officials to serve on a policy making level, and legal advisors are considered exempt employees and are excluded from coverage under the Fair Labor Standards Act (29 C.F.R. § 553.11).

6. Trainees and students are not employees within the meaning of the Fair Labor Standards Act if they meet all six criteria below:
   (1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;
   (2) The training is for the benefit of the individual;
   (3) The trainee does not displace regular employees, but is supervised by them;
   (4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;
   (5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and
   (6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training (5 C.F.R. § 551.104).

7. Volunteers are not employees and an employee cannot volunteer to do the same work for the same public agency which he is being paid (29 C.F.R. §§ 553.100, 553.102).


9. Executive, administrative, and professional white-collar employees are exempt from both minimum wage and overtime provisions if they meet all the requirements specified for their job category. These are not the only exemptions, but are the most typical in Arkansas cities and towns.

   Note: The salary rate is scheduled to increase from $455 per week to $684 per week, effective January 1, 2020.

a. Executive employees
   (1) The employee must be compensated on a salary basis at a rate not less than $455 per week ($684 per week, effective January 1, 2019);
   (2) The employee’s primary duty must be managing the enterprise in which the employee is employed or managing a customarily recognized department or subdivision of the enterprise;
   (3) The employee must customarily and regularly direct the work of two or more other full-time employees or their equivalent; and
   (4) The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any
other change of status of other employees are given particular weight (29 C.F.R. § 541.100).

b. Administrative employee
(1) Compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging or other facilities ($684 per week, effective January 1, 2019); and
(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance (29 C.F.R. § 541.200).

c. Professional employee
(a) The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act shall mean any employee:
(1) Compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging, or other facilities ($684 per week, effective January 1, 2019); and
(2) Whose primary duty is the performance of work:
   (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
   (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (29 C.F.R. § 541.300).

d. Computer Employee Exemption
(a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.
(b) The (a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging or other facilities, and the (a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour ($684 per week, effective January 1, 2019). In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:
(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

A combination of the aforementioned duties, the performance of which requires the same level of skills (29 C.F.R. § 541.400).

10. Employees of amusement or recreational establishments are exempt from minimum wage and overtime if one of the following requirements is satisfied:

   (a) The establishment must not operate for more than seven months in any calendar year.

   (b) During the preceding calendar year, the establishment’s average receipts for any six months of that year must have been equal to or less than one-third of its average receipts for the other six months of that year (29 C.F.R. § 779.385).

Uniformed Employees-Police and Fire

11. Law enforcement officers in cities and towns with fewer than five (5) law enforcement officers, including the chief or marshal, are exempt from the overtime provisions (29 U.S.C. § 213(b)(20); 29 C.F.R. §§ 553.200, 553.211). To count as a law enforcement officer, the officer must be someone: (1) who is a uniformed or plain clothed member of a body of officers and subordinates who are legally authorized to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics (29 C.F.R. § 553.211).

   Volunteers are not considered “employees” for this purpose however. No distinction is made between part-time and full-time employees.

   This means that if you have four (4) or fewer than four (4) law enforcement officers (not including radio operators), the city does not have to pay overtime. You must be sure your officers receive minimum wage for all hours worked in a work period.

12. Cities and towns with fewer than five (5) paid firefighters, including the chief (if paid), are exempt from paying overtime to those employees who meet the following definition: “Employee in fire protection activities” means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who--

   (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

   (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk (29 U.S.C. § 203(y); see also 29 C.F.R. § 553.210(a)).
You must be sure your paid firefighters (four or fewer) receive minimum wage for all hours on duty during the work period (see 29 U.S.C. § 213(b)(20); A.C.A. § 11-4-210(a)(2)).

13. Volunteer firefighters and auxiliary police officers are “volunteers” and are not treated as employees under the 1985 Amendments to the Fair Labor Standards Act (29 C.F.R. § 553.104(b)).

14. The FLSA provides a partial overtime exemption for law enforcement officers and firefighters who work a “work period” established by the city of no fewer than seven days and no more than twenty-eight days. The city can establish separate work periods for the police department and the fire department. If the city fails to establish a work period, 207(k) does not apply and a fire or police employee working over forty hours will accrue overtime compensation (29 C.F.R. § 553.230).

   The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel, determining that law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171 and that fire department employees working in excess of 212 hours within a 28-day period must also be compensated (29 C.F.R. § 553.230). These 28-day standards can be used as ratios to determine maximum hours for other approved work periods. See the following chart.
When determining compensatory time for either law enforcement personnel or firefighters who miss a shift due to illness, vacation, personal leave, or any other reason, hours missed will not count as hours worked and are not compensable for overtime purposes (29 C.F.R. §§ 553.201, 553.230).

15. Civilian radio operators, clerks, secretaries, and janitors of police and fire departments are on a 40-hour workweek with time and one-half for all hours over 40 hours per week. They do not qualify for the law enforcement officers or firefighters’ “work period” hours exemption (see 29 C.F.R. §§ 553.210(b), 553.211(e)).

16. The city as employer has the option of paying overtime or of giving comp time off. The employee must understand that the city has a policy of compensatory time off. Compensatory time is accrued at 1 ½ hours for each hour worked. Public safety employees—police and fire—and emergency response employees can accrue a maximum of 480 hours of comp time or 320 hours worked. After an employee has accrued maximum compensatory time, the employee must be paid in cash for overtime worked.

An employee shall be permitted to use accrued comp time within a reasonable period after requesting it if to do so would not disrupt the operations of the employer. Payment of accrued

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<th>Work period (days)</th>
<th>Maximum hours standards</th>
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<tr>
<td></td>
<td>Fire protection</td>
<td>Law enforcement</td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>212</td>
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<td>7</td>
<td>53</td>
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</table>
comp time upon termination of employment shall be calculated at the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher (29 C.F.R. § 553.21(o)(3)(B)).

If the employer pays cash wages for overtime hours rather than in compensatory time, the wages must be paid at one and one-half times the employee’s regular rate of pay (29 C.F.R. § 553.232).

The United States Supreme Court has held that a public employer may require its employees to use their accumulated compensatory time. Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655 (2000). If employees do not use accumulated compensatory time, the employer must pay cash compensation in some circumstances. In order to avoid paying for accrued compensatory time, Harris County, Texas, enacted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time.

The Court described Harris County’s policy as follows: “The employees’ supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee’s stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times.” The Court held that, although 29 U.S.C. § 207(o)(5) limits an employer’s ability to prohibit the use of compensatory time when requested, that does not restrict the employer’s ability to require employees to use compensatory time.

Non-Uniformed Employees

17. All non-uniformed employees are entitled to overtime or compensatory time off after 40 hours per week worked unless they are otherwise exempt (see, for example the categories discussed in No. 8 above) (29 C.F.R. § 778.101).

18. There is no FLSA limit on the number of hours per day worked (other than child labor) (29 C.F.R. § 778.102).

19. A work week under the FLSA is defined as seven consecutive 24-hour periods (although this may be altered for police and firefighters as discussed above). Note that this may not be the same as the city’s “pay period.” The city can determine the day and the time of day that the work week begins. Once the beginning time of an employee’s workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act (29 C.F.R. § 778.105). We recommend that the city work week for water, sewer, street, sanitation, etc., employees begin at 5 p.m. on Fridays.

The city can schedule the hours worked within the work week to limit or prevent overtime. If an emergency occurs over the weekend and some employees must work 16 hours Saturday and 16 hours Sunday, then the city can (if their services are not absolutely needed) tell those
employees to take off the rest of the week after working one eight hour shift each. This way each employee is limited to 40 hours per week for the week beginning 5 p.m. on Friday.

20. Only hours worked count in calculating overtime. Pay for holidays, vacations, sick time, jury duty, etc., do not count as hours worked (see 29 C.F.R. § 778.102).

21. If an employee works more than 40 hours per week, the city could give him compensatory time off at the rate of 1 ½ hours for each hour worked over 40 hours per week. The compensatory time belongs to the employee and can accrue to a maximum of 240 hours (160 hours actual work).

The employee must be allowed to use his comp time when he desires unless it would unduly disrupt the city’s operations to do so at that particular time. For a discussion of requiring the employee to take accumulated compensatory time, see point 16 above.

In case of termination of employment, an employee shall be paid for all accrued comp time at his then salary or the average rate of pay for the final three years of employment, whichever is greater (29 C.F.R. §§ 553.21, 553.25).
Fair Labor Standards Act Rules Update:
Overtime Salary Exemption Thresholds

On Tuesday, September 24, 2019, the Department of Labor (“DOL”) announced its final rule updating the overtime salary thresholds for exempt employees under the Fair Labor Standards Act (“FLSA”). There were no changes to the current duties test for determining who is exempt, and the new rule is effective January 1, 2020.

The rule change has a tortured history, reaching back to May 18, 2016, when the White House announced changes to the salary threshold required for employees to fall into one of the FLSA overtime exemptions. That proposed rule would have set the primary threshold to a minimum of $913 per week ($47,476 annually). However, the rule never went into effect after several state attorneys general and private entities challenged the rule in court. After the challenge, the DOL set about establishing an update that would not invite legal challenges, and the updated rule was announced this week.

The new rule updates the regulations governing which executive, administrative, and professional employees are entitled to the FLSA’s overtime pay protections. Generally, the rule changes mean that more employees are going to be entitled to overtime pay because fewer employees will meet the exceptions required to be exempt under the rules.

The Previous Version:

1) A “white collar worker” who made at least $455 per week ($23,660.00 per year) could be exempt from overtime pay, if other factors (job duties) were met; and

2) A “highly compensated worker” could be exempt from overtime requirements where he or she made at least $100,000.00 in total annual compensation.

The 2019 changes:

1) In order to meet the “white collar worker” exemption an employee must be paid at least $684 per week ($35,568.00 annually for a full-year worker). Additionally, the salary basis test now allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level;

2) In order to meet the “highly compensated workers” exemption an employee must be paid at least $107,432.00 in total annual compensation.

Resources: Arkansas Municipal League’s updated FLSA 21 Things You Should Know publication, which may be found at: [www.arml.org/pubs](http://www.arml.org/pubs); and the DOL’s publications on the rule changes, which may be found at: [www.dol.gov/whd/overtime2019](http://www.dol.gov/whd/overtime2019).
How to Become a Certified Municipal Official (CMO) or Certified Municipal Personnel (CMP)
Becoming a CMO/CMP

All municipal officials—mayors, city administrators, city managers, city directors, council members, city clerks, recorders, treasurers; or municipal department heads, managers, and other key personnel—are invited to participate in the new advanced voluntary certification program.

To become a Level 1 Certified Municipal Official (CMO) or Certified Municipal Personnel (CMP), a participant must complete 21 hours of the Level 1 courses, which must include 15 hours of “core” coursework. Each core course counts as five hours of credit. The remaining six hours of credit needed to achieve CMO/CMP status may be obtained by attending continuing education courses held during the League’s annual Winter Conference, annual Convention in June, or the Planning & Zoning Workshop held in April on the odd years.

The three Level 1 core courses are repeated each year and are designed to give an overview of local governance. Continuing education courses, however, cover a variety of topics.

Advanced Level Training

For the first time, advanced level training will be offered to our members. The new advance classes will include 15 hours of Advanced Level 2 training and 20 hours of Advanced Level 3 training. Participants pursuing any and all levels of certification must obtain six hours of Continuing Education on an annual basis to maintain certification status.

If you have previously achieved your Level 1 training of 21 hours and received your certification certificate, you may advance to Level 2 training.
Maintaining Certification

Once CMOs/CMPs complete Levels 1, 2, and 3, the League encourages participants to maintain their certification moving forward by obtaining six hours of continuing education annually.

Registration Policy for Voluntary Certification Workshop Attendance

The Arkansas Municipal League’s Voluntary Certification Program is offered to mayors, city administrators, city managers, city directors, council members, city clerks, recorders, and treasurers who are currently in office; or municipal department heads, managers, and other key personnel. Members attend workshops to receive certification credit hours to obtain their CMO or CMP certificates.

Candidates running unopposed for one of the above positions may attend certification workshops if space permits. Candidates who do not fit this criteria may not attend certification workshops.

Course Schedule

Please examine the class schedule in this brochure for a preview of the next two years. Specific dates are assigned each year at the League’s annual planning meeting in August. For the current year’s schedule, consult the Calendar of Events on the League’s website, www.arml.org.

Officials may check their voluntary certification hours at the following link: www.arml.org/VCP.
<table>
<thead>
<tr>
<th>Month</th>
<th>Odd Year</th>
<th>Even Year</th>
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<tbody>
<tr>
<td>January</td>
<td>*City Government 101 (5 hours core)</td>
<td>3 Hours of Continuing Education</td>
</tr>
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<td></td>
<td>Held during Winter Conference</td>
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<td>3 Hours of Continuing Education</td>
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<td></td>
<td>Held during Winter Conference</td>
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</tr>
<tr>
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<td>Planning &amp; Zoning Workshop (5 hours continuing)</td>
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<tr>
<td></td>
<td>Held in April at League HQ</td>
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<td>3 Hours of Continuing Education</td>
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<tr>
<td>Total</td>
<td>*15 core hours + 6 continuing hours</td>
<td>*15 core hours + 6 continuing hours</td>
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One of the primary goals of the Arkansas Municipal League is to promote municipal education and provide local government officials with the knowledge and leadership skills to meet the challenges of the 21st Century. To that end the League’s Executive Committee in 2010 established a voluntary certification program for municipal officials. The purpose of the certification program is to increase municipal officials’ knowledge of local governance.
<table>
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<tr>
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<td>Winter Conference (3 Hours of Continuing Education)</td>
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<td>Feb.</td>
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<td>Disaster Preparedness (5 hours of Advanced Level 2)</td>
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<tr>
<td>Mar.</td>
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<td>City Government 101 (5 hours of Level 1)</td>
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<tr>
<td>April</td>
<td>City Government 101 (5 hours of Level 1)</td>
<td>Leadership 101 (5 hours of Advanced Level 2)</td>
</tr>
<tr>
<td>May</td>
<td>Leadership 101 (5 hours of Advanced Level 2)</td>
<td>June Convention (3 Hours of Continuing Education)</td>
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<tr>
<td>June</td>
<td>June Convention (3 Hours of Continuing Education)</td>
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<td>July</td>
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<tr>
<td>Aug.</td>
<td>Municipal Finance 101 Workshop (5 hours of Level 1)</td>
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</tr>
<tr>
<td>Sept.</td>
<td>Municipal Finance 101 Workshop (5 hours of Level 1)</td>
<td>Human Resources (5 hours of Level 1)</td>
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<td>Oct.</td>
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<tr>
<td>Nov.</td>
<td>MHBP/MLWCP</td>
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<tr>
<td>Dec.</td>
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### Voluntary Certification Program

#### Advanced Level 2
- Municipal Finance 201
- Disaster Preparedness
- Leadership 101 at the Local Level

**15 hours**

#### Advanced Level 3
- Personnel Management
- Technology/Cybersecurity
- Conflict Management
- Leadership 201 at the Local Level

**20 hours**

### Class Schedule

<table>
<thead>
<tr>
<th>Month</th>
<th>Odd Year 2021</th>
</tr>
</thead>
</table>
| Jan.  | Winter Conference  
City Gov’t 101 (5 hours of Level 1) 
plus (3 Hours of Continuing Education) |
| Feb.  | Personnel Management  
(5 hours of Advanced Level 3) |
| Mar.  | Technology/Cybersecurity  
(5 hours of Advanced Level 3) |
| April | Planning & Zoning  
(5 hours of Continuing Education) |
| May   | Conflict Management  
(5 hours of Advanced Level 3) |
| June  | June Convention  
(3 Hours of Continuing Education) |
| July  | |
| Aug.  | |
| Sept. | Municipal Finance 101 Workshop  
(5 hours of Level 1) |
| Oct.  | Human Resources (5 hours of Level 1) |
| Nov.  | Leadership 201 (5 hours of Advanced Level 3) |
| Dec.  | |
For more information on the Certification Program, contact Whitnee V. Bullerwell (501) 978-6105, email wvb@arml.org or Tricia Zello at (501) 374-3484 ext. 285, email tzello@arml.org.
Achieving Respect and Understanding in the Arkansas Municipal Workplace
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Introduction

We live in a rapidly changing world that challenges municipal officials and city employees to be aware of the evolving changes occurring in the municipal workplace. Many of the demographic changes in Arkansas, such as the growth in the number of minorities, the emergence of the Millennial generation, and the exiting of the Baby Boomers in the workforce increase the importance of Arkansas municipal officials embracing respect and understanding of others.

Demographic workplace changes can foster misunderstandings and serious problems. However, they can also present opportunities for accessibility to a wider variety of viewpoints and increased tolerance for different work styles, habits, and work performance. Responding to demographic, cultural and other changes in a positive, open-minded manner will be critical to leading your municipality to respect and understand all people. To fully embrace your role as an Arkansas public servant, you must strive to understand the world we live in today. The cities that you serve are dramatically different than those of your predecessors. Workplace changes occur daily. These changes will affect you in a variety of ways. How you choose to accept and respond to the changes will impact your effectiveness as a city official for years to come.

The purpose of this publication is to provide Arkansas municipalities with suggested guidelines to assist in navigating the choppy waters of workplace changes. This training manual is a way to encourage each Arkansas municipality to examine its specific set of challenges and adopt a workplace culture of respect and understanding. To supplement the overview presented in this manual, we have included a list of additional resources available that provide a more in-depth study of the issues covered here.
Chapter One
Responding to Change

Global changes have an impact on even the smallest and most remote cities in Arkansas. The world is getting smaller and more interconnected. What happens in China, India, or the Middle East impacts all of us in some way. Decisions made around the world can affect the price of gas, the cost of your clothes, car, computer, everyday tools, and appliances. These global decisions can also impact business and industry in your city sooner and more dramatically than any other time in world history. Global changes affect Arkansas municipalities economically, politically, militarily, socially, and technologically. We exist in a world where we are all tied together by a complex web of interdependent economies. Most manufactured items that we buy have been produced in several countries, on different continents.

The world has changed from an agrarian-based economy in which the primary products are food to an industrial or post-industrial economy in which the primary products are goods, services, and information. The world has a population of over seven billion people. Almost half the world’s population now lives in urban areas. This has placed a tremendous burden on urban infrastructures, especially in developing countries. Accompanying the dramatic growth in worldwide population is the massive migration of immigrants into the developed nations of North America, Europe, and Australia. These are but just a few of the ongoing worldwide changes that have impacted and will impact cultural changes in the Arkansas municipal workplace.

Technological Changes

Technological changes have dramatically impacted the Arkansas workplace. Twenty-five years ago municipal workers performed tasks with a few basic technological tools. They typed on typewriters, used land-line telephones, visited the library for research purposes, and wrote memos on paper. Today’s workers go about their day with smartphones and tablets attached to them at all times. The existence of the Internet means information is as close as the devices we carry. Email has replaced written memos, power point presentations have replaced bulletins and chalkboards, and there is an app for almost everything at your fingertips. With technology, the municipal workers of today have a wealth of knowledge and information not even dreamed about 25 years ago.

As a result of the many and rapid technological changes in the workplace, it is essential that all municipal employees, regardless of age, stay current with technology. Offering to explain new devices and software to older employees—rather than poking fun at them for not quickly understanding or getting on board with the new technology—will make for a happier and more respectful workplace.

Demographic Changes

Demographic changes in the municipal workplace should be apparent to even the casual observer. Beginning in the 1970’s, the workplace has shifted from one dominated by white males to a more diverse community. Women, minorities, and those with disabilities now share the workplace at all levels. It is advantageous for municipal officials to recognize and take into account preferences, beliefs, and values of the various demographics that comprise their cities. Today there are more women in the workforce than ever before, including jobs in police, fire, and public works. According to the U.S. Census Bureau, Latinos have now surpassed African Americans as the largest minority in the United States. There are several Arkansas cities in which the Latino population has reached half of the local population and we have at least six counties in which African Americans represent over half of the population. There has never been a time in Arkansas history in which the municipal workplace has been as diverse as it is today.

In addition to a more racially diverse workplace, the Arkansas workplace is made up of three generations: so-called Baby Boomers, Generation X, and Millennials. Today’s municipal leaders should recognize the existence of the generations, the differences among them, and the ways each views the working world.
Personnel Law

As workplace diversity increases, trends indicate that more and more groups will be asking for recognition as a protected status. Municipal officials and personnel will have to continually maintain knowledge of emerging issues as they relate to legal compliance, including the most current personnel laws about discrimination, sexual harassment and medical privacy. As a result, municipalities should update personnel policies frequently to reflect the latest personnel laws and workplace changes.

Who are my citizens and colleagues?

Municipalities, like people, have personalities. Factors such as historical, geographical, and economic influences contribute to your city’s personality. However, the citizens themselves are the greatest contributors to the personality of your city. In an attempt to understand your city and the people you serve, municipal leaders should be aware of who comprises your citizenship. Be aware of the trends that have developed in your municipality that contribute to changes that may be occurring. Knowing and understanding these changes will help you achieve respect and understanding in the municipal workplace. The Arkansas Municipal League has provided a sample form that may be used to measure and note a variety of demographic trends that may be occurring in your municipality. (See sample form “Charting Your Municipality’s Demographics” in Appendix A.)

Careful analysis of local demographics can lead municipal leaders to better understand the personality of your city and thus prepare you to respond to these trends. Noted trends such as an increase in minority citizens, citizens over 65, or an increase of high school educated citizens, would dictate a different municipal government response to citizens’ needs than trends indicating otherwise.

Who are my fellow municipal workers?

Municipal leaders need to know who comprises the municipal workforce of your city. The League has provided you with a sample form that may be used to note the demographic making of your municipal workforce. (See sample form “Charting Your Municipal Workforce Demographics” in Appendix B.) The information should be repeated for every department. Once the information has been gathered, the results should be analyzed. The results may show your workforce closely reflects the demographic makeup of your municipality or there may be areas where there are omissions of certain demographic groups. Why does this matter? Because a workforce that does not reflect the citizens it serves may have a difficult time understanding cultural differences and proper ways to respond to citizens’ needs.
Similarities and Differences

As we interact with new American citizens, it is advisable to learn about cultural differences to avoid offending others and, more importantly, to be able to respond to their needs. It is important that you learn customs and traditions of various cultures.

The role of the family, views of morality, manners and religious faith are important to understand. These differences often define cultures and races and they also make us unique as Americans. However, it is equally important to understand our similarities. What do citizens whose families have been Americans for generations have in common with citizens who are first generation Americans? The most common similarity includes what has often been referred to as the “American Dream.”

For many, the American Dream centers on economic opportunities, personal freedom, education, and location. An economic opportunity is the ability to provide a better life for one’s family by working hard in any profession that a person chooses. Personal freedom deals with our First Amendment rights: free speech, freedom to worship, and the right to assemble. These are rights that many did not have in their countries of origin. Education is the key to providing for oneself and for our families. Today, the ability to obtain an education is not restricted by your socio-economic class. In many countries of origin, education is available only to the wealthy. As for location, it is a privilege to live anywhere one chooses and to travel without restriction.

Municipal officials and personnel must understand that we do have a variety of differences that define us as Americans, but what we have in common is far greater than are differences. Changes are occurring rapidly and differences are more apparent than ever before. However, the American Dream has remained a constant motivation to all demographic and cultural groups.

Accepting Change

It is not easy for some municipal officials or employees to accept change. Change moves us out of our comfort zones. Changes at work are among the top life stressors that we can experience. What steps can we take to manage these changes?

1. Recognize that change is constant. The more you recognize that change will happen, the less upset and surprised you will be when you encounter change.

2. Be flexible. Your ability at adapting to change greatly increases your chance of being an effective city official or employee.

3. Be positive in your actions and attitude. Focus on how change can benefit your municipality. Look for opportunities to apply your skills and talents to new challenges to effect positive changes. Change can be frightening and disruptive. However, with the right attitude and actions, you can find opportunities in that change.
Chapter Two
Law Enforcement and Citizen Trust

Law enforcement departments are dramatically different than other local government departments. Law enforcement officers often make life and death decisions regarding the use of force and decisions on whether or not to restrict the freedom of citizens. We ask law enforcement officials to make these decisions on the streets and under pressure. Law enforcement officers are required to abide by constitutional law, state statutes, and local ordinances. All municipal employees work for the citizens. However, the nature of law enforcement tends to place officers in more frequent and intense contact with citizens—often under unpleasant circumstances—than other city employees.

Through the years, the role of law enforcement has expanded, and as a result, law enforcement officers are working in a more difficult environment. As officers serve and protect, they must interact with people from different cultures, religions, races, and lifestyles, which can compound the difficulty of police work. For many cities and law enforcement officers, these are new challenges.

Municipal leaders should understand that today’s social challenges are too complex for any one agency to manage alone. Now more than any other time police have to partner with other government and non-government service agencies, working to solve these far-reaching problems.

Get Involved to Build Trust

It is critical that today’s law enforcement departments recognize that gaining the trust of citizens is paramount. Recent high-profile events in cities such as Ferguson, Missouri, and Baltimore, Maryland, have highlighted the importance of fostering strong, collaborative relationships between local law enforcement and the citizens they serve. Creating a culture of integrity in your law enforcement department is critical. In cities with a diverse cultural makeup, law enforcement departments must make every effort to mirror the local population within the ranks of their employment.

Engaging citizens promotes trust. There are a number of ways that law enforcement departments can build trust and earn the respect of their citizens. In most cases, successful programs involve face-to-face interaction, such as:

- Coaching a youth sports team,
- Serving food at a local homeless shelter,
- Volunteering to read at public schools with a large immigrant population,
- Volunteering to help at a local hospice care facility,
- Volunteering your time at a domestic violence shelter,
- Educating kids about the dangers of using illegal drugs,
- Providing driver education,
- Coordinating neighborhood watch associations, or
- Speaking to civic organizations, schools and town hall meetings.

Law enforcement departments should not underestimate the value of developing partnerships with faith-based organizations. Most cities have deeply rooted faith-based organizations that may have a better insight into the sources of neighborhood problems that need to be addressed. Partnering with faith-based organizations to reduce crime can become a highly effective way of establishing respect and understanding.
When police officers work with different groups in their city, it reinforces the idea that law enforcement and citizens should be partners, not enemies. Recognizing new opportunities for involvement in municipal activities will contribute to building trust and understanding between law enforcement and your citizens.

**Avoidance of Racial Profiling**

In order to engage the citizens, law enforcement officers need to know and understand your city's demographics. Data on who is breaking the law, where crimes are being committed, and what types of crimes are being committed could be of benefit to law enforcement and city officials as they work to enforce the law and prevent crime. The League has provided a sample form that may be used to measure and note trends involving crimes. *(See sample form “Charting Municipal Crime” in Appendix C.)*

Data from the sample form can provide law enforcement and city leaders with an overall view of the types of laws being violated and alert you to trends that may be occurring. With this information in hand, law enforcement has the ability to foster positive and productive citizen and police cooperation.

However, law enforcement must be extremely careful to avoid profiling citizens. Racial profiling can hurt innocent people who may then become the victims of inappropriate police encounters. Racial profiling can erode trust between local law enforcement and citizens. Arkansas law enforcement departments should devote the necessary resources to train and develop all department personnel in diversity, cultural and community understanding. City officials as well as law enforcement officers should understand the requirements in Ark. Code Ann. § 12-12-1401, which addresses the state's prohibition on racial profiling.

**Advantages of Residency Requirements**

There are many city leaders that believe that a residency requirement for law enforcement officers is a desirable policy that contributes to building respect and understanding. It would stand to reason that municipal citizens are more likely to trust the officers that serve them if they get to know them on a personal level. Furthermore, when citizens see law enforcement officers at church, school, or at the grocery store they are more likely to view them as fellow citizens with the same goals and interests as the rest of the citizens. Many city leaders contend that a connection is lost when people who serve their cities don't live in those same cities. Perhaps the recent unrest in cities across America could have been avoided if most of the officers had been residents of the city where they worked. As municipal leaders who are trying to make a positive difference in our cities, you must consider whether residency requirements could be a part of the overall solution to achieving respect and understanding. After all, achieving respect and understanding is a two-way street. It can be easier to look down on and mistreat people you don't know and are not connected with as opposed to those who you view as your fellow citizens. Ask yourself: Would I prefer to have law enforcement officers reside in my neighborhood, rather than two counties away?

Being an Arkansas law enforcement officer is a duty of the highest honor. It is also a duty with the highest degree of responsibility and visibility, and it can be a great challenge. In order to carry out the police mission—to protect and to serve—law enforcement agencies' first job is to inspire trust and second is to extend trust. One of the building blocks of trust is credibility. Credibility comes from behavior. Arkansas municipal officials should do your best to encourage police departments to take the necessary steps to build trust within the cities they serve.
Chapter Three
Embracing the Immigrant Population

Today there are roughly 53 million Latinos representing 17 percent of the total population of the United States. Latinos are now the largest minority group in America. The Latino population in Arkansas has increased by 123 percent since 2000. The Latino population is now seven percent of the total Arkansas population. As with other Arkansas workplace changes, the addition of the Latino worker brings challenges to Arkansas municipal officials. How we embrace and manage cultural diversity will go a long way in creating cities that reflect the commitment to respecting and understanding all people.

The influx of people of Latino origin into Arkansas has been dramatic. Arkansas ranks sixth in the nation for the increase in the Latino population since 2000. There are currently over 190,000 citizens of Latino origin in Arkansas. As of 2016, several Arkansas cities have a Latino population greater than or near 50 percent. These cities include:

- De Queen (Sevier County) 55.4%
- Danville (Yell County) 52.6%
- Wickes (Polk County) 52.1%
- Green Forrest (Carroll County) 49.7%
- Hermitage (Bradley County) 42.0%

Communication and Cultural Awareness

With the influx of the Latino population comes a need for heightened cultural awareness. Cultural awareness is the foundation of communication and becomes especially important to local government officials when interacting with people from other cultures. Miscommunication often occurs when we lack awareness of cultures other than our own. Because the Latino population represents the largest immigration group in Arkansas, it is important to be familiar with some of the unique cultural characteristics of these Arkansas citizens.

- Members of the Latino community typically have large families. The Latino concept of family extends to friends, neighbors, and organizations that make up their community.
- On average, Latino households in Arkansas consist of at least five people. Half of teens live with both biological parents until marriage.
- Divorce rates are low, motherhood is important, and children are expected to care for family elders.
- Religion is central to marriage and family life. The vast majority of Latino Americans are Catholic.
- Work is viewed as a means to meet family responsibilities and obligations. Latino workers are characterized as dedicated, hardworking, loyal and trustworthy. They are viewed as employees who do not complain. Latino labor has a great presence in service-oriented businesses, such as construction, landscaping, and agricultural activities.
In most Arkansas cities, the Latino population has been welcomed. This new group of immigrants has integrated into Arkansas cities and the economy just as previous generations of immigrants have done. However, Arkansas municipal officials must be aware that with the influx of Latino immigrants comes a variety of challenges. The most common challenges include:

- **Education**—Latino children whose parents are immigrants are the fastest growing group of children in the public school system. The limited understanding of English has challenged school districts in a variety of ways.
- **Health care**—Sixty-three percent of Latino immigrants under the age of 65 are without health insurance.
- **Housing**—Nearly one quarter of Latino immigrants live in crowded housing (defined by the Census Bureau as more than one person per room – including bedrooms and all other rooms).
- **Language barrier**—Approximately 25 percent of Arkansas Latino workers are bilingual, and over half speak limited English.

Here are some simple steps that Arkansas city officials can take to embrace immigrants and encourage respect and understanding.

1. Understand your city’s unique demographic characteristics.
2. Utilize key resources and opportunities to effectively engage, communicate and serve your new citizens. Make Spanish language versions of all city mail-outs, signs, and informational materials available.
3. Prioritize the hiring of employees that reflect the demographics of your city.
4. Engage the new citizens in community decision-making.
5. Build community relationships.
6. Embrace cultural diversity.

Learning about cultural differences can assist you in communicating with others more effectively. Cultural differences may challenge us but should not divide us. Creating a work culture that embraces rather than resists cultural differences can lead to better and more inclusive solutions to solve today’s complex municipal issues.
Chapter Four
Generational and Gender Differences

As a municipal leader of today, you must recognize that today’s workforce consists of three different generations. Each of these generations views the world they live and work in very differently. These differences have the potential to become a source of workplace friction. In fact, sociologists believe that this type of generational diversity has not existed in the workplace since our great-grandparents abandoned the agricultural lifestyle for the factory and the office. Workers from these different generations may often find themselves at odds on how they view their role as workers.

Today’s workplace consists of three distinct generations.

1. Baby Boomers—This generation consists of people born between 1945 and 1960 and for many years was the largest group to occupy the workforce, representing 70–75 million people. This is the generation that is often associated with 1960s counter culture, the Vietnam War, and the civil rights movement. As they approach retirement age, Baby Boomers will be rapidly leaving the workplace in the next several years.

2. Generation X—This generation consists of people born between 1960 and the early 1980s. This group constitutes approximately 41 million people. They have been referred to as the latch key kids. They were the first generation whose parents both worked, and whose parents had a higher rate of divorce. This generation, for the most part, has more formal education than the Baby Boomers.

3. Millennials—This generation consists of young adults born since the early 1980s. Their numbers have recently overtaken that of the Baby Boomers at 75 million. They are a differently motivated workforce than previous generations. They are very mobile. For them, technology is as natural as the air they breathe.

Every generation is defined by common tastes, attitudes, experiences, and defining social moments, and the more you know about those who are not within your own age group, the better we can understand and respect each other.

Although each generation may be broadly categorized, you must remember that not all persons of a specific generation can be profiled by the traits of their generation. Categorizing others based on our initial perceptions, physical features, and life experiences with persons of any group may be human nature, but we must keep an open mind in order to understand not only generational differences, but differences on all levels. Doing so will create a work culture based on respect and understanding.

Gender Differences and Challenges

Regardless of our age we have all worked with others who are not the same sex and gender as we are. Understanding gender and sex is critical to enabling respect and understanding in the workplace.

Sex and gender are two separate measures. Sex refers to biological differences whereas gender refers to the state of being male or female. Gender describes the characteristics that a society or culture delineates as masculine or feminine. Gender also refers to the personal sexual identity of an individual, regardless of the person’s biological sex.

Important issues now impacting the municipal workplace are gender identity and sexual orientation. Gay, heterosexual, lesbian, bisexual, and transgender people have always lived and worked in our cities. What is different today is that many people now openly acknowledge their gender identity and sexual orientation because of evolving views and societal acceptance.

One of the basic rules of interacting with others is that people should have the right to choose the words that describe themselves. The following chart features terms and definitions regarding sexual orientation and gender identity. It is important to remember that language and how it is used evolves. This means that terms accepted today may not be in the future. It is important to stay informed about how language and its meaning changes over time.
Gender Identity and Sexual Orientation Terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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</thead>
<tbody>
<tr>
<td>Sex</td>
<td>Biological differences, primarily chromosomes, hormonal profiles, internal, and external sex organs.</td>
</tr>
<tr>
<td>Gender</td>
<td>State of being male or female.</td>
</tr>
<tr>
<td>Gender Role</td>
<td>Characteristics and behaviors that different cultures attribute to the sexes.</td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td>Term used to describe everything that goes into why people are attracted to each other. It takes into account past experiences, current situations, and self-identifications.</td>
</tr>
<tr>
<td>Straight</td>
<td>Common term used to mean heterosexual persons.</td>
</tr>
<tr>
<td>Heterosexual</td>
<td>People who are attracted to and love members of the opposite sex.</td>
</tr>
<tr>
<td>Gay</td>
<td>The umbrella term for homosexual persons, although it most specifically refers to men who are attracted to and love men. It is equally acceptable and more accurate to refer to gay women as lesbians.</td>
</tr>
<tr>
<td>Homosexual</td>
<td>People who are attracted to and love members of the same sex. Most people today chose to use the term gay or lesbian as a descriptor.</td>
</tr>
<tr>
<td>Lesbian</td>
<td>A woman who is attracted to and loves women.</td>
</tr>
<tr>
<td>Bisexual</td>
<td>A person who is attracted to members of either sex.</td>
</tr>
<tr>
<td>Transgendered</td>
<td>Men or women whose psychological self, differs from the physical sex that they were assigned at birth. They feel more comfortable as a member of the other sex, or, not completely comfortable in either sex.</td>
</tr>
<tr>
<td>Transsexual</td>
<td>Men or women who have had medical procedures to alter their physical sexual characteristics to match their perceived gender self-identity.</td>
</tr>
<tr>
<td>Transvestite</td>
<td>A person who dresses in clothing of another gender. This may or may not be connected to sexual orientation.</td>
</tr>
<tr>
<td>Homophobia</td>
<td>Fear of homosexuality.</td>
</tr>
<tr>
<td>Heterosexism</td>
<td>The assumption that everyone is heterosexual. The belief and behavior that heterosexual orientation is inherently better than other orientations.</td>
</tr>
<tr>
<td>Significant Other</td>
<td>A term created to signify the equivalent of spouse for people who live in loving partnership without marriage.</td>
</tr>
<tr>
<td>Closet</td>
<td>A figure of speech used to describe the hiding of one's sexual identity.</td>
</tr>
<tr>
<td>Coming Out</td>
<td>Telling oneself or other people about your gay, lesbian, or bisexual identity.</td>
</tr>
</tbody>
</table>

Adapted from Zuckerman & Simons.

Increasing our awareness and improving our understanding of this complex issue is a starting point. Fostering respect and understanding includes promoting a workplace that provides a comfortable setting for everyone regardless of gender identity and sexual orientation.
Conclusion

Our country, state, and cities are in a constant state of change. Municipalities face a tsunami of challenges amid the changes. As a municipal official, working to publicly serve your citizens effectively, you must understand your city’s demographics and characteristics. Keep an open mind in dealing with controversial issues such as race, immigration, generational differences and sexual orientation. Have the courage to engage in dialogue about diversity with your citizens and municipal employees, and utilize key resources in your city to effectively communicate and serve your citizens.

As municipal leaders, keep searching for new ways to serve the citizens of our ever changing cities and towns.
## Charting Your Municipality’s Demographics

### SAMPLE

<table>
<thead>
<tr>
<th>Description</th>
<th>Year 2000</th>
<th>Year 2010</th>
<th>Current Estimates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Median age</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Median Household Income</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% of High School Graduates</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% of College Graduates</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Housing Units</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Companies/Businesses</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of employed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individuals below poverty</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Female head of household</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

### Race Breakdown

<table>
<thead>
<tr>
<th>Race Breakdown</th>
<th>2000</th>
<th>2010</th>
<th>Current Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Latino</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Asian</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>American Indian</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Two or more races</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix B
Charting Your Municipal Workforce Demographics
SAMPLE

CITY OF ______________________
Total number of municipal employees per year ____________

<table>
<thead>
<tr>
<th>Age Group</th>
<th>25-35</th>
<th>35-45</th>
<th>45-55</th>
<th>55-Greater</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Groups</th>
<th>Ethnicity</th>
<th>Males</th>
<th>Females</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>White</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Black</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Asian</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Latino</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix C
Charting Municipal Crime
SAMPLE

1. Who is breaking the Law?

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Year</th>
<th>18-34</th>
<th>35-44</th>
<th>45-64</th>
<th>65+</th>
<th>Gender</th>
<th>Race</th>
<th>Income</th>
<th>Repeat offenders</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2010</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2015</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>YTD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2. What laws are being broken?

<table>
<thead>
<tr>
<th>Year</th>
<th>Speeding</th>
<th>Illegal Drugs</th>
<th>Resisting Arrest</th>
<th>Theft &amp; Robbery</th>
<th>Violent Assaults</th>
<th>Murder</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2015</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>YTD</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3. Where and when crimes are being committed?

<table>
<thead>
<tr>
<th>Area of City/Town</th>
<th>Address or name of structure/subdivision</th>
<th>Time: Day/Night</th>
<th>2010</th>
<th>2015</th>
<th>YTD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residential Neighborhoods</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commercial areas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shopping Centers (i.e. Wal- Mart)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Schools/Churches</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Community Center</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>City Facility</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State Facility/Courts etc.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Additional Resources

• Police Perspectives: Building Trust in a Diverse Nation—No. 1. How to Increase Cultural Understanding

• Police Perspectives: Building Trust in a Diverse Nation—No. 2. How to Serve Diverse Communities

• Police Perspectives: Building Trust in a Diverse Nation—No. 3. How to Support Trust Building in Your Agency

• “Reducing Fear of Crime and Increasing Citizen Support for Police,” by Richard R. Johnson, Ph.D., ©2015,
  Link: llrmi.com/articles/legal_update/2015_johnson_reducingfear.shtml

• “What Influences Overall Citizen Satisfaction with the Police?” by Richard R. Johnson, Ph.D., ©2015,
  Link: llrmi.com/articles/legal_update/2015_johnson_citizensatisfaction.shtml


Drug Free Workplace
Non-Commercial Driver’s License Employees
Revised May 2019
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**Examples of Evidence that an Employee is Under the Influence** ..................... 16
Ten Steps To Compliance With The Arkansas Municipal League Drug And Alcohol Testing For Non-CDL Employees

**Step 1**
Participate in the Arkansas Municipal League Legal Defense Program. Member cities that are in the Legal Defense Program and participate in the optional drug testing program are eligible to participate in the Arkansas Municipal League Drug/Alcohol Compliance Testing Program. The cost for participation in the optional drug/alcohol testing program is 20 cents per capita of each city’s population. There will be a one-time, once-a-year billing to each city.

**Step 2**
Adopt an ordinance conforming to AML’s sample drug-free workplace ordinance (revised January, 2016). Certain variations may be made as explained in the sample ordinance. (See sample ordinance, page 4)

**Step 3**
Require that each employee sign a receipt indicating that he or she has been provided a copy of the city’s policies on drug and alcohol testing. (The city may provide employees a copy of the ordinance, or reproduce the text of the ordinance as a drug-free policy manual). A sample acknowledgment of receipt form is included in this publication on page 13.

**Step 4**
Designate two city employees as the “contact persons” who will answer employees’ questions concerning drug and alcohol testing. These contact persons will be responsible for receiving and handling all correspondence concerning the city’s drug and alcohol policies and procedures, test results and testing times in a confidential manner. The designated contact persons should be readily available to receive test results. The contact persons would also serve as the city’s representative to receive information from the AML drug/alcohol testing program administrator.

**Step 5**
Take steps to ensure that all supervisors with authority to determine reasonable suspicion receive at least 60 minutes of training on alcohol misuse and an additional 60 minutes of training on controlled substance abuse. (For information on training programs contact the AML.)
Step 6
The city’s contact persons should send to a’TEST Consultants, Inc. a list of city employees subject to testing on the form provided in this publication on page 14. The contact person should read and understand the information provided concerning random testing. The list should include the name, social security number and the city department of each employee and must be signed by the contact person. This list must be updated monthly. The list of names will be added to lists from other cities and will comprise the AML Non-DOT Consortium list for random drug and alcohol testing.

Step 7
Set up a separate filing system in which all records and information concerning employee drug and alcohol testing are kept. These records should not be combined with any CDL testing records. All records should be kept in a locked filing cabinet in order to prevent disclosure of information to unauthorized individuals. Remember that employee drug/alcohol testing records are confidential.

Step 8
Compile a resource list of information and assistance about drug and alcohol abuse. Each city government is required to advise all employees who engage in conduct prohibited under the rules of the available resources for evaluation and treatment of alcohol and drug problems. (A listing of resources and information on alcohol and drug abuse treatment centers are available through the AML and a’TEST.)

Step 9
Arkansas municipalities will receive routine summary reports from the laboratory documenting the results of the controlled substance testing program. The AML may request summary reports from the Arkansas municipalities for statistical reports.

Step 10
Document, document, document! Placing your actions and efforts in written form demonstrates your city’s good faith effort to be fair and reasonable with all your employees.
Sample Drug Free Workplace Ordinance

(NON-CDL)

[Note: text appearing in italics and brackets is explanatory only, and should not be included in the enacted ordinance. Underlined text is optional.]

ORDINANCE NO. __________

AN ORDINANCE ESTABLISHING A POLICY FOR A DRUG-FREE WORKPLACE
BE IT ORDAINED BY THE CITY COUNCIL OF
___________________, ARKANSAS, THAT;

Section 1. Purpose of Policy

The City has a vital interest in providing for the safety and well being of all employees and the public, and maintaining efficiency and productivity in all of its operations. In fulfillment of its responsibilities, the City is committed to the maintenance of a drug and alcohol free workplace.

The City and certain employees who drive commercial motor vehicles are subject to the requirements of federal statutes and implementing regulations issued by the Federal Highway Administration of the U.S. Department of Transportation. However, certain city employees who perform safety and security-sensitive functions are not covered by the foregoing provisions. In addition, the City has an interest in maintaining the efficiency, productivity and well being of employees who do not perform safety or security-sensitive functions. In order to further provide a safe environment for city employees and the public, the City has adopted the following Drug-Free Workplace Policy for those employees who are not covered by federal law.

This policy does not govern or apply to employees who are subject to testing as commercial motor vehicle operators under the foregoing federal law and regulations. They are governed by a separate policy enacted pursuant to that legislation. However, such employees may be tested as authorized by this policy if the circumstances giving rise to such testing do not arise from the employee’s operation of a commercial motor vehicle.

Section 2. Policy Statement

(a) All employees must be free from the effects of illegal drugs and alcohol during scheduled working hours as a condition of employment. Drinking alcoholic beverages or using drugs while on duty, on City property, in City vehicles, during breaks or at lunch, or working or reporting for work when impaired by or under the influence of alcohol, or when drugs and/or drug metabolites are present in the employee’s system, is strictly prohibited and grounds for disciplinary action up to and including immediate discharge. In addition, employees are subject to disciplinary action up to and including immediate discharge for the unlawful manufacture, distribution, dispensation, possession, concealment or sale of alcohol or drugs while on duty, on City property, in City vehicles, during breaks or at lunch.

(b) The City reserves the right to require employees to submit to urine drug testing and Breathalyzer alcohol testing to determine usage of drugs and/or alcohol as provided below. Employees must submit to all required tests. Any employee who refuses to submit to any required test without a valid medical explanation will be subject to immediate discharge. Refusal to execute any required consent forms, refusal to cooperate regarding the collection of samples, or submission or attempted submission of an adulterated or substituted urine sample shall be deemed refusal to submit to a required test.
(c) The City also reserves the right to require return to duty and follow-up testing as a result of a condition of reinstatement or continued employment in conjunction with or following completion of an approved drug and/or alcohol treatment, counseling or rehabilitation program.

Section 3. Safety and Security-Sensitive Positions Defined

[Note: this section is extremely important! The fourth amendment to the United States Constitution prohibits random drug testing of any employee or official except those holding safety or security sensitive positions].

(a) A safety-sensitive position is one in which a momentary lapse of attention may result in grave and immediate danger to the public. The following positions are considered safety sensitive:

(1) Law enforcement officers who carry firearms and jailers.

(2) Motor vehicle operators who carry passengers including, but not limited to, ambulance drivers, bus or jitney drivers, and drivers who transport other city employees where the operation of a motor vehicle is not incidental to the employee’s occupation. For the purposes of this section, a “motor vehicle” is defined as every vehicle which is self-propelled and every vehicle which is propelled by electric motor obtained from overhead trolley wires but not operated upon rails.

(3) Fire department employees and volunteer firefighters who directly participate in fire-fighting activities.

(4) Medical personnel with direct patient care responsibilities including physicians, nurses, surgical scrub technicians, emergency medical technicians and trainees, medical and nurses assistants.

(5) Mechanics, welders and sheet metal workers who work on vehicles designed to carry passengers such as buses, ambulances, police cruisers, vans, aircraft, and the like.

(6) Lifeguards, emergency medical technicians, emergency services dispatchers, and rescue workers.

(7) Operators of heavy equipment, including front-end loaders, trucks, and riding lawn mowers, or other similar equipment, where the equipment is used around individuals, alongside the public right of way, or on public roads.

(8) Waste water treatment plant operators, and water treatment operators.

(9) Other employees whose duties meet the definition of safety or security sensitive after consultation with and approval by the Arkansas Municipal League, and where the operation of a motor vehicle is not incidental to the employee’s occupation.

(b) A security sensitive position includes

(1) any police officer, jailer, police dispatcher and police department employee, including clerical workers, having access to information concerning ongoing criminal investigations and criminal cases, which information could, if revealed, compromise, hinder or prejudice the investigation or prosecution of the case.

(2) the City also considers law enforcement officers as holding security-sensitive positions by reason of their duty to enforce the laws pertaining to the use of illegal substances. Officers who themselves use such substances may be unsympathetic to the enforcement of the law and subject to blackmail and bribery.

[Note: SECTION 3 lists safety-sensitive employees for which the Arkansas Municipal League provides coverage. Additional positions may be added after consultation with and approval by the League. The city shall submit a written job description of any such additional employee to the Arkansas Municipal League along with a request for coverage.]
Section 4. Drug-Free Awareness Program/Education and Training

The City will establish a Drug-Free Awareness Program to assist employees to understand and avoid the perils of drug and alcohol abuse. The City will use this program in an ongoing educational effort to prevent and eliminate drug and alcohol abuse that may affect the workplace.

The City’s Drug-Free Awareness Program will inform employees about: (1) the dangers of drug and alcohol abuse in the workplace; (2) the City’s policy of maintaining a drug and alcohol free workplace; (3) the availability of drug and alcohol treatment, counseling and rehabilitation programs; and (4) the penalties that may be imposed upon employees for drug and alcohol abuse violations.

As part of the Drug-Free Awareness Program, the City shall provide educational materials that explain the City’s policies and procedures. Employees shall be provided with information concerning the effects of alcohol and drug use on an individual’s health, work and personal life; signs and symptoms of an alcohol or drug problem; and available methods of intervening when an alcohol or drug problem is suspected, including confrontation and/or referral to management.

Supervisors who may be asked to determine whether reasonable suspicion exists to require an employee to undergo drug and/or alcohol testing shall receive at least 60 minutes of training on alcohol misuse and 60 minutes of training on drug use. The training shall cover the physical, behavioral, speech, and performance indicators of probable alcohol misuse and drug use.

Section 5. Prohibited Substances/Legal Drugs/Unauthorized Items

(a) Prohibited Substances. Alcoholic beverages and drugs are considered to be prohibited substances in the workplace. For purposes of this policy, the term “drugs” includes controlled substances (as identified in Schedules I through V of Section 202 of the Controlled Substances Act, 21 USC § 812, and the regulations promulgated thereunder, as defined in the Uniform Controlled Substances Act, Ark. Code Ann. § 5-64-201 et seq.), or as defined by federal and state law), including synthetic narcotics, designer drugs, and prescription drugs, excepting: prescription drugs approved by and used in accordance with the directions of the employee’s physician.

(b) The abuse, overmedication, inappropriate consumption, or mistreatment of prescription drugs approved by the employee’s physician is considered to be the abuse of “drugs” as stated in § 5(a) of this Ordinance.

(c) Legal Drugs. The appropriate use of prescription drugs and over-the-counter medications is not prohibited. Any employee using a prescription drug should consult with his/her physician and pharmacist regarding the effects of the drug. Employees should read all labels carefully.

(d) Unauthorized Items. Employees may not have any unauthorized items in their possession or in any area used by them or under their control. Unauthorized items include, but are not limited to, alcoholic beverage containers and drug paraphernalia.
Section 6. Use of Alcohol and Drugs/Prohibited Conduct

All employees covered under this policy are subject to the following prohibitions regarding the use of alcohol and drugs (controlled substances):

1. Employees shall not report for duty or remain on duty while impaired by the consumption of alcohol. An employee will be deemed to be impaired by alcohol if that employee has a blood alcohol concentration of 0.04% or greater.

2. Employees shall not consume alcohol while on duty.

3. Employees required to undergo post-accident testing shall not use alcohol for 8 hours following the accident, or until they undergo a post-accident alcohol test.

4. Employees shall submit to all authorized drug or alcohol tests.

5. Employees shall not report for duty or remain on duty while under the influence of any controlled substance, except when the use thereof is pursuant to the instructions of a licensed physician who has advised the employee that the effect of the substance on the employee does not pose a significant risk of substantial harm to the employee or others in light of his/her normal job duties.

6. Employees shall not abuse, knowingly overmedicate, inappropriately consume, or otherwise mis-treat any prescription drugs approved by the employee’s physician.

7. Employees shall not possess, smoke, or otherwise use medical marijuana while on city premises or while on duty.

In addition, subject to disciplinary rules set forth below, employees who are found to have an alcohol concentration of 0.02% or greater, but less than 0.04%, in any authorized alcohol test shall be removed from duty, and may not return to duty until the start of the employee’s next regularly scheduled shift, but not less than 24 hours following administration of the test.
The foregoing rules shall apply to all employees and shall apply while on duty, during periods when they are on breaks or at lunch, or not performing safety or security sensitive functions.

Section 7. When Drug and Alcohol Testing May Be Required of All Employees

Employees (and applicants) covered by this policy shall be required to submit to urine testing for use of prohibited drugs and/or Breathalyzer alcohol testing in the following circumstances:

(a) When the city has reasonable suspicion that an employee has violated any of the above prohibitions regarding use of alcohol or drugs.

For purposes of this rule, reasonable suspicion shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. The required observations must be made by a supervisor or city official or employee who is trained in detecting the signs and symptoms of misuse of alcohol and drug use.

(b) Return to duty testing is required after an employee has engaged in any of the above prohibitions concerning use of alcohol or drugs, unless the violation results in termination.

(c) As part of a pre-employment physical examination after a conditional job offer has been made, a fitness for duty physical examination, or any other lawful required periodic physical examination. Non-safety and non-security sensitive positions will not be required to undergo a pre-employment drug or alcohol test unless the applicant is otherwise required to undergo a pre-employment physical examination after a conditional job offer has been extended to the employee.

(d) When the City management has a reasonable suspicion based on observations or credible information submitted to the City, that the employee is currently using, impaired by or under the influence of drugs or alcohol.

(e) When an employee suffers an on-the-job injury or following a serious or potentially serious accident or incident in which safety precautions were violated, equipment or property was damaged, an employee or other person was injured, or careless acts were performed by the employee. Such testing will be required of non-safety sensitive employees only when such factors, when taken alone or in combination with other factors, give rise to reasonable suspicion that the employee may be under the influence of drugs or alcohol.

(f) As part of a return to duty or follow-up drug and/or alcohol test required under an agreement allowing an employee to return to duty following disciplinary action for a positive drug and/or alcohol test, or as the result of a condition of continued employment or reinstatement in conjunction with or following completion of an approved drug and/or alcohol treatment, counseling or rehabilitation program.

In order to return to duty, an employee who has a positive drug or alcohol test (i.e. a verified positive drug test or an alcohol test indicating an alcohol concentration of 0.04 or greater) must have a verified negative drug test and/or an alcohol test indicating an alcohol concentration of less than 0.02, and be evaluated and released by a substance abuse professional (SAP). In addition, the employee shall be subject to follow-up testing for a period not to exceed 24 months from the date of the employee’s return to duty, in accordance with an SAP’s recommendations. (The City also reserves the right to require return to duty and follow-up testing of an employee who has an alcohol test indicating an alcohol concentration of 0.02 or greater, but less than 0.04, based on an SAP’s recommendations.)

(g) When any prohibited drug or alcoholic beverage, is found in an employee’s possession.

(h) When the laboratory values in any authorized drug test indicated the need for additional testing, as determined by the Medical Review Officer (MRO), or where any authorized drug test must be canceled due to a collection, chain of custody or other procedural problem.
[Note: SECTION 7 dealing with reasonable suspicion requires observation by a person trained in recognizing signs of substance abuse. However, if possible it is recommended that the ordinance specify that testing based on reasonable suspicion be done only when verified by two such persons.]

Section 8. When Drug and Alcohol Testing May Be Required of Employees Holding Safety and Security-Sensitive Positions

Employees in (and applicants for) safety and security-sensitive positions shall be required to submit to urine testing for use of prohibited drugs and/or Breathalyzer alcohol testing in the foregoing and in the following circumstances:

(a) When a safety-sensitive employee is involved in an accident involving a motor vehicle on a public road, and the employee’s position is safety-sensitive because it involves driving a motor vehicle.

(b) Random testing for drugs (but not alcohol) will be conducted. In order to treat all employees as equally as possible, and to maintain consistency in the administration of its efforts to maintain a drug-free workplace, random testing under this policy will be governed by 49 U.S.C. § 31306 and implementing regulations to the extent that it is lawful and feasible to do so. Further guidance must be found in The Omnibus Transportation Employee Testing Act of 1991 - Steps to Compliance for Arkansas Municipalities, published by the Arkansas Municipal League.

Section 9. Disciplinary Action

(a) Employees may be subject to disciplinary action, up to and including discharge, for any of the following infractions:

(1) Refusal to submit to an authorized drug or alcohol test. Refusal to submit to testing means that the employee fails to provide an adequate urine or breath sample for testing without a valid medical explanation after he/she has received notice of the requirement to be tested, or engages in conduct that clearly obstructs the testing process. Refusal to submit to testing includes, but is not limited to, refusal to execute any required consent forms, refusal to cooperate regarding the collection of samples, and/or submission or attempted submission of an adulterated or substituted urine sample.

(2) Drinking alcoholic beverages or using drugs while on duty, on City property, in City vehicles, during breaks or at lunch.

(3) Unlawful manufacture, distribution, dispensation, possession, concealment or sale of any prohibited substance, including an alcoholic beverage, while on duty, on City property, in City vehicles, during breaks or at lunch.

(4) Any criminal drug statute conviction and/or failure to notify the City of such conviction within five [5] days.

(5) Refusal to cooperate in a search.

(6) Having an alcohol concentration of 0.04% or greater in any authorized alcohol test.

(7) Testing positive for drugs and/or their metabolites in any authorized drug test. Except, employees authorized to use medical marijuana under the Arkansas Medical Marijuana Amendment are not subject to discipline solely because of a positive test for marijuana.
Although the foregoing infractions will ordinarily result in discharge regardless of the employee’s position, the City reserves the right to consider extenuating circumstances and impose lesser discipline when such action is deemed appropriate.

[Note: the following underlined language in Section 9 is optional. The penalty for a positive test may be determined by each local government and may include immediate termination. However, the AML financial commitment does not include return to duty or follow up testing. The AML financial commitment also does not include the cost for in-patient or out-patient professional counseling or treatment for substance abuse. Thus, if the city adopts the following provisions, it must decide whether it will pay those expenses or require the employee to pay them.]

(b) In order to be re-employed following completion of a suspension for a positive drug or alcohol test, the employee must undergo and pass a return to duty drug and/or alcohol test, and be evaluated and released by an SAP.

The City will schedule the return to duty drug and/or alcohol test and the evaluation by an SAP to avoid any lost work time beyond the period of the suspension. The employee will remain on disciplinary suspension, without pay, until the City has received written notice that the employee has passed the return to duty drug test (and/or notice from the collection site that the employee had an alcohol concentration of less than 0.02 in the return to duty alcohol test) and written notice from an SAP that the employee has been released to return to duty. However, the employee may use accumulated leave time between the end of the original suspension and being released to return to work.

If the employee tests positive for any drug or has an alcohol concentration of 0.02 or greater in any subsequent test, he/she shall be subject to discharge.

(c) Rehabilitation and Additional Testing. In cases where an employee receives disciplinary action other than discharge for a drug and/or alcohol related infraction, the following procedures shall also apply:

(1) The City may require the employee to participate in an approved treatment, counseling or rehabilitation program for drug and/or alcohol abuse at the time discipline is imposed, based on the recommendations of an SAP.

(2) If the employee is required to enroll in such a program, his/her reinstatement or continued employment shall be contingent upon successful completion of the program and remaining drug and alcohol free for its duration.

The employee must submit to any drug and/or alcohol testing administered as part of the program, and provide the City with the results of such tests. The employee must also provide the City with progress reports from his/her therapist, or the agency running the program, on at least a monthly basis. (Failure to provide such reports or the results of such tests may result in discipline up to and including termination.)
(3) An employee who has been identified as needing assistance in resolving problems associated with use of drugs and/or misuse of alcohol may be administered unannounced follow-up drug and/or alcohol tests for a period of up to 24 months.

Section 10. Employment Status Pending Receipt of Test Results

In addition to appropriate disciplinary measures, including suspension, which may be taken in response to the incident or course of conduct which gave rise to the test, the City reserves the right to decide whether the incident or course of conduct prompting the test is of such a nature that the employee should not be put back to work until the test results are received. If such a decision is made, the employee will be suspended without pay. Where the test result is negative, the employee will be reinstated with back pay, provided the employee has not been given an appropriate disciplinary suspension for violation of another work rule which also covers the time missed waiting for the test results.

Section 11. Voluntary Drug and Alcohol Rehabilitation

If an employee who is not otherwise subject to disciplinary action for use of drugs and/or alcohol voluntarily admits that he/she has a drug and/or alcohol abuse problem, the Mayor or City Manager (or his/her designee) will meet with the employee to discuss the various treatment, counseling and rehabilitation options that are available. For purposes of this section, an employee’s admission to having a drug and/or alcohol abuse problem will not be defined as “voluntary” if it is made after the employee learns that he or she has been selected for a random drug test.

These options may include allowing the employee to continue working while receiving outpatient treatment, counseling or rehabilitation in an approved drug and/or alcohol abuse program, or placing the employee on a medical leave of absence while he/she is receiving treatment, counseling or rehabilitation in an approved inpatient or outpatient drug and/or alcohol abuse program.

When an employee voluntarily admits that he/she has a drug and/or alcohol abuse problem, the City shall have the right to require the employee to be evaluated by an SAP and/or submit to drug and/or alcohol testing prior to deciding what action is appropriate. No disciplinary action will be taken by the City against an employee who voluntarily admits that he/she has a drug and/or alcohol abuse problem in the situation described above. However, the City shall have the following rights in such a situation:

1. The employee may be required to enroll in and successfully complete an approved inpatient or outpatient drug and/or alcohol abuse program, and remain drug and alcohol free for its duration as a condition of reinstatement or continued employment. However, the city will not be responsible for financial obligations associated with treatment.

2. If the employee is required to enroll in such a program, he/she must submit to any drug and/or alcohol tests administered as part of the program, and provide the City with the results of such tests. The employee must also provide the City with progress reports from his/her therapist, or the agency running the program, on at least a monthly basis. (Failure to provide such reports or the results of such tests will result in discipline up to and including termination.)

3. The employee shall be required to agree to be subject to unannounced follow-up drug and/or alcohol tests, at the City’s discretion, for a period of up to 24 months.

[Note: Section 11 is optional. However, as stated in the notes to Section 9, the Arkansas Municipal League does not provide funding for treatment, counseling, follow-up, or return-to-duty testing.]
Drug And Alcohol Compliance Testing
Reasonable Suspicion Verification Form (Non-CDL)

Employee Name: ____________________________
Social Security Number: ____________________________
City of: ____________________________ Department: ____________________________

Observation
Date: ____________________________ Time (from ___________ am/pm to ___________ am/pm)
Location: ____________________________ Street ____________________________ City ____________________________ State ____________________________ Zip

The above-named employee was observed by me to exhibit the following:

Behavior: (Speech)
☐Normal ☐Incoherent ☐Slurred ☐Confused ☐Slowed
☐Other: ____________________________

Awareness:
☐Normal ☐Confused/Disoriented ☐Mood Swings
☐Unusually Aggressive Behavior ☐Drowsiness or Sleepiness
☐Other: ____________________________

Appearance and/or Odors:
☐Normal ☐Disheveled/Unkept ☐Dilated/Constricted Pupils ☐Dry Mouth Symptoms
☐Puncture Marks ☐Alcohol on Breath ☐Flushed ☐Bloodshot Eyes ☐Profuse Sweating
☐Tremors ☐Runny Nose/Sores
☐Other: ____________________________

Motor Skills:
☐Lack of Coordination/Falling, Swaying, Staggering, Stumbling
☐Unexplained Work-related Accident or Injury ☐Unsafe Actions
☐Other: ____________________________

Were drugs or drug paraphernalia observed? ☐Yes ☐No
Other Observed Actions or Behavior (Specify): ____________________________

In my opinion, this behavior is interfering with the above-named employee’s ability to perform his/her duties.

* Supervisor’s Signature ____________________________ Date/Time ____________________________
Witness ____________________________ Date/Time ____________________________
Mayor/Personnel Director Contacted ____________________________ Date/Time ____________________________
City Attorney Contacted ____________________________ Date/Time ____________________________

* By signing this form, I further certify that I have received a minimum of one hour training in both alcohol use and controlled substance abuse in accordance with Federal Motor Carrier Safety Regulations, Title 49, C.F.R. Part 40, Section 382.603.
Arkansas Municipal League

Sample Informed Consent And Release Of Liability

DOCUMENT FOR USE WITH DRUG OR ALCOHOL TESTING (NON-CDL)

Informed Consent and Release of Liability

I UNDERSTAND that according to the City of ____________________’s Drug and Alcohol Policy, which I have read and understand, I may be required to undergo testing procedures, including, but not limited to, urine, saliva, hair or blood analysis, or breath testing.

THE PURPOSE of this testing is to determine the absence or presence of drugs or alcohol.

I CONSENT freely and voluntarily to any such drug and alcohol testing that the City conducts pursuant to its Drug and Alcohol Testing Policy. I hereby release and hold harmless the City of ____________________ and its employees and agents from any liability whatsoever arising from its drug testing program.

I UNDERSTAND a documented chain of specimen custody exists to ensure the identity and integrity of my specimens throughout this collection and testing process.

I UNDERSTAND that refusal to submit to any required test without a valid medical explanation may result in immediate discharge from my employment. Refusal to execute any required consent forms, refusal to cooperate regarding the collection of samples, or submission or attempted submission of an adulterated or substituted urine sample shall be deemed refusal to submit to a required test.

____________________________________       __________________________
Applicant/Employee (Print name)              Social Security Number

____________________________________
Signature

____________________________________
Date

____________________________________
Badge Number

____________________________________
Parent/Guardian (for minors, print name)

____________________________________
Parent/Guardian Signature

____________________________________
Witness (Print name)

____________________________________
Position

____________________________________
Signature

____________________________________
Date
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<th>Name</th>
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I certify that I have read and understand the information contained on the reverse side of this page, “Non-CDL Employees subject to Random Drug Testing” and that each of the employees listed above falls into one of the safety or security-sensitive categories listed.

Signature of person submitting names  
Title  
Date

*List categories from attached sheet, “Non-CDL Employees Subject to Random Drug Testing”

Return to: Kim Gillum, a’Test Consultants, Inc., P. O. Box 2119, N. Little Rock, AR 72115
Arkansas Municipal League
Non-CDL Employees Subject to Random Drug Testing

Safety-Sensitive Positions

(a) A safety-sensitive position is one in which a momentary lapse of attention may result in grave and immediate danger to the public. The following positions are considered safety sensitive:

(1) Law enforcement officers who carry firearms and jailers.

(2) Motor vehicle operators who carry passengers, including, but not limited to, ambulance drivers, bus or jitney drivers, and drivers who transport other city employees.

(3) Fire department employees who directly participate in fire-fighting activities (volunteer firefighters may now be included at the city's option).

(4) Medical personnel with direct patient care responsibilities including physicians, nurses, surgical scrub technicians, emergency medical technicians and trainees, medical and nurses assistants.

(5) Mechanics, welders and sheet metal workers who work on vehicles designed to carry passengers such as buses, ambulances, police cruisers, vans and the like.

(6) Lifeguards, emergency medical technicians, emergency services dispatchers, and rescue workers.

(7) Operators of heavy equipment, including front-end loaders, trucks, and riding lawn mowers, or other similar equipment, where the equipment is used around individuals, alongside the public right of way, or on public roads.

(8) Waste water treatment operators, and water treatment operators.

Security-Sensitive Positions

(1) Any police officer, jailer, police dispatcher and police department employee, including clerical workers, having access to information concerning ongoing criminal investigations and criminal cases, which information could, if revealed, compromise, hinder or prejudice the investigation or prosecution of the case.

(2) Law enforcement officers may also be considered security-sensitive by reason of their duty to enforce the laws pertaining to the use of illegal substances. Officers who themselves use such substances may be unsympathetic to the enforcement of the law and subject to blackmail and bribery.
Examples of Employees Who Are Not Subject to Random Testing

- Administrative Assistant or Secretary
- Animal control officer
- Attorneys
- Building inspector
- Elected officials
- Fire dispatcher
- Janitor
- Laborer
- Office worker/file clerk (non-police)
- Utility managers and workers, meter readers, etc.
- Any other employee who is not safety or security-sensitive as defined above.

**Important:** The Fourth Amendment to the United States Constitution prohibits randomly testing employees whose positions are not safety or security-sensitive

Examples of Evidence that an Employee is Under the Influence

- Symptoms of the employee’s speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, or other irrational or unusual behavior that are inconsistent with the usual conduct of the employee;
- Negligence or carelessness in operating equipment, machinery, or production or manufacturing processes;
- Disregard for safety;
- Involvement in an accident that results in:
  (a) Damage to equipment, machinery, or property;
  (b) Disruption of a production or manufacturing process; or
  (c) An injury; or
- Other symptoms causing a reasonable suspicion that the current use of drugs may negatively impact the performance of the job duties or tasks or constitute a threat to health or safety.\(^1\)

---

\(^1\) These examples are contained in the Arkansas Medical Marijuana Amendment, and this type of evidence maybe used to demonstrate an employee was under the influence of marijuana during business hours. It provides helpful evidence examples for other types of drug use as well. Ark. Const. amend. XCVIII, § 2.
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INTRODUCTION

MESSAGE FROM THE ARKANSAS MUNICIPAL LEAGUE TO CITY OFFICIALS

The Arkansas Municipal League offers this suggested Sample Personnel Handbook to help your city establish guidelines concerning various personnel issues. However, employment law is heavily regulated and rapidly changing, and this sample handbook covers only general employment and personnel issues. Therefore, strict reliance on this handbook alone is neither encouraged nor advised and should never replace consultation with your city attorney and Human Resources professional. We strongly encourage you to continually monitor and update your city’s personnel handbook to ensure that it continues to meet the needs of your city from both legal and employee relations standpoints. The League recommends that city officials and city attorneys conduct no less than an annual review of all items in the handbook. While this may be considered a burdensome administrative task, it could result in substantial monetary savings if it helps prevent just one lawsuit or administrative complaint from being filed against your city.

The Arkansas Municipal League legal staff has reviewed the contents of this handbook. Nevertheless, we encourage you to seek the legal advice of your city attorney in all local personnel matters and not rely solely on the contents of this handbook.

If you adopt a personnel handbook, failing to follow and enforce its guidelines may result in legal liability. For this reason, we suggest that the handbook adopted by your city be as simple and concise as possible. We strongly advise you to read this sample handbook, consider and discuss its contents, and develop a handbook that is practical and useful for your city. Before adopting a final version of any handbook, you should ask your city attorney to review it to ensure that it complies with federal and state laws.

Lastly, policies are of no use if city employees, supervisors, department heads, and officials are not advised of them. For that reason, this handbook contains a sample acknowledgement that should be used to ensure that every employee receives, reads, and keeps a copy of your policies.
PREFACE

USING THIS HANDBOOK

A. EXPLANATORY NOTES
Throughout this handbook, we have included explanatory notes in brackets and italics. These explanatory notes, including all information contained in this preface, should not be included in the final version of the handbook that you develop and formally adopt.

B. GENDER STATEMENT
In drafting this sample personnel policy handbook, we have avoided the use of gender-specific pronouns where possible. However, where such avoidances would have led to awkward sentences, we have used the masculine pronoun. This reference should be considered to refer to both genders alike. If you follow the same approach in your personnel handbook, we suggest you adopt a gender statement similar to the one that follows:

Reference is made throughout this manual to the personal pronouns “his,” “him,” and “he.” The use of these words is not intended to imply gender, and consequently, such references mean both male and female.

C. A SPECIAL WORD ABOUT UNIFORMED EMPLOYEES
The Arkansas Municipal League did not attempt to develop separate sample handbooks for uniformed city employees and non-uniformed city employees. Uniformed departments are governed by numerous Arkansas statutes, including Civil Service laws in some cities. City officials should follow the specific statutes that relate to police officers and firefighters. Nothing in these guidelines should be interpreted to conflict with or override state law. To the extent that any state law provides additional or different benefits or rights to uniformed employees, the provisions of these employee guidelines shall be deemed to include those statements of law.

D. CHANGING ADOPTED PERSONNEL PROCEDURES
Municipalities adopting new handbooks or revising old ones will have to repeal any previous handbooks that were adopted by ordinance and passed by a majority vote of the council, the new or revised personnel handbook. If a new or revised personnel handbook is adopted, all employees should be notified and provided a copy of the new or revised handbook with an acknowledgment form.
CHAPTER 1

GENERAL POLICIES

1.1 PURPOSE

This Personnel Handbook contains policies, practices and procedures that are necessary to implement and administer the city’s personnel system. By adopting this handbook, the city endeavors to achieve consistent treatment for all employees through the establishment of uniform guidelines and systematic procedures.

This handbook contains only general information and guidelines. It is not intended to be comprehensive or to address all the possible applications of, or exceptions to, the general policies and procedures described. For that reason, if you have any questions concerning eligibility for a particular benefit or the applicability of a policy or practice to you, you should address your specific questions to _______________________________ [insert title of appropriate individual].

This handbook does not represent an employment contract or any aspect of an employment contract and should not be construed as such. The City of __________________ is an at-will employer under law and nothing in this handbook shall waive the city’s at-will status.

1.2 SCOPE

All employees of the City of ______________________ are subject to the application of the personnel policies and procedures described in this handbook.

1.3 DEFINITIONS

**DESIGNATED CAREGIVER**—Employee who has agreed to assist a physically disabled qualifying patient with the medical use of marijuana, and who has registered with the Department of Health under the Arkansas Medical Marijuana Amendment.

**EMPLOYEE**—An individual who is compensated by and provides a service to the city regardless of the number of hours of work performed during any given time period or the length of the term of employment. The term “employee” shall not include any elected official, any voluntary, appointed member of any board, commission or authority, or any person performing services for the city on the basis of a service contract, retainer, or prescribed fee.

**EXEMPT EMPLOYEE**—Employee who is not eligible for overtime or compensatory time as defined by the Fair Labor Standards Act (FLSA).

**FULL-TIME EMPLOYEE**—Employee who is regularly scheduled to work in a position that has daily, weekly, and monthly hours as established by the city council for full-time work.

**IMMEDIATE FAMILY MEMBER**—For purposes of this handbook, this shall mean mother, father, brother, sister, son, daughter, grandparents, son-in-law, daughter-in-law, spouse, spouse's parents, or those relatives who live in the employee's household, including “step” relatives. However, with respect to FMLA leave, “immediate family” means spouse, child, or parent—but not a parent “in-law” with a serious health condition.

**NON-EXEMPT EMPLOYEE**—Employee who is eligible for overtime compensation or compensatory time off as defined by the FLSA.

**OVERTIME**—Hours worked in excess of 40 hours during a regular work week. For firefighters, hours worked in excess of __________ during a ______ day work period; for law enforcement officers, hours worked in excess of __________ during a ______ day work period.

**PART-TIME EMPLOYEE**—Employee who is regularly scheduled to work in a position whose daily, weekly, or monthly hours are less than the hours established for full-time employees.

**QUALIFYING PATIENT**—Employee who has been diagnosed by a physician as having a qualifying medical condition and who has registered with the Department of Health under the Arkansas Medical Marijuana Amendment.
SUPERVISOR—Person who has been designated to oversee other employees in a department.

TEMPORARY EMPLOYEE—An employee hired for an intermittent or specified period of time, for a season, for a job of limited duration, or for a non-recurring work project.

WORK WEEK—Seven (7) day period beginning at 5:00 p.m. on Friday, except for police officers and firefighters and any other employees specifically excluded from this provision by the terms of this handbook.

1.4 AMENDMENTS AND REVISIONS

This manual may be amended and revised periodically as necessary at the direction of the city council.

Since personnel practices and procedures are in a constant state of change, the city will continuously review this handbook for amendments or revisions that might better serve the needs of the city and its employees. As such, this handbook has been designed to be routinely updated and amended as the need arises.

The City of ____________________ shall have the exclusive right to change, alter, delete, add, or modify any provision of these personnel policies at any time, with or without notice. Final approval of all changes to the personnel policies shall be approved by action of the city council. Changes made to these policies shall be communicated through standard communication channels and/or through revisions to this manual, however advance notice may not always be possible.

This policy manual supersedes all previous manuals, letters, memoranda, resolutions, and understandings unless otherwise noted.

1.5 DISTRIBUTION LIST

A copy of this manual and all subsequent revisions or amendments shall be distributed to all employees and elected or appointed city officials.

CHAPTER 2

EQUAL EMPLOYMENT OPPORTUNITY

2.1 EQUAL OPPORTUNITY EMPLOYER

The City of ____________________ provides equal employment opportunities (EEO) to all employees and applicants for employment without regard to race; color; religion; sex; national origin; age; disability unrelated to job requirements; genetic information; political status; marital status; status as a veteran or member of the military or national guard; status as a qualifying patient or designated caregiver; or any classification or activity protected by the equal protection clause or other provision of the United States or Arkansas Constitution or other applicable federal, state, and local laws. The city’s commitment in this regard extends to all employment-related decisions and terms and conditions of employment, including hiring, placement, promotion, termination, layoff, recall, transfer, leaves of absence, compensation, discipline, and training.

2.2 AMERICANS WITH DISABILITIES ACT

The City of ____________________ abides by the requirements of the Americans with Disabilities Act, the ADA Amendments Act, and state laws governing employment of individuals with disabilities. Qualified individuals with disabilities may be entitled to an accommodation in the application process and/or in the workplace. Any qualified individual with a disability who requires reasonable accommodation in the employment process and/or in the workplace shall notify ____________________ [insert title of appropriate individual].

2.3 UNLAWFUL DISCRIMINATION AND HARASSMENT

2.3.1 POLICY

The City of ____________________ expressly prohibits its officials or employees from engaging in any form of unlawful harassment or discrimination, on grounds such as those listed in paragraph 2.1 of this policy or any other ground protected by state or federal constitutions or laws.
Harassment or discrimination of any employee is a serious violation of city policy and will not be tolerated. Neither will workplace retaliation against someone for having complained of harassment.

2.3.2 PROHIBITED CONDUCT DEFINED

For the purposes of this policy, “harassment” refers to an annoying, persistent act or actions that single out an employee to that employee's objection or detriment, because of the employee's membership in any legally protected class or for some other trait the employee was born with (i.e., race, color, religion, sex, national origin, age, genetic information, political status, marital status, or status as a veteran or special disabled veteran, or the presence of any physical, mental, or sensory handicap). Harassment may be considered a violation of federal and/or state law.

Employees should know that they should not participate in (and do not have to tolerate) the following types of protected class harassment regardless of whether the harasser is a co-worker, supervisor, citizen, or any other person with whom the employee's job brings him/her into contact:

- Racial harassment
- Harassment due to religion or views concerning religion
- Harassment due to national origin
- Sexual harassment (gender neutral)
- Harassment due to age of employees who are at least 40 years old
- Harassment because of disability or perceived disability
- Harassment based on color
- Harassment based on other protected categories in paragraph 2.1 of this policy

2.3.3 DISCRIMINATION AND HARASSMENT GENERALLY

Discrimination or harassment can take many forms and can include slurs, comments, jokes, innuendos, unwelcome compliments, pictures, cartoons, pranks, or other verbal or physical conduct, including but not limited to the following actions:

- Verbal abuse or ridicule. This includes epithets, derogatory comments, slurs or unwanted sexual advances, unwanted sexual invitations, or negative comments because of the employee's protected class membership;
- Interference with an employee's work. This includes physical contact such as assault, blocking normal movement, or interferences with the work directed at an individual because of the employee's protected status;
- Displaying or distributing offensive materials. This includes derogatory or sexual posters, cartoons, emails, calendars, magazines, drawings, or gestures;
- Discriminating against any employee in work assignments or job-related training because of one of the above-referenced bases;
- Unwanted, intentional physical contact, whether it be of a sexual or other nature;
- Making protected status innuendos;
- Requesting favors (sexual or otherwise), explicitly or implicitly, as a condition of employment, promotion, transfer, or any other term or condition of employment;
- Gender-based harassment, including sexual harassment and harassment based on pregnancy, childbirth, or related medical conditions; and/or
- Retaliation for having reported harassment.

Discrimination or harassment based upon a person's protected status is prohibited by federal and state anti-discrimination laws and violates city policy where it:

- Has the purpose or effect of creating an intimidating, hostile, or offensive working environment;
- Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- Otherwise unreasonably and adversely affects an individual employment opportunity.

2.3.4 SEXUAL HARASSMENT

Sexual harassment is illegal and is a serious form of misconduct. Sexual harassment of employees, non-employees, and/or citizens with whom the City of ________________ has a business, service, or professional relationship, including vendors and clients, is prohibited and will not be tolerated. The City of ________________ is committed to maintaining a working environment, free from all forms of sexual harassment.
Sexual harassment occurs when the verbal and physical conduct described above is sexual in nature or is gender-based, that is, directed at a person because of their gender. Sexual harassment does not refer to casual conversation or occasional compliments of a socially acceptable nature.

Sexual harassment violates federal and state law and is prohibited under the city’s harassment policy when:

- Submission to the conduct is either explicitly or implicitly a term or condition of employment;
- Submission to or rejection of the conduct is used as a basis for an employment decision affecting such individual; and/or
- The conduct unreasonably interferes with the individual’s job performance or creates a work environment that is intimidating, hostile, or offensive.

Sexual harassment includes, but is not limited to:

- Inappropriate physical contact, including blocking of movement, brushing against the body, coercive sexual involvement, cornering, grabbing, hugging, kissing, patting, pinching, poking, stalking, any form of sexual assault, and touching;
- Inappropriate visual contact including leering, obscene gestures, and staring;
- Posting of sexually suggestive or derogatory pictures, cartoons, or drawings, even at one’s individual work station;
- Unwelcome verbal behavior, such as comments, suggestions, jokes, demeaning remarks, insults, requests, sexual innuendo, suggestive statements, slurs, or other derogatory remarks based on sex;
- Unwelcome or invasive flirting;
- Continued requests for dates and propositioning an individual; and/or
- Unwanted sexual advances, requests or pressure for sexual favors and/or basing employment decisions (such as an employee’s performance evaluation, work assignments, advancement) upon the employee’s acquiescence to sexually harassing behavior in the workplace.

2.4 COMPLAINT REPORTING AND INVESTIGATION

The city is committed to diligently enforcing its harassment policy by promptly and impartially investigating all complaints. When harassment is discovered, the city shall take appropriate disciplinary action, up to and including termination. The complaint procedure is designed to deal with complaints in a fair, discreet, and timely manner to:

- Determine if the conduct alleged in the complaint took place and constitutes harassment that violates federal and/or state law and city policy or constitutes harassment in the form of inappropriate or offensive behavior which violates city policy.
- Stop the offending behavior.
- Restore the complainant’s working environment.
- Take steps to prevent retaliation and repetition of the harassment.
- Educate, sanction, or discipline the harasser consistent with the seriousness of the offense.

2.4.1 COMPLAINT PROCEDURES

It is every employee’s and official’s responsibility to ensure that his or her conduct does not constitute harassment in any form. If, however, harassment or suspected harassment has or is taking place:

1. An employee must immediately report the harassment or suspected harassment, in writing, to the ______________________ [insert title of appropriate individual]. If the ______________________ [preceding title] is the source of the alleged harassment, or is so closely associated with the source of the harassment that the employee does not feel comfortable reporting to that person, the employee may report the complaint to ______________________ or ______________________ [insert title of appropriate individuals].

2. Employees have a responsibility to report harassment. Employees should not wait to report the harassment or discrimination until the acts become so pervasive or offensive that they create a hostile working environment. Employees should note that failure to report harassment creates a situation where a harassed employee’s situation is much more likely to remain unresolved. The very worst thing for an employee to do in a harassment situation is fail to report it.

3. If the complaint involves sexual harassment and the complaining employee prefers to speak with a person of the employee’s same gender, the city will make every effort to accommodate that request.

4. Any supervisor or department head who learns of or receives a complaint of harassment through any means (including witnessing, overhearing, learning of a rumor, or otherwise becoming aware of alleged harassment in the workplace) is obligated to report it to the ______________________ [insert title of appropriate individual].
5. Each complaint shall be treated confidentially and be fully investigated internally. A determination of the facts and an appropriate response will be made on a case-by-case basis.

If it is determined that harassment has occurred, the city shall take appropriate corrective disciplinary action, which may include but is not limited to, verbal and/or written warnings, probation, suspension, demotion, and/or termination.

If the investigation does not find that harassment occurred or that the alleged incident(s) did not constitute harassment, the matter shall be referred back to the ____________________ [insert title of appropriate individual] for further appropriate action. For example, if workplace misconduct may have occurred but not harassment, the ____________________ [insert title of appropriate individual] shall determine the manner in which to act upon the findings set forth in the investigation report.

2.4.2 RETALIATION

No employee shall be subject to any form of retaliation or discipline for pursuing a harassment complaint, and no witnesses shall suffer retaliation as a result of their involvement in the investigation. The City of ____________ will not tolerate harassment or any form of retaliation against an employee who has either instigated or cooperated in the investigation of alleged harassment. Disciplinary action will be taken against those who are found to have violated the city's policy against such retaliation.

2.4.3 FALSE ACCUSATIONS

Employees who have genuinely been subjected to harassment are encouraged to come forward and report it, so that the city can take action to stop the problematic behavior. This is because harassment is harmful to others and cannot be tolerated. Conversely, if false accusations are proven to have been intentionally made against others by an employee who knows (or has reason to know) that the allegations are false, this would be considered equally harmful by the city, and—as is the case of someone proven to be harassing others—would result in appropriate disciplinary action.

CHAPTER 3

GENERAL EMPLOYMENT POLICIES

3.1 AT-WILL EMPLOYER

The City of _________________ is an at-will employer. This means that the City of _________________ or any of its employees may terminate the employment relationship at any time for any reason with the understanding that neither has an obligation to base that decision on anything but his or her intent to discontinue the employment relationship. No policies, comments, or writings made herein or during the employment process shall be construed in any way to waive this provision.

This handbook is not intended to create any contractual or other legal rights. It does not alter the city's at-will employment policy nor does it create an employment contract for any period of time.

3.2 AUTHORITY TO HIRE AND FIRE

[NOTE: State law dictates that local government department heads serve at the will of the mayor. See Ark. Code Ann. § 14-42-110. State law does not, however, indicate who has the specific authority to hire and/or fire other non-department head employees of the city.

There are, of course, a variety of options a city may exercise with respect to authority to hire and fire individuals, and it is suggested that a specific option be identified, approved and stated in this section of the handbook. We recommend that this decision-making be done by those in charge of the day-to-day operations of the city, i.e., the mayor and/or the department head.

Obviously, the city council could engage in hiring and firing, although, as the policy maker for the city, it is suggested that this is outside the realm of the council's responsibilities. This is a local option that each city may exercise.

For example, in a small city, the city council may wish to engage in hiring and firing, whereas in a larger city it may not. Furthermore, in a smaller city, the local government may determine that it is appropriate for both the mayor and the
department head to be in some agreement before the employee is terminated and to jointly make that decision. On the other hand, you may wish to simply vest that authority in either the mayor or the department head.

Council or city board members should also be aware that they are not individually immune from lawsuits arising from personnel issues. Individual council members are immune from liability for action that is “legislative” in nature, such as passing ordinances or resolutions. This immunity does not apply, however, to administrative or executive action such as making individual personnel decisions or supervising city employees or department heads. Although a council as a whole is not prohibited from making personnel decisions, the council should weigh the risk of personal liability—coupled with the complexity of personal law—against the perceived need to make individual personnel decisions. Regardless of which option you choose, your decision should be clearly stated in the handbook.

3.3 JOB POSTING AND ADVERTISING

An application for employment will be accepted from anyone who wishes to apply for employment on forms provided by the city. Application forms are available in the office of ________________________________ [insert title of appropriate contact person, i.e., personnel director, department head, etc.]. All information provided on the application must be true and correct with the provision of false information being grounds for elimination of consideration for hiring and/or dismissal from city employment.

In the event of a job opening, the position or positions open will be announced and posted in __________________ [insert name of periodical wherein announcement is placed or location of posting] at least ten (10) days prior to the deadline for receiving applications. Copies of the job announcement will be distributed to city departments and as appropriate, to public and private employment agencies, local newspapers, and other sources that might recruit applicants. Recruitment resources will be notified at least ten (10) days prior to the predetermined cut-off date for receiving applications.

Applications for full-time city employment will not be accepted from anyone under eighteen (18) years of age. Except as otherwise provided by Arkansas law, the __________________ [insert title of appropriate individual] is authorized to make the final decision with respect to hiring new employees and promoting existing employees.

3.4 EMPLOYMENT APPLICATIONS AND RESUMES

The City of __________________ relies upon the accuracy of information contained in the employment applications and resumes submitted by prospective employees, as well as other information provided throughout the hiring process and employment. Any misrepresentations, falsifications, or material omissions in any of this information may result in the exclusion of the individual from further consideration for employment or, if the person has been hired, in termination or other disciplinary measures.

3.5 POST-OFFER PRE-EMPLOYMENT PHYSICALS

Post-offer pre-employment physicals will be required for every applicant to be hired for the city in a permanent employment position. Such examinations shall be paid for by the city. The examinations shall be performed by licensed physicians selected by the __________________ [insert title of appropriate individual]. A summary report of the examining physician shall be provided to the __________________ [insert title of appropriate individual] as to whether the applicant can perform the job sought and what, if any, restrictions are necessary to determine any necessary work restructuring or accommodations. Although the physicians may make the medical determinations relative to physical/mental requirements of the job and any direct safety threat determinations, their determinations are only recommendations; final authority to hire rests with the city. Only in cases of emergency may an applicant begin work prior to the post-employment job offer medical examination, but employment is subject to the applicant’s passing such examination.

Reports and records of all physical, psychological and mental exams shall be kept in the offices of the physicians or mental health practitioners with only a summary report provided to the __________________ [insert title of appropriate individual] to be kept in a confidential file apart from the individual’s personnel file. The city may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, government officials investigating compliance with the ADA, state workers’ compensation offices, state second injury funds, workers’ compensation insurance carriers, health care professionals when seeking advice in making reasonable accommodation determinations, and for insurance purposes. Should there be a dispute concerning the exam, or should a supervisor be informed as to the need of reasonable accommodation including job restructuring, the report shall be made available to the necessary legal and supervisory or administrative personnel within the city government.
3.6 FITNESS FOR DUTY EXAM

Employees who, due to mental or physical disabilities, are rendered unable to perform their essential job functions with or without reasonable accommodation or who pose a direct safety threat to themselves or others shall be subject to a fitness for duty examination. Based on the findings of the exam and other job restructuring factors, the ________________ [insert title of appropriate individual] shall take such action that is necessary to ensure that the requirements of the individual's position are satisfied.

3.7 THE OMNIBUS TRANSPORTATION EMPLOYEE TESTING ACT OF 1991

It is the City of ________’s intent to comply with all regulations and requirements of the Omnibus Transportation Employee Testing Act of 1991. City employees required to have a Commercial Driver’s License (CDL) must comply with all regulations in the 1991 Omnibus Transportation Act. The Act requires alcohol and drug testing for all city employees whose jobs require a CDL. These tests include pre-employment, post-accident, random, reasonable suspicion, and return-to-duty and follow-up testing. The City of ____________ will not permit an employee who refuses to submit to requisite testing to perform or continue to perform any activity that requires a CDL. All CDL drivers must obtain from the city of ________ the city’s written substance abuse policy. CDL drivers are required to read this material and sign a statement acknowledging that they have received a copy of the city’s Substance Abuse Policy.

3.8 DRUG AND ALCOHOL TESTING

The City of ________________________ has a responsibility to ensure safe-working conditions for its employees and a productive city workforce unimpaired by chemical substance abuse. To satisfy these responsibilities, the city is committed to maintaining a work place that is free from the effects of drugs, alcohol, or other performance-impairing substances. All employees are expected to obey all laws regarding the use of illegal drugs or alcohol. The city prohibits the possession, unlawful manufacturing, distribution of illegal drugs or the abuse of alcohol or prescription drugs while on city premises during work hours.

[Optional] This city policy provides for testing for drug and alcohol abuse by employees who hold safety or security sensitive positions which otherwise are not covered by the controlled substance screen requirements of the Federal Motor Carrier Safety Regulation. [NOTE: the Fourth Amendment to the United States Constitution prohibits random drug testing of many municipal employees, and allows “reasonable suspicion” testing only as to those employees. Employees who are “safety or security sensitive” as defined by court decisions may be randomly tested if the city so provides in its policy. The Arkansas Municipal League operates a non-CDL drug testing program. For further information on this program please refer to the League Publication titled Drug Free Workplace for Non-Commercial Driver’s License Employees available at www.arml.org/services/publications/publications-for-free. For a summary of the law on drug testing, see Municipal Law in Arkansas, Questions and Answers.]

[Optional] The City of ________________________ prohibits the possession, smoking, or otherwise use of medical marijuana on city premises. The City of ____________ reserves the right to take action based upon the good faith belief that a qualifying patient was under the influence of marijuana while on the premises of the employer or during the hours of employment, provided that a positive test result for marijuana cannot provide the sole basis for the employer’s good faith belief. [The Arkansas Medical Marijuana Amendment of 2016 does not permit a person to possess, smoke, or otherwise engage in the use of marijuana in a public place. The Amendment allows employers to establish and implement a drug-free workplace policy and allows employers to prevent employees from working under the influence of marijuana on employer premises or during employment hours.]

Any city employee who violates this substance abuse policy, or who is convicted of an alcohol or drug violation, will be subject to disciplinary action, up to, and including dismissal, as allowed by federal, state, and local laws.

3.8.1 FITNESS FOR DUTY

Current abuse of drugs is not a protected disability under the Americans with Disabilities Act (ADA). The city will not hire anyone who is known to currently abuse drugs. Furthermore, all employees are expected to report to work in a fit condition to perform their duties. Employees on official business or representing the city on or off of the work place are prohibited from purchasing, transferring, using or possessing illegal drugs or from abusing alcohol or prescription drugs in any way that is illegal.

An employee reporting or returning to work whose behavior reflects the abuse of alcoholic beverages or drugs may be referred for a medical evaluation to determine fitness for work. Failure to report for an evaluation or follow the
recommendations of the city will result in appropriate disciplinary action, including termination, as allowed by federal, state, and local law.

3.8.2 NOTIFICATION

As a condition of employment with the city, employees must abide by the terms of this drug and alcohol policy and report any conviction under a criminal drug or alcohol statute including DWI convictions for violations occurring on or off city premises while conducting city business. A report of a conviction shall be made within five (5) days after the conviction. Failure to report a conviction within the five (5) day period may result in disciplinary action, including immediate termination.

3.9 GENETIC INFORMATION.

The city shall not request or require genetic information from an individual or family member, except as specifically allowed by the Genetic Information Nondiscrimination Act of 2008 (GINA). In making any request for medical information, the city shall include the following language to the medical provider:

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. ‘Genetic information,’ as defined by GINA, means, with respect to any individual, information about an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

[NOTE: The Genetic Information Nondiscrimination Act of 2008 (GINA) applies to employers with 15 or more employees for each working day in each of 20 or more calendar weeks.]

CHAPTER 4

COMPENSATION AND MATTERS AFFECTING EMPLOYMENT STATUS

[NOTE: Keep in mind that any employment action, whether positive or negative, should be thoroughly documented, preferably in writing and placed in chronological order within the employee's personnel file. For suggestions on how to organize a personnel file, please refer to Model Personnel File Folder produced by and available through the Arkansas Municipal League. Regardless of the organizational method used, the League suggests that all employees' files be maintained consistently, i.e., in the same manner, by the same person, under the same conditions.]

4.1 ATTENDANCE

Employees shall be in attendance at their work stations in accordance with the rules and regulations established by _______________. Regular and punctual attendance is an essential job duty for every employee with the city.

4.2 WORK HOURS

Except for police officers and firefighters, the standard workweek shall consist of forty (40) hours per week within a seven-day period, unless otherwise arranged by the _______________ [insert title of appropriate individual] to meet specific departmental needs. Work hours for police and fire employees shall be in accordance with state statutes and departmental regulations.

Departments may vary employee's schedules based upon departmental necessity. The standard work week is _______________ through _______________. Flexible work arrangements are dependent on departmental requirements and are left to the discretion of the _______________ [insert title of appropriate individual].

The city reserves the right to adjust and change hours of work, days of work and schedules to fulfill its responsibility to the citizens of the City of _______________. In an emergency, previously scheduled hours of work, days of work, and work arrangements may be altered at the discretion of the _______________ [insert title of appropriate individual]. Changes in work schedules will be announced as far in advance as practicable, but can be changed with little or no notice.
Whenever possible, full-time employee work schedules shall provide a rest period (break) during each four-hour work shift. Reasonable time off for a meal will be provided.

[NOTE: Employers are generally not required by law to provide rest or break periods, however most employers do so in order to maintain morale and enhance productivity through appropriate rest periods.]

4.3 UNAUTHORIZED WORK TIME

Because of FLSA regulations, non-exempt employees are not to commence work prior to the scheduled starting time, work during their meal break, or work past the scheduled end of their shift without prior approval of their immediate supervisor. FLSA non-exempt employees who work unauthorized overtime hours will be subject to disciplinary action including, but not limited to, suspension without pay.

4.4 COMPENSATION

4.4.1 REPORTING AND VERIFYING HOURS WORKED

It is each employee's responsibility to monitor and record an accurate status of the hours the employee works per payroll period to ensure that the employee is properly paid for time worked.

[NOTE: See example below for how to format a reporting section that uses a physical payroll form.]

All employees shall report their hours worked on the forms provided by ____________________________ [insert title of appropriate individual]. It is the responsibility of each employee to properly complete a timesheet recording the time that the employee worked during every payroll period and to sign each time sheet. By signing the timesheet, each employee is verifying its accuracy. Signed and completed timesheets must be turned in on a ____________________________ [insert appropriate timeframe, i.e., daily, weekly, etc.] basis to their supervisors for signatures. The supervisors shall forward the same to ____________________________ [insert title of appropriate individual] in a timely manner to ensure that proper records are kept as to vacations, sick leave, hours worked, and overtime accrued and taken.

[NOTE: See example below for how to format a reporting section that uses an electronic system rather than a physical payroll form.]

All employees shall report their hours worked by utilizing the time and attendance system assigned by ____________________________ [insert title of appropriate individual]. It is the responsibility of each employee to properly use the system as directed. All employees must submit their time worked each pay period to their supervisor for approval and payroll processing. The supervisors shall forward the same to ____________________________ [insert title of appropriate individual] in a timely manner to ensure that proper records are kept as to time work and any leave taken.

4.4.2 PAYROLL RECORDS

__________________________ [insert title of appropriate individual] shall keep and maintain a record of work attendance, vacation, and sick leave earned, used, and accrued, along with any other leave, whether with or without pay. These records shall be available to the department head, and individual employees shall be able to inspect their own records during normal business hours as the requirements of the employee's work duties permit.

4.4.3 PAYROLL PROCEDURES AND PAYDAY

Employees are paid every ____________________________ [insert appropriate payday schedule]. When a holiday falls on a regular payday, employees will be paid on the last working day prior to the holiday.

Each employee is responsible for monitoring the accuracy of each paycheck received. Any employee who believes that the employee's paycheck does not properly compensate him/her for all hours worked in a given payroll period should immediately report those concerns to ____________________________ [insert title of appropriate individual].

4.4.4 WITHHOLDING OF MEMBERSHIP DUES

Upon receipt of a written request signed by a full-time municipal employee who is represented by a union or professional association, the city will withhold membership dues of the union or professional association from the salary of the employee. The withholding request shall be on a form provided to the employee by the city. The city will transmit all dues that are withheld under this section to the union or professional association representing the employee within five (5) days of the end of the pay period.
A withholding initiated under this section shall be discontinued only upon receipt of a written notice of cancellation signed by the employee.

4.5 SALARY BASIS POLICY

The Fair Labor Standards Act (FLSA) is a federal law which requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department’s regulations.

[NOTE: The United States Department of Labor has proposed to change the salary test from $455 per week ($23,660 per year) to $679 per week, or $35,308 per year. For more information see www.dol.gov/whd/overtime2019. This rule may have been adopted by the time this publication is in circulation.]

4.5.1 SALARY BASIS REQUIREMENT

To qualify for exemption, employees generally must be paid a federally-mandated minimum salary and meet additional requirements imposed by the Fair Labor Standards Act.

Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a “salary basis.” If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

4.5.2 CIRCUMSTANCES IN WHICH THE CITY MAY MAKE DEDUCTIONS FROM PAY

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions (see policies on penalties for workplace conduct rule infractions). Also, the city is not required to pay the full salary in the initial or terminal week of employment; for penalties imposed in good faith for infractions of safety rules of major significance, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. In these circumstances, either partial day or full day deductions may be made to the extent allowed by law.

4.5.3 CITY POLICY

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all supervisors from making any improper deductions from the salaries of exempt employees.

4.5.4 WHAT TO DO IF AN IMPROPER DEDUCTION OCCURS

If you believe that an improper deduction has been made to your salary, you should immediately report this information to _____________________ [insert title of appropriate individual] or _______________________________ [insert alternative complaint mechanism(s)].

Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made.
4.6 OVERTIME AND COMPENSATORY TIME

4.6.1 OVERTIME

The city will pay overtime in accordance with the Fair Labor Standards Act (FLSA) at one and one-half times the base rate or hourly rate for all hours worked in excess of the hours per week or work period set forth in the WORK HOURS section of this handbook.

Overtime will be permitted only with prior approval of ______________________ [insert title of appropriate individual] prior to the commencement of such work or when absolutely necessary due to emergency conditions. Failure to obtain prior approval before working overtime will result in disciplinary action, including but not limited to suspension without pay.

4.6.2 COMPENSATORY TIME

Compensation for overtime may be made in the form of compensatory leave time (“comp time”) to the employee. Compensatory time is accrued at a rate of time and a half for all hours worked in excess of 40 hours per workweek, unless the employee is working in a classification with special overtime rules under FLSA (i.e., police officers and firefighters). No civilian employee may accumulate more than ____________ hours and no uniformed employee may accumulate more than ___ hours of compensatory time at any given time during the calendar year. Hours in excess of the specified maximum shall be paid at the appropriate overtime rate. Upon termination of employment, any unused compensatory time is to be paid at a rate equal to the employee’s then-prevailing rate of pay.

Each employee shall be responsible for maintaining accurate records of overtime hours worked. However, the overtime and compensatory records of the ______________________ [insert title of appropriate individual] shall be final with respect to the number of compensatory leave days earned of an employee. Compensatory leave should be scheduled in the same manner required for vacation days. By signing the acknowledgement enclosed in this handbook, the employee and city agree that compensatory time may be given in lieu of overtime payments. In addition, it is understood that the city may substitute monetary payment at the rate of time and one-half for any outstanding compensatory leave time. After an employee accumulates _____ hours of leave time, the city may require the employee to take compensatory leave as determined by _____________________.

4.6.3 NON-EXEMPT AND EXEMPT EMPLOYEES

Non-exempt employees are subject to the Fair Labor Standards Act (FLSA) overtime requirements and therefore are subject to the overtime policies set forth in this handbook.

Exempt employees are not subject to the FLSA overtime requirements. Certain employees are classified as exempt based upon the nature of the work, conditions of employment, and by the criteria set forth in the rules and regulations of the FLSA. Exempt employees shall not be eligible for overtime or comp time for hours worked in excess of the regular workweek.

[NOTE: Sworn law enforcement officers and firefighters may be subject to special exceptions which permit the establishment of work periods up to 28 days. If such work periods are adopted, overtime is not measured in terms of 40-hour work weeks but should be paid for work performed in excess of 171 hours in a 28-day work period for police officers or for work performed in excess of 212 hours in a 28-day work period for firefighters. For more information, see FLSA---21 Things You Should Know, available on the web page, www.arml.org/resources/legal-faqs/.]

4.7 EMERGENCY SITUATIONS

It is the policy of the city to maintain hours of operation, which make the best use of employees and resources in serving the needs of the public. Emergency situations may from time to time necessitate the closure of city offices. Such situations shall be determined by the city council after consideration of all facts. Essential personnel required to be at work under emergency situations shall receive their normal rate of pay.

At times it may become necessary to close individual offices due to limited staffing levels, special departmental meetings, etc. Department closures shall be approved by the city council. Arrangements shall be made with other departments to handle any emergency situations during the department’s closure. A skeleton crew shall remain in each department to cover phones and assist the public when at all possible.
4.8 TEMPORARY AND SEASONAL EMPLOYEES
On occasion, the city may hire temporary or seasonal employees who are hired for a set duration (i.e., in the form of a seasonal employee, such as a lifeguard for an outdoor swimming pool) or for a specific project. These employees are not intended to be employed on a regular basis and are employed at-will. Temporary employees may be hired full- or part-time and are paid for actual hours worked at a rate determined by the department head. Temporary, non-exempt employees are eligible for overtime for hours exceeding 40 hours per workweek, subject to all other overtime policies set forth in this handbook. A temporary employee may be employed for up to six (6) months at which time the temporary status shall be reviewed before employment is continued. Unless otherwise authorized by the city council, temporary and seasonal employees do not qualify for annual leave, sick leave, or other city benefits.

4.9 VACANCIES AND PROMOTIONS
It is the intent of the City of _________________ to hire and promote the most qualified applicant for all vacant positions. To give the employees of the City of ____________ an opportunity to apply for job vacancies, announcements of job openings will be posted on employee bulletin boards.

In accordance with equal employment opportunity guidelines and this manual, notice of job vacancies will be sent to the appropriate news media and employment agencies throughout the relevant labor market. A job description of each vacant position will be provided upon request.

The final decision regarding promotions shall be made by the ______________ [insert title of appropriate individual] upon the recommendation of the ________________ [insert title of appropriate individual].

4.10 TRAINING
The City of _______________ is committed to continuing training for all employees. If an employee feels that additional training is needed, the employee is responsible for notifying the employee's department head. Expenses incurred in on-the-job training should be assumed by the city.

4.11 PERFORMANCE EVALUATIONS
All employees will participate in a performance review session, at least annually, with their supervisor. This review is intended to provide support for the individual; to improve the performance of the individual by providing meaningful, constructive feedback on the adequacy of performance; and to assist in the development and fulfillment of professional growth goals and job responsibilities.

Formal and documented reviews, as well as casual and undocumented discussions with your supervisor, will be a part of your performance evaluation. To the extent practicable, evaluations will be based on the direct supervisor's direct observations of each employee's performance, the quality and quantity of each employee's performance, and any additional efforts undertaken by the employee.

Your signature on formal review forms will serve as notice that the review has taken place and not whether you agree or disagree with the contents. Completed formal evaluation forms will be placed in the employee's personnel file. Please note that a performance evaluation does not necessarily mean a salary adjustment.

4.12 JOB SAFETY
The City of ________________ strives to provide a healthy and safe working environment. Safety is largely the use of good judgment and careful work habits. If an employee is unsure of how to perform a task safely, he should ask his supervisor or department head for the correct method.

Unsafe conduct constitutes misconduct. The following safety rules should always be observed:

- Follow all departmental safety rules.
- Use all mechanical safeguards on or for employee equipment.
- Immediately cease using and report any faulty or potentially faulty equipment to the supervisor or department head.
- Immediately report any unsafe or potentially unsafe working condition or equipment.
- Immediately report any and every accident to the supervisor or department head.

Violence or threats of violence are strictly prohibited and, if confirmed, may be grounds for immediate termination. Examples of such conduct include: harassing or threatening phone calls, email or written communication directed towards an employee or his or her friends/family members; stalking; and the destruction of personal and/or city property.
Dangerous items of any nature such as weapons, explosives, or firearms will not be permitted in buildings, owned and maintained by the city, or on an employee's person while conducting offsite city business unless the employee is a law enforcement officer or a security guard employed by a state agency, or a city or county, or any state or federal military personnel. Further, no dangerous items are allowed on any part of a detention facility, prison, or jail, including parking lots. If an employee is undergoing disciplinary proceedings, or is terminated and must return to work for any reason, the employee shall neither possess nor store the dangerous items on the employee's person or in the employee's vehicle. Of course, theft of any kind will not be tolerated.

[NOTE: The League has established a Loss Control Program to help cities reduce risks and prevent accidents. The League Loss Control specialist will conduct an on-site safety inspection to interested cities at no charge. Cities that wish to use the services of the Loss Control Program may call League headquarters at (501) 374-3484.]

4.13 REFUSAL TO WORK

A city employee's commitment is to public service. Any work stoppage, slowdown, strike, or other intentional interruption of the operations of the city shall cause the employee to forfeit his or her employment and result in the termination of the employee from the City of ________________, as allowed by federal, state, and local law.

4.14 RESIGNATION/TERMINATION

Employees who wish to terminate their employment with the City of __________ are urged to notify the city at least two (2) weeks in advance of their intended termination. Such notice should preferably be given in writing to the employee's department head or supervisor. Although not required, proper notice generally allows the city sufficient time to calculate all final accrued monies due the employee for his or her final paycheck. Without adequate notice however, the employee may have to wait until after the end of the next normal pay period to receive such payments. Employees who plan to retire are urged to provide the city with a minimum of two (2) months notice. This will allow ample time for the processing of appropriate pension forms to ensure that retirement benefits to which an employee may be entitled commence in a timely manner. All employment relationships with the City of __________ are on an at-will basis. Thus, although the City of __________ hopes that the relationship with employees are rewarding, the city reserves the right to terminate the employment relationship of any employee at any time for any lawful reason.

4.15 EXIT INTERVIEWS

Employees whose employment has terminated may be requested to participate in an exit interview and sign an exit interview form at the time of termination. During the interview, matters of final pay and benefits will be discussed, and the employee will be required to return any city property in the employee's possession or which was entrusted to him/her.

4.16 JOB DESCRIPTIONS

It shall be the responsibility of the ________________ [insert title of appropriate individual] to maintain a job description on file for each position in the department. The job description should include scope of responsibility, essential job functions, minimum qualifications, working conditions, physical requirements, and an employee acknowledgment.
CHAPTER 5

BENEFITS

5.1 VACATIONS

5.1.1 POLICE DEPARTMENT

Pursuant to Ark. Code Ann. § 14-52-106, each employee shall be granted a minimum accrual of an annual vacation of not less than fifteen (15) working days with full pay.

All employees of the police department shall accumulate vacation time at the rate of one and one-quarter (1¼) working days for each month of working service. A working day is defined for purposes of this section as eight (8) hours, regardless of the length of a shift typically worked by the employee. Vacation time for December shall accrue on the first day of the month so that the employee will have the vacation time available to use before the end of the year.

The police chief shall see that employees of the police department take all of their vacation time before the end of the calendar year, or shortly thereafter.

[NOTE: Ark. Code Ann. § 14-52-106 has been amended by Act 799 of 2019 to read as follows:

(a) The head or chief of each police department shall:
(1) Grant each employee annual vacation leave of not less than (15) working days with full pay; and
(2) Approve the use of annual vacation leave before the annual vacation leave is used.
(b) Unused annual vacation leave may accumulate to a maximum allowance as determined by ordinance of the municipality.
(c) Upon the first day after the end of the term of service or retirement, an employee may be paid for his or her unused accumulated vacation leave at the employee's regular rate of pay, not to exceed the maximum allowance under ordinance of the municipality.

This law takes effect on the 91st day after April 24, 2019. The attorney general has not issued a opinion as of this writing as to the effective date, but AML staff calculates that it will be July 24, 2019. Please note that provisions allowed by subsections (b) and (c) must be enacted by city ordinance.]

5.1.2 FIRE DEPARTMENT

Pursuant to Ark. Code Ann. § 14-53-107, each employee shall be granted a minimum accrual of an annual vacation of not less than fifteen (15) days with full pay.

All employees of the fire department shall accumulate vacation time at the rate of one and one-quarter (1¼) calendar days for each month of working service. The chief shall require all employees to take their vacations in increments of five (5) or more consecutive days. A working day is defined for purposes of this section as eight (8) hours, regardless of the length of a shift typically worked by the employee. Vacation time for December shall accrue on the first day of the month so that the employee will have the vacation time available to use before the end of the year.

[NOTE: The statutes cited above have not been reproduced in their entirety. Before your city adopts a personnel handbook, please review the statutes and edit these sections accordingly.]

5.1.3 VACATION TIME FOR NON-UNIFORMED EMPLOYEES

[NOTE: The following provides a sample vacation policy only. The vacation days discussed are not required by law, and with the exception of uniformed personnel discussed above, cities and towns are not obligated to provide the number of vacation days discussed below. You should determine the number of vacation days available to employees and state them clearly in the handbook that you develop and adopt.]

After six months of full-time employment, employees accrue five (5) working days of paid vacation annually. After one (1) year of full-time employment, employees accrue ten (10) working days of paid vacation annually. After five (5) year of full-time employment, employees accrue fifteen (15) working days of paid vacation annually.
5.1.4 VACATION ACCRUAL RATE

<table>
<thead>
<tr>
<th>YEARS OF SERVICE</th>
<th>VACATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 6 Months</td>
<td>None</td>
</tr>
<tr>
<td>6 months But Less Than 1 Year</td>
<td>5 Working Days</td>
</tr>
<tr>
<td>1 Year But Less Than 5 Years</td>
<td>10 Working Days</td>
</tr>
<tr>
<td>5 Years or More</td>
<td>15 Working Days</td>
</tr>
</tbody>
</table>

Accrued vacation time will be paid if the employee leaves the employment of the city. No more than five (5) vacation days may be carried over six (6) months past the anniversary date without prior written approval of the ___________________ [insert title of appropriate individual]. Accrued vacation days not taken within this time period will be deemed used.

Policies concerning vacation time for non-uniformed employees in no way alter the City of ______________’s at-will employment policy as described in this personnel handbook.

5.1.5 SCHEDULING VACATIONS

Each full-time employee may take accrued vacation with full pay at such time as is mutually agreed upon between the employee and their supervisor. All vacation leave must have the advance approval of the employee’s supervisor, so that the leave fits in to the overall scheduling of the department. Employees should notify their department heads at least ___________ days in advance of being absent for vacation time. The permissible number of employees taking vacation any one time will be governed determined by the _________________ [insert title of appropriate individual, i.e., department head, etc.] based upon departmental work loads. The city reserves the right to alter vacation schedules.

Approval of vacation leave requests falls under the discretion of _______________ [insert title of appropriate individual]. The _______________ [insert title of appropriate individual] evaluates each request on a case-by-case basis and determines approval based on the timeliness of the request and the departmental needs. Maximum vacation leave to be taken at any one time is fifteen (15) days, unless advance approval is granted.

5.2 HOLIDAYS AND HOLIDAY PAY

The appropriation made by the city council for salaries shall include additional pay for holidays for all full-time employees of the city. Uniformed employees will receive holiday pay as provided by the laws of the State of Arkansas.

[NOTE: The following holidays are provided by way of example only. Cities are not obligated to provide the following holidays with pay and should determine which, if any, to observe as paid days off.]

<table>
<thead>
<tr>
<th>HOLIDAY</th>
<th>DAY/DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Year’s Day</td>
<td>January 1</td>
</tr>
<tr>
<td>Martin Luther King Jr. Day</td>
<td>Third Monday in January</td>
</tr>
<tr>
<td>George Washington’s Birthday or Presidents’ Day</td>
<td>Third Monday in February</td>
</tr>
<tr>
<td>Memorial Day</td>
<td>Last Monday in May</td>
</tr>
<tr>
<td>Independence Day</td>
<td>July 4</td>
</tr>
<tr>
<td>Labor Day</td>
<td>First Monday in September</td>
</tr>
<tr>
<td>Veterans’ Day</td>
<td>November 11</td>
</tr>
<tr>
<td>Thanksgiving Day</td>
<td>Fourth Thursday in November</td>
</tr>
<tr>
<td>The Day After Thanksgiving</td>
<td>Fourth Friday in November</td>
</tr>
<tr>
<td>Christmas Eve</td>
<td>December 24</td>
</tr>
<tr>
<td>Christmas Day</td>
<td>December 25</td>
</tr>
</tbody>
</table>

The City of __________________ will publish a holiday schedule for the sequent year no later than ___________ of each year. The city reserves the right to change observance of any published holiday. Firefighters and law enforcement officers shall be paid for each holiday established by the city, in addition to their regular rates of pay. This additional pay shall be [CHOOSE ONE OF THE FOLLOWING TWO METHODS] prorated and paid during the regular payroll periods [OR] paid
in one lump sum annually on the ___ day of December. Holiday pay is defined for purposes of this section as pay for an eight (8) hour day, regardless of the length of a shift typically worked by the employee.

5.3 INCLEMENT WEATHER

In the event city offices are open but a non-essential employee is unable to report to work due to inclement weather conditions, the employee may elect to use vacation, or accrued comp time. The employee must report their absence to their immediate supervisor to remain in pay status for any such absence. Failure to report your absence could result in disciplinary action, up to and including termination.

The decision regarding inclement weather will be communicated [place where inclement weather will be communicated, such as local television states and/or city website].

Essential personnel are those employees who are required to provide mandatory services, and who must be on the job regardless of weather conditions. ________________ [insert title of appropriate person here] will ensure that those employees designated as essential services for their department are aware of this designation and understand that they are required to report to or remain at work.

5.4 SICK LEAVE

5.4.1 POLICE DEPARTMENT

Pursuant to Ark. Code Ann. § 14-52-107, law enforcement officers, regardless of their titles, shall accumulate sick leave at the rate of twenty (20) working days per year beginning one (1) year after the date of employment. If unused, sick leave shall accumulate to a maximum of sixty (60) days. A working day is defined for purposes of this section as eight (8) hours, regardless of the length of a shift typically worked by the employee.

Time off may be charged against accumulated sick leave only for such days that an officer is scheduled to work. No sick leave, as provided in this section, shall be charged against any officer during any period of sickness, illness, or injury for any days which the officer is not scheduled to work.

If, at the end of his term of service, upon retirement or death, whichever occurs first, any police officer has unused accumulated sick leave, he shall be paid for this sick leave at the regular rate of pay in effect at the time of retirement or death. Payment for unused sick leave will not be made when the officer's employment terminates for any reason other than death or retirement. Payment for unused sick leave in the case of a police officer shall not exceed sixty (60) days' salary (Ark. Code Ann. § 14-52-107).

[NOTE: With respect to the last sentence of the foregoing paragraph, the city may pass an ordinance allowing payment for up to ninety (90) days of unused sick leave under Ark. Code Ann. § 14-52-107(c).]

5.4.1.1 CATASTROPHIC LEAVE

[Note: Act 883 of 2019 has added the following language to Ark. Code Ann. § 14-52-107:]

(d)(1) A city of the first class, a city of the second class, and an incorporated town may adopt a catastrophic leave program by ordinance under § 14-42-122 to include a “presumptive illness list for municipal police department” under this section.

(2) As used in this section, a “presumptive illness list for municipal police department” means an illness that is chronic or fatal.

This law takes effect on the 91st day after April 24, 2019. The attorney general has not issued an opinion as of this writing as to the effective date, but AML staff calculates that it will be July 24, 2019.

5.4.2 FIRE DEPARTMENT


Significantly, the new revisions mandate that all firefighters employed by cities of the first and second class shall accumulate sick leave in accordance with a municipal ordinance at the rate of not less than ten (10) working days nor more than twenty (20) working days per year, beginning one (1) year after the date of employment.

Cities of the first class, cities of the second class, and incorporated towns shall have the option of providing sick leave for firefighters to accumulate at a rate of fifteen (15) twenty-four-hour working days per year beginning with the date of em-
ployment and decreasing to twelve (12) twenty-four-hour working days beginning four (4) years after employment.

The sick leave statute states that the number of days of sick leave in effect for firefighters employed by cities of the first and second class on January 1, 2005, shall remain in effect until changed by municipal ordinance. However, if the ordinance in effect falls short of the minimum number of sick days as discussed above, the ordinance should be changed accordingly to comply with the mandated minimum days.

In cities having sick leave provisions through ordinance, the total sick leave accumulated by the individual firefighter shall be credited to him or her and new days accumulated under the provisions of this section until the maximum prescribed below is reached.

If the governing body of the employing municipality successfully reduces the accrual rate, no firefighter shall have any previously earned sick leave reduced in value.

The following suggested language reflects other changes effected by the new revisions to the sick leave statute.

In accordance with municipal ordinance and Ark. Code Ann. § 14-53-108, all firefighters shall accumulate sick leave in accordance with a municipal ordinance at the rate of _____ working days per year, beginning one (1) year after the date of employment. For purposes of calculating sick days, a “working day” shall be calculated as that period of time a firefighter is on duty within a 24-hour period. If a firefighter is on duty for twelve (12) hours or more in a 24-hour period, a working day shall not be less than twelve (12) hours or more than 24 hours.

[NOTE: If you are a city of the first or second class or an incorporated town and choose to provide sick leave for firefighters to accumulate at a rate of fifteen (15) twenty-four-hour working days per year beginning with the date of employment and decreasing to twelve (12) twenty-four-hour working days beginning four (4) years after employment, you should use the following language in lieu of that above: “In accordance with municipal ordinance and Ark. Code Ann. § 14-53-108, all firefighters shall accumulate sick leave in accordance with a municipal ordinance at the rate of fifteen (15) 24-hour working days per year beginning with the date of employment and decreasing to twelve (12) 24-hour working days beginning four (4) years after employment.”]

If unused, sick leave shall accumulate to a maximum of 1,440 hours.

[NOTE: The city by ordinance authorizes the accumulation of a greater amount, in no event to exceed a maximum accumulation of two thousand one hundred sixty (2,160) hours. If you enact an ordinance authorizing a greater accumulation, the sick leave statute states that the number of days of sick leave in effect for firefighters employed by cities of the first and second class on January 1, 2005, shall remain in effect until changed by municipal ordinance. However, if the ordinance in effect falls short of the minimum number of sick days as discussed below, the ordinance should be changed accordingly to comply with the mandated minimum days.]

[NOTE: Cities of the first or second class or incorporated towns which have chosen to provide its firefighters with fifteen (15) 24-hour working days per year (later decreasing to twelve (12) 24-hour working days) should use the following language with respect to payment of unused leave, in lieu of the language suggested above: “If unused, sick leave shall accumulate to a maximum of one hundred (100) 24-hour working days.”]

Unused accumulated sick leave shall not be used for the purpose of computing years of service for retirement purposes.

Time off may be charged against accumulated sick leave only for the days that a firefighter is scheduled to work. No sick leave as provided in this section shall be charged against any firefighter during any period of sickness, illness, or injury for any days that the firefighter is not scheduled to work.

If at the end of his or her term of service, upon retirement or death, whichever occurs first, any firefighter has unused accumulated sick leave, he or she shall be paid for this sick leave at the regular rate of pay in effect at the time of retirement or death.

Payment for unused sick leave in the case of a firefighter, upon retirement or death, shall not exceed three (3) months’ salary.

[NOTE: The city may, by ordinance, authorize a greater amount, but in no event to exceed four and one-half (4 ½) months’ salary. If your city enacts an ordinance authorizing a greater amount, reflect that figure here in lieu of the 3 months discussed above.]
5.4.2.1 CATASTROPHIC LEAVE FOR FIREFIGHTERS

Act 883 of 2019 provides:

Arkansas Code § 14-53-108, concerning uniform sick leave for municipal fire departments, is amended to add an additional subsection to read as follows:

(e)(1) A city of the first class, a city of the second class, and an incorporated town may adopt a catastrophic leave program by ordinance under § 14-42-122 to include a “presumptive illness list for municipal fire department” under this section.

(2) As used in this section, a “presumptive illness list for municipal fire department” means an illness that is chronic or fatal.

5.4.3 NON-UNIFORMED EMPLOYEES

[NOTE: The following provision references a specific number of sick days for illustration purposes only. Except as discussed above with respect to police officers and firefighters, cities are not obligated to provide the same number of sick days as discussed below.]

The City of ______________ recognizes that inability to work because of illness or injury may cause economic hardships. For this reason, the City of _____________ provides paid sick leave to full-time employees. Eligible employees accrue sick leave at the rate of one and two-thirds (1⅔) working days per month. A working day is defined for purposes of this section as eight (8) hours, regardless of the length of a shift typically worked by the employee.

Any sick leave days which are not used in any calendar year may be carried over as accumulated sick leave days for the succeeding calendar year up to a maximum of sixty (60) days.

An employee may be eligible for sick leave days for the following reasons:

- Personal illness or physical incapacity.
- Quarantine of an employee by a physician or health officer.
- Illness, injury, or death in the employee’s immediate family, as defined in the definitions section of this policy, which require the employee’s presence.
- Necessity of medical or dental care, including medical, dental, psychological, and optical visits.

An employee who is unable to report for work due to one of the previously listed sick leave reasons shall report the reason for his absence to the employer’s supervisor or someone acting for the employee’s supervisor within two (2) hours from the time the employee is expected to report for work. Sick leave with pay may not be allowed unless such report has been made as aforementioned.

Employees who are absent more than three (3) consecutive days due to illness or injury may be required by the supervisor or department head to submit a physician's statement. Employees absent from employment due to illness and under a physician's care may be requested to present a certificate of release to the department head before returning to work.

An employee who uses all of his or her accrued sick leave days shall thereafter be placed on an inactive, without-pay status, except as required to provide a reasonable accommodation as required by the Americans with Disabilities Act.

An employee may use earned sick leave while receiving workers’ compensation benefits only to the extent that the leave augments the employee’s workers’ compensation benefit to the amount equal to that employee's regular rate of pay. An employee may use sick leave in this fashion for a maximum of six months.

Non-uniformed employees will not be paid for accrued sick days upon termination of employment with the city.

[NOTE: This section does not govern leave under the Family and Medical Leave Act (FMLA).]

5.4.3 CATASTROPHIC LEAVE

[Note: Cities and Towns now have statutory authority to implement a catastrophic leave program as provided in Act 883 of 2019, to be codified at §§14-42-122, 14-52-107, and 14-53-108.

This law takes effect on the 91st day after April 24, 2019. The attorney general has not issued a opinion as of this writing as to the effective date, but AML staff calculates that it will be July 24, 2019. For catastrophic leave for police departments and firefighters, see sections 5.4.1.1 and 5.4.2.1 above.]
5.5 FUNERAL OR BEREAVEMENT LEAVE

Funeral leave with pay up to a maximum of three (3) calendar days will be granted to all city employees in cases of death or in the circumstances of death in the immediate family (as defined in the definitions section of this policy) only. Any leave requested more than three (3) calendar days must be charged to accrued vacation or compensatory leave.

Travel time may be granted upon prior approval from the ______________ [insert title of appropriate individual] in addition to the three (3) days where travel time of more than eight (8) hours is necessary.

The ______________ [insert title of appropriate individual] may grant funeral leave of not more than one (1) day for an employee to be a pallbearer or attend a funeral of someone not within the immediate family.

5.6 MATERNITY LEAVE

Employees affected by pregnancy, childbirth or related medical conditions will be treated the same for all employment-related purposes as persons with non-pregnancy-related health impairments, illnesses, or injuries. An employee's accrued sick leave and vacation leave will be granted for maternity use, after which leave without pay must be used, in accordance with the city's family medical leave policy, if applicable.

In the event the Family Medical Leave Act is inapplicable, the employee may use accrued sick leave and/or accrued annual leave as required to the extent of exhaustion of sick leave and annual leave benefits.

5.6.1 NURSING MOTHERS

[NOTE: The Affordable Care Act amended section 7 of the FLSA—effective March 23, 2010—to require employers to provide reasonable break time for an employee to express breast milk, and a secure place, other than a bathroom, to express breast milk. More information can be found at the Department of Labor's website www.dol.gov/whd/nursingmothers.]

Nursing mothers will be allowed reasonable unpaid break time to express breast milk. This may run concurrently with other paid or unpaid break already provided. If the employee's work space is not private and secure, we will make a reasonable effort to provide a location where the mother may express. Employees shall make reasonable efforts to minimize the disruption of the employer's operations.

5.7 UNIFORMED SERVICES

Certain rights to re-employment after service in the uniformed services, as well as provisions relating to pension and health benefits are established in the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 USC 4301 et seq., and in Ark. Code Ann. § 21-4-102. It is the city's policy to honor and comply with the provisions of those statutes.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination against persons because of their service in the military. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

A summary of rights afforded by the Uniformed Services Employment and Reemployment Rights Act (USERRA) is contained in a poster developed by the U.S. Department of Labor and re-printed in Appendix A of this handbook. As an employer, the city shall provide to persons entitled to rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under USERRA.

In addition, under Ark. Code Ann. § 21-4-102, employees who are members of a military service organization or National Guard unit shall be entitled to a military leave of fifteen (15) days with pay plus necessary travel time. As mentioned below, the FLSA provides further rights to family members of military personnel.

5.8 FAMILY MEDICAL LEAVE

The Family Medical Leave Act (FMLA) of 1993 requires cities with fifty (50) or more employees to offer up to twelve (12) weeks of unpaid, job-protected leave to eligible employees for certain family and medical reasons. The FMLA also allows an employee who is the spouse, son, daughter, parent, or nearest blood relative of an injured Armed Services member to take the 12 weeks of unpaid leave plus an additional 14 weeks, for a total of 26 weeks. Eligible city employees may take unpaid leave for the following reasons:
- The birth and care of the employee's child;
- The placement of a child into an employee's family by adoption or by foster-care arrangement and to care for the newly placed child;
- For spouse, son, daughter, or next of kin of an eligible service member to care for an injured service member that is seriously injured or ill in the line of active duty, up to 26 weeks during a “single 12-month period;”
- The care of an immediate family member (spouse, child or parent, but not a parent “in-law”) who has a serious health condition;
- The inability of a city employee to work because of a serious health condition which renders the employee unable to perform the essential functions of his or her job; and
- For any qualifying exigency when the employee's spouse, son, daughter, or parent is a covered military member (on active duty or is notified of an impending call to active duty) in support of a contingency operation.

You must conclude leave for the birth of a child or for adoption or foster care within twelve (12) months after the event. However, leave may begin prior to birth or placement, as circumstances dictate.

Leave entitlements for medical reasons are predicated upon the existence of a serious health condition suffered by you or an immediate family member as defined by the FMLA. A serious health condition is an illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care in a hospital, hospice, or residential medical care facility; or
- Continuing treatment by a health care provider for a chronic or long-term health condition that is so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days, and for prenatal care.

Generally, a condition will be considered a serious health condition if the condition or its treatment causes an employee to be absent from work on a recurring basis or for more than three calendar days.

The Family Medical Leave Act (FMLA) requires that the city maintain the health coverage of an employee eligible for FMLA under any group plan during the time the employee is on FMLA leave.

5.8.1 FMLA ELIGIBILITY

To be eligible for the FMLA benefits employees must: 1) be employed by the city for at least one year; and 2) have worked 1,250 hours over the previous twelve (12) months preceding the date of the leave is requested to begin. In addition, the employee must work at a location where at least 50 employees are employed by the employer within 75 miles. An employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours of service that would have been performed but for the period of military service in determining whether the employee worked the 1,250 hours of service.

Employees are required to use all sick leave which they have accrued, prior to going on leave without pay. The city shall not require the use of annual leave as part of family medical leave. The employee, at the employee's option, may use annual leave as part of family medical leave. Such paid leave status shall be included in the total of the 12 work weeks.

5.8.2 CALCULATION OF LEAVE

[NOTE: There are four (4) permissible methods for calculating the 12-month period during which the 12 weeks of FMLA leave may occur. The method described below is an illustration of one of the four permissible methods. You should decide which method best suits your city's needs and clearly state the method in the handbook which your city adopts. For other methods, please see the League publication Family and Medical Leave Act Guide.]

Employees eligible for FMLA may use up to 12 weeks of leave during a 12-month period measured forward from the date the employee's first FMLA leave begins. Therefore, the 12-month period will begin on the first date FMLA leave is taken. The next 12-month period will begin on the first day FMLA leave is taken after completion of any previous 12-month period.

5.8.3 USE OF PAID TIME OFF BENEFITS

When leave is taken under the Family Medical Leave Act, you will be required to first use your available annual and accrued sick and vacation leave concurrently with FMLA leave during the twelve (12) week family leave before becoming eligible for unpaid leave. That portion of family leave of absence which is taken using annual and accrued leave days will be with pay, according to the city's annual leave policy. Using paid time off benefits does not add to the total length of the maximum 12-week leave permitted.
For example, Employee A has two (2) weeks of accrued vacation leave and two (2) weeks of accrued sick leave. Employee A requests and is granted 4 weeks of FMLA leave. This leaves Employee A with eight (8) remaining weeks of available FMLA leave.

[NOTE: An employee using leave for the birth of a child is required to use annual and accrued leave for leave taken for physical recovery after childbirth. For other employees, you may make sick leave run concurrently with FMLA leave (29 CFR sec. 825.07) as provided in this sample policy, if you gave the written notice required in section 825.300(c)(1), see especially subsection (iii). See also the Designation Notice section of the League's Family and Medical Leave Act Guide.]

5.8.4 INTERMITTENT OR REDUCED LEAVE

In circumstances where FMLA leave is sought for your own serious health condition, or that of a family member, you may take leave intermittently or be placed on a reduced work schedule, if medically necessary. In addition, when you chose to use FMLA for the birth or adoption of a child, you may also take leave intermittently or be placed on a reduced work schedule. However, this may only be done with prior permission and approval of the ________________ [insert title of appropriate individual]. If you request intermittent or reduced leave status, the city may in its sole discretion temporarily transfer you to another job, with equivalent pay and benefits, if another position would better accommodate that intermittent or reduced schedule. Furthermore, if the need to use leave is foreseeable and based on pre-planned and pre-scheduled medical treatment, you should schedule the treatment in a manner that does not unduly disrupt the city’s operations.

5.8.5 NOTIFICATION

You must provide ________________ [insert title of appropriate individual] with thirty (30) days’ written notice of your need to be absent for FMLA purposes when the need is foreseeable or predictable. The city will provide appropriate forms on which to make known your need to be absent. However, if emergency circumstances prevent 30 days’ written notification, you must notify ________________ [insert title of appropriate individual] as soon as possible.

5.8.6 LEAVE PROVISIONS FOR SPOUSES BOTH WORKING FOR THE CITY

In the event a husband and wife both work for the city, the maximum combined leave for both spouses is 12 weeks, if FMLA leave is taken for the adoption or birth of a healthy child, or to take care of a sick parent.

If FMLA leave is taken to care for an ill child, spouse, or for the employee’s own serious illness, then each spouse is entitled to 12 total weeks of leave.

5.8.7 JOB RESTORATION

Employees granted FMLA leave will be returned to the same position held prior to the leave or one that is equivalent in pay, benefits, and other terms and conditions of employment. However, certain highly-compensated, “key” salaried employees, although eligible for FMLA leave, are not guaranteed restoration to their positions if they choose to take leave. Such employees will be informed of this status when they request leave. If the city deems it necessary to deny job restoration for such employees while they are on FMLA leave, the city will inform the employee of its intention and will offer the employee the opportunity to return to work immediately.

5.8.8 EMPLOYEE BENEFITS

During an employee’s FMLA leave of absence, the employee’s health care benefits will continue. Both the city and the employee will be required to pay the customary portions of the monthly health premium. The employee’s failure to pay his or her share of the premium may result in loss of coverage. ________________ [insert title of appropriate individual] will advise the employee of the payment due dates. If the employee’s payment is more than 30 days overdue, the health care coverage will be dropped by the city. Prior to dropping an employee from coverage for non-payment, ________________ [insert title of appropriate individual] will provide the employee with at least 15 days’ written notice before the date coverage is to cease.

If the employee unequivocally informs the city that the employee does not intend to work at the end of the leave period, the city’s obligation to provide health benefits ends. If the employee chooses not to return to work for reasons other than a continued serious health condition which would otherwise entitle the employee to FMLA leave or other circumstances beyond the employee’s control, the employee is required to reimburse the city the amount which it contributed toward the employee’s health coverage during the leave period.
For purposes of this section, an employee who returns to work from FMLA leave for at least 30 calendar days is deemed to have returned to work. In addition, an employee who transfers directly from FMLA leave to retirement or who retires within the first 30 days after returning from FMLA leave is deemed to have a returned to work status.

An employee on FMLA leave will not be allowed to accrue employment benefits, such as vacation pay, sick leave, pension, etc. However, employment benefits which accrued up to the day on which the FMLA leave began will not be lost. The use of FMLA leave will not be considered a break in service when vesting or eligibility to participate in benefit programs is being determined.

Employees who fail to return to work on the first working day following the end of their FMLA leave will be deemed to have terminated their employment with the city, unless the employee otherwise notifies ______________________ [insert title of appropriate individual] prior to the end of the FMLA leave.

5.8.9 CERTIFICATION
Medical certification, by a qualified health care provider, of the need for FMLA leave for medical reasons is required. A certification form may be obtained from ___________________ [insert title of appropriate individual]. This form should be filled out and returned to ______________ [insert title of appropriate individual]. When the leave is foreseeable and at least 30-days’ notice has been provided, the employee must provide the certification before the leave begins. When prior notice of the leave is not possible, the employee must provide the requested certification within 15 calendar days of the employee’s departure, unless it is not practicable under the circumstances to do so, despite the employee’s diligent good faith efforts. Employees who do not provide certification within these 15 calendar days must provide a reasonable explanation for the delay along with the certification.

Qualified health care providers include: doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, and physician assistants authorized to practice under State law and performing within the practice under State law. Qualified health care providers also include Christian Science practitioners listed with the First Church of Christ, Scientist, in Boston, Massachusetts.

5.8.10 RELEASE TO RETURN TO WORK
A medical doctor’s release is required for all city employees who return to work from a medical leave of five (5) working days or longer, which is taken for the employee’s own serious health condition. Such release shall be provided to ______________ [insert title of appropriate individual] prior to returning to work.

5.8.11 DISPUTE RESOLUTION
If a disagreement occurs over the medical opinion provided by your physician, the city may require a second medical opinion, from a qualified health care provider chosen by the city. The city will pay for a second or, if necessary, a third medical opinion. In the event a third opinion is deemed necessary, the city and the employee will jointly select the third qualified health care provider. The third opinion will be considered final.

Additional information and forms may be obtained from ______________ [insert title of appropriate individual].

5.9 LEAVE FOR WITNESS OR JURY DUTY
[NOTE: Employers are not required to provide paid leave for witness or jury duty.]

Employees will be granted paid leave for witness or jury duty. Employees are also permitted to retain the allowance for services from the court for such service. To qualify for jury or witness duty leave, employees must submit to the ______________ [insert title of appropriate individual] a copy of the summons or other relevant court related paperwork as early as possible upon receipt thereof. In addition, proof of service must be submitted to the employee’s supervisor when the employee's period of jury or witness duty is completed.

[NOTE: Firefighters are not exempt from jury duty. The statute providing for exemption was repealed in 1997.]

5.10 MISCELLANEOUS LEAVE
The attendance of employees at seminars and training programs is considered part of continual professional development. Attendance of such seminars and programs must be preapproved by ______________ [insert title of appropriate individual]. Compensation for travel time and attendance at programs will be made in accordance with 29 Code of Federal Regulations [C.F.R.] sections 785.10 through 785.41.
The city will pay all reasonable out-of-pocket expenses for lodging, travel costs, meals, etc., pursuant to its regular expense policy. However, no such expenses will be reimbursed without receipts documenting payments of such expenses. The misrepresentation or altering of claims for reimbursement may result in the filing of criminal complaints, as well as disciplinary action.

[NOTE: An expense policy should be developed and distributed to all employees.]

5.12 EMPLOYEE HEALTH BENEFITS

The City of __________ provides a group health plan for all of its full-time employees. Detailed information on the policy and coverage will be given to employees at the time of hire. Additional information may be obtained from the ________________ [insert title of appropriate individual].

5.13 OCCUPATIONAL INJURIES

All city employees are covered under the Arkansas State Workers’ Compensation laws. Any employee incurring an “on-the-job” injury should immediately notify the employee’s supervisor who will arrange for appropriate medical treatment and prepare the necessary reports required for the employee to be compensated. Rules and regulations concerning Workers’ Compensation have been posted on bulletin boards located _________________ [specify location].

5.14 ACCIDENTAL INJURY

[NOTE: Employers are not required to provide paid leave for absences due to accidental injuries sustained off-duty, except as required by the Family Medical Leave Act and the Americans With Disabilities Act.]

If any full-time employee is involved in an accident which is not job-related and the injury sustained in such accident necessitates that the employee be absent from work, the employee shall be entitled to receive pay at a regular salary for the number of days of accumulated sick leave credited to that employee at the time the accident occurred.

CHAPTER 6

STANDARDS OF CONDUCT

6.1 COMMUNICATING WITH THE PUBLIC

Employees of the City of __________ shall at all times be civil, orderly, and courteous in their conduct and demeanor towards the public. Each employee should treat members of the public with respect and efficiently provide responses to their inquiries or requests. This attitude or approach to public service cannot be overemphasized.

When an employee is uncertain of the correct response to an inquiry or request from the public, the employee should refer the inquiry to the individual or the department which can provide the most satisfactory response to the inquiry. It is better to admit lack of knowledge than to provide erroneous information.

6.1.1 COMMUNICATING ON BEHALF OF THE CITY

The ________________ [insert title of appropriate individual] is authorized to communicate on behalf of the city in interviews, publications, news releases, on social media sites, and related communications. Other employees may represent the city if approved by one of these individuals to communicate on a specific topic. When speaking on behalf of the city or while carrying out your official duties:

• Employees must identify themselves as representing the city. Account names on social media sites must clearly be connected to the city and approved by ________________ [insert title of appropriate individual].
• All information must be respectful, professional, and truthful. Corrections must be issued when needed.
• Employees need to notify ________________ [insert name of appropriate individual] if they will be using their personal technology (cell phones, home computers, cameras, etc.) for city business. Employees should be aware that the data transmitted or stored may be subject to the Freedom of Information Act (FOIA).
6.1.2 HANDLING REQUESTS FOR INFORMATION PURSUANT TO FOIA

Any citizen of the State of Arkansas may request to inspect, copy, or receive copies of public records pursuant to the Freedom of Information Act. Any requests must immediately be forwarded to the public records custodian. If the employee receiving the request is not the custodian, the employee must notify the requester of this fact and identify the custodian.

6.1.3 HANDLING MEDIA REQUESTS

With the exception of routine events and basic information that is readily available to the public, all requests for interviews or information from the media are to be routed through the ____________ [insert title of appropriate individual] or the custodian of the records in the case of a records request. Media requests include anything intended to be published or viewable to others in some form such as television, radio, newspapers, newsletters, and websites. When responding to media requests, employees should follow these steps:

1. If the request is for routine or public information (such as a meeting time or agenda) provide the information and notify ____________ [custodian of the records] of the request.
2. If the request is regarding information about city personnel, potential litigation, controversial issues, and opinion on a city matter, or if you are unsure if it is a “routine” question, immediately forward to the ____________ [insert title of appropriate person] or in the case of a records request, to ____________ [custodian of the records]. An appropriate response would be, “I’m sorry, I don’t have the full information regarding that issue. Let me take some basic information and submit your request to the appropriate person who will get back to you as soon as she/he can.”
3. Ask the media representative's name, questions, deadline, and contact information.

6.2 PERSONAL COMMUNICATIONS

It is important for employees to remember that the personal communications of employees may reflect on the city, especially if employees are commenting on city business. The following guidelines apply to personal communications including various forms such as social media (Facebook, Twitter, blogs, YouTube, etc.), letters to the editor of newspapers, and personal endorsements.

• Remember that what you write is public, and will be so for a long time. It may also be spread to large audiences. Use common sense when using email or social media sites. It is a good idea to refrain from sending or posting information that you would not want your boss or other employees to read, or that you would be embarrassed to see in the newspaper.
• If you publish something related to city business, identify yourself and use a disclaimer such as, “I am an employee of the City of ____________. However, these are my own opinions and do not represent those of the City of ____________.”
• City resources, working time, or official city positions cannot be used for personal profit or business interests, or to participate in personal political activity. For example, a building inspector could not use the city’s logo, email, or working time to promote his/her side business as a plumber.

6.3 UNIFORMS AND PERSONAL APPEARANCE

Uniforms or uniform allowance will be provided to personnel of certain departments as authorized by the ____________ [insert title of appropriate individual]. Personnel who are provided uniforms or uniform allowance shall wear uniforms at all times while on duty. Uniforms shall be kept as neat and presentable as working conditions permit. Employees must not wear uniforms while off duty except to and from your scheduled shift or work assignment. It is essential that an employee not be viewed by the public as a representative of the city in any official capacity unless authorized to do so.

Employees not required to wear uniforms should dress in appropriate professional departmental attire. If an employee is unsure what constitutes appropriate attire, then the employee should check with the employee's supervisor or department head.

6.4 GUIDELINES FOR APPROPRIATE CONDUCT

The City of ____________ expects its employees to accept certain responsibilities, adhere to acceptable principles in matters of personal conduct, and exhibit a high degree of personal integrity at all times. This not only involves a sincere
respect for the rights and feelings of others, but also demands that both while at work and in their personal lives, employees refrain from behavior that might be harmful to the employees, co-workers, the citizens, and/or the city.

Whether an employee is on-duty or off-duty, the employee's conduct reflects on the city. An employee should observe the highest standards of professionalism at all times.

Types of behavior and conduct that the city considers inappropriate include, but are not limited to the following:

- Falsifying employment or other city records;
- Violating any city nondiscrimination and/or harassment policy;
- Soliciting or accepting gratuities from citizens;
- Excessive absenteeism or tardiness;
- Excessive, unnecessary, or unauthorized use of city property;
- Reporting to work intoxicated or under the influence of non-prescribed drugs or participation in the illegal manufacture, possession, use, sale, distribution, or transportation of drugs;
- Buying or using alcoholic beverages while on city property or using alcoholic beverages while engaged in city business, except where authorized;
- Fighting or using obscene, abusive, or threatening language or gestures;
- Theft of property from co-workers, citizens, or the city;
- Unauthorized possession of firearms on city premises or while on city business;
- Disregarding safety or security regulations;
- Insubordination;
- Neglect or carelessness resulting in damage to city property or equipment.

Should an employee's performance, work habits, overall attitude, conduct, or demeanor become unsatisfactory and in violation of either of the above-referenced items or any other city policies, rules, or regulations, an employee will be subject to disciplinary action up to and including dismissal.

6.5 ABSENTEEISM AND TARDINESS

Regular attendance is essential to the effective business operations, and the City of ______________ expects all of its employees to report to work on time and on a regular basis. Unnecessary absences and tardiness are expensive, disruptive, and place an unnecessary burden on fellow employees, supervisors, city government as a whole, and the taxpayers who receive city services. Should an employee be unable to report to work on time because of illness or personal emergency, the employee should give proper notice to his or her supervisor.

Excessive absences or tardiness, unexcused absences and tardiness, falsification of reasons for any absence or tardiness, absences/tardiness which form unacceptable patterns (i.e., regularly reporting late on Monday mornings or calling in absent on Fridays), or failing to provide proper medical documentation to support absences/tardiness may result in disciplinary action.

“Proper notice” is defined by the city as notice in advance of the time an employee should report for work or no later than one (1) hour thereafter if advance notice is impossible.

An absence of an employee from duty, including any absence of one (1) day or part thereof, (other than an absence authorized by this personnel handbook or by law) that is not authorized in advance by the department head or the employee's supervisor will be deemed absence without leave. Such absence shall be without pay.

6.6 OUTSIDE EMPLOYMENT OR MOONLIGHTING

If an employee is considering additional employment, he or she should discuss the additional employment with his or her department head or supervisor for approval.

If, as an employee of the city, an employee participates in additional employment, it must not interfere with the proper and effective performance of his or her job with the city. The work of a full-time employee of the city shall have precedence over any other occupational interest or pursuit of the employee. A full-time employee is expected to be available for work during all regular working hours and for overtime as required. An employee's outside employment must not be of a nature that adversely affects the image of the city, or of a type that may be construed by the public to be an official act of the city or which in any way violates these policies. City uniforms shall not be worn during outside employment unless approved in advance by the ______________________ [insert title of appropriate individual].
6.7 VOTING
City employees are encouraged to exercise their legal right to vote and, if necessary and requested in advance, reasonable time will be granted for the purpose.

6.8 OUTSIDE COMPENSATION
No reward, gift, or other form of remuneration in addition to regular compensation shall be received from any source by employees of the city for the performance of their duties as employees of the city. If a reward, gift, or other form of remuneration is made available to any employee, it shall be credited to a designated employee fund with approval of the ______________ [insert title of appropriate individual].

6.9 USE OF NARCOTICS, ALCOHOL AND TOBACCO
Employees of the City of ______________ shall not use habit-forming drugs, narcotics, or controlled substances unless such drugs are properly prescribed by a physician.

The consumption of alcohol or other intoxicants is prohibited while an employee is on duty. Employees are not to consume intoxicants while off duty to such a degree that it interferes with or impairs the performance of their duties. Employees involved in any unauthorized use, possession, transfer, sale, manufacture, distribution, purchase, or presence of drugs, alcohol or drug paraphernalia on city property or reporting to work with detectable levels of illegal drugs or alcohol will be subject to disciplinary action including termination, as allowed by federal, state, and local laws.

Smoking, or the use of any tobacco product, is not allowed inside any city-owned facility or vehicle. The city complies with all aspects of the Arkansas Clean Indoor Act of 2006. Any employee violating this policy is subject to disciplinary action up to and including termination and may be required to pay a fine if levied by the Arkansas Department of Health.

6.10 DRUG-FREE WORKPLACE
It is the policy of the City of ____________ to create a drug-free workplace in keeping with the spirit and intent of the Drug-Free Workplace Act of 1988 and its amendments. The use of controlled substances is inconsistent with the conduct expected of employees, subjects all employees and visitors to city facilities to unacceptable safety risks, and undermines the city’s ability to operate effectively and efficiently. Therefore, the unlawful manufacture, distribution, dispensation, possession, sale, or use of a controlled substance in the workplace, while engaged in city business for the City of ____________, or on the city’s premises is strictly prohibited. Such conduct is also prohibited during non-working hours to the extent that, in the opinion of the city, it impairs an employee's ability to perform on the job or threatens the reputation and integrity of the city.

To educate employees on the danger of drug abuse, the city has established a drug-free awareness program. Periodically, employees will be required to attend training sessions at which the dangers of drug abuse, the city's policy regarding drugs, the availability of counseling, and the city's employee assistance program will be discussed. Employees convicted of controlled substances related violations in the workplace must inform the city within five (5) days of such conviction or plea. Employees who violate any aspect of this policy may be subject to disciplinary action up to and including termination, as allowed by federal, state, and local law. At its discretion, the city may require employees who violate this policy to successfully complete a drug abuse assistance or rehabilitation program as a condition of continued employment.

6.11 USE OF CITY ASSETS AND RESOURCES

6.11.1 TELEPHONES
Telephones are to be used to conduct city business. Long distance or toll calls of a personal nature are prohibited unless prior approval is received in writing from ______________ [insert title of appropriate individual]. Although occasional, limited personal telephone calls are permitted, they should be kept to a minimum in time and frequency and should not interfere with work performance of the employee or the employee’s colleagues. Discretion should be used in discussing confidential information using cellular communication. Employees are responsible for taking reasonable precautions to prevent theft and/or vandalism of cellular equipment.

City-issued cellular or mobile telephones should be used for city business-related purposes. Personal calls are to be minimized. The city reserves the right to monitor the billing and use of all city-issued cellular/mobile telephones and has the authority to withhold any unauthorized amounts from the employee’s wages.
By accepting the use of city-issued cellular telephones, employees agree to promptly reimburse the city for all personal calls made which are deemed by the city to be excessive in frequency or duration.

Employees are responsible for maintaining a record of the phone numbers and names of persons or businesses that have been called, or who call, for personal reasons and provide a copy of the records to ____________________________ [insert title of appropriate individual]. In the alternative, the required information may be noted on the monthly cellular service billing. The employee shall attach a copy of the receipt or check to the cellular phone bill to show reimbursement has been made to the city for any personal calls.

Any employee who violates the conditions of these policies relating to cellular/mobile phone usage is subject to having the use of the employee's city-issued cellular/mobile phone terminated.

6.11.2 COMPUTERS AND OTHER TECHNOLOGICAL RESOURCES

To help maximize its employees’ efficiency in carrying out their respective job duties, the City of ___________________ provides various information and technology resources such as email, computers, software/computer applications, networks, the Internet, the intranet, facsimile machines, cell phones, pagers, and other wireless communication devices and voicemail systems. Please remember that these tools are city property and must be used in a manner that reflects positively on the city and all who work here. Occasional, limited personal use of these resources is permitted, but should not interfere with your work performance, or the work performance of your colleagues.

Employees, however, should have no expectation of privacy as to their use of city property. The city has the right to access and monitor any and all messages and files on electronic equipment owned by it and will do so as deemed necessary and appropriate. Employees will be held accountable for all usage of their systems and shall keep their keywords and passwords confidential to protect their assigned equipment and their files from misuse. Employees shall not access or copy software of data belonging to others or to the city. Reading another employee's files is prohibited unless authorized by the department head. Employees shall not transport software or data provided by the city to another computer site without prior authorization from the department responsible for the data.

The city will not tolerate inappropriate or illegal use of these assets and reserves the right to take appropriate disciplinary actions, as needed, up to and including termination of employment. Such inappropriate use of these resources can include, but is not limited to, the following:

- Hacking;
- Pirating software or audio/video files;
- Soliciting;
- Distributing literature for outside entities;
- Sending inappropriate emails;
- Accessing, viewing, or downloading inappropriate websites, i.e., sites advocating hate, violence, sexually explicit material, or promoting illegal activities;
- Distributing confidential information to persons/entities who are not entitled to such information;
- Storing or placing unlawful information on a computer or the network;
- Copying system files without proper authorization;
- Copying copyrighted materials without proper authorization;
- Use of abusive or otherwise objectionable language in either public or private messages;
- Sending messages that are likely to result in the loss of the recipient's work or systems use;
- Sending “chain-letters,” jokes, lists, or any other types of use that would cause congestion or disrupt the operation of the networks or otherwise interfere with the work of others;
- Decryption of system or user passwords.

Only software which has been purchased or approved by the City of ___________________ may be loaded or used on any of its computers. All software, programs, applications, templates, data, and data files stored in, residing on, or developed with city computers, networks, or storage media are property of the city and shall not be removed from the workplace without proper authorization. The city's software and software manuals should not be duplicated or reproduced in any manner which would violate the license agreements which pertain to usage of the software.

Computer equipment, including software, should not be removed from city premises without prior written approval from ____________________________ [insert title of appropriate individual].

The city reserves the right to monitor and inspect, without notice, the use of its information and technology resources.
6.11.3 INTERNET ACCESS

Internet access is provided to employees to conduct city business. Employees accessing the Internet are to do so for business-related purposes only. The city reserves the right to monitor Internet use to assure that Internet use is for legitimate business purposes and that access to the Internet is not abused by any one employee.

Downloading files without the express consent of the department head is prohibited. Files downloaded from the Internet, or any other outside service, may contain a computer virus and must be scanned by a virus checking software prior to being used on a city computer. Uploading to the Internet is prohibited unless authorized by the department head to avoid interception and unauthorized access to information.

6.11.4 ELECTRONIC MAIL AND CONFIDENTIALITY

The City of _____________________ provides electronic mail for business purposes. The city maintains the ability to access any messages left on or transmitted over the system. Employees should not assume that such messages are confidential or that access by the city or its designated representative will not occur. Therefore, any personal use of the city’s electronic mail system shall be kept to a minimum.

The electronic mail system shall not be used to solicit or further commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations; to create any unwelcome, offensive, or otherwise disruptive messages including sexual innuendo, racial slurs, gender-specific comments, or any other comment that offensively addresses someone’s age, sexual orientation, religious or political beliefs, national origin, or disability; or to send or receive copyrighted materials, trade secrets, proprietary or financial information, or similar materials without prior written authorization from the owner of the material.

Employees are not authorized to retrieve or read email messages that are not sent to them.

6.11.5 REMOVAL OF CITY PROPERTY

No city owned, leased, or licensed equipment or documents may be removed from city premises without prior written approval from ___________________________ [insert title of appropriate individual].

6.11.6 USE OF PRIVATELY OWNED ELECTRONIC COMMUNICATIONS EQUIPMENT FOR PUBLIC JOB RELATED PURPOSES

Employees with personal privacy concerns should be aware that there may be consequences to using privately owned electronic communications equipment (including privately owned cell phones) for work related purposes. If an employee uses privately owned equipment for work related purposes, such as work related text messages or emails, the records of the privately owned equipment might be subject to disclosure to the public by the Arkansas Freedom of Information Act. Employees are therefore encouraged to use city-owned communications equipment and city-owned software (such as city email) when communicating for job related purposes.

6.12 WAIVER OF PRIVACY

Employees waive their right to privacy in anything created, stored, sent, or received on the city’s computer or telecommunications system. The city reserves the right to inspect any data, emails, social media content, files, settings, or any other aspect of access made by a city-owned computer or related system and will do so on an as-needed basis as determined by the _______________ [insert title of appropriate individual]. Employees understand that any information created, stored, sent, or received on the city’s computer or telecommunications system may be subject to the provisions of the Freedom of Information Act, regardless of whether the information is business-related or personal to the employee. Therefore, any such information may be accessed and/or inspected at any time by any member of the public unless it is exempted by law from disclosure.
6.13 CITY VEHICLES

On occasion, the city may permit certain employees to use its vehicles to conduct city business. A valid and current driver's license must be in possession of the operator and maintained at all times. When using a city vehicle, employees shall exhibit due care at all times and shall comply with all federal, state, and local laws pertaining to operation of the vehicle.

The use of city vehicles is restricted to city business purposes only. Employees using city vehicles shall not pick up or transport any private parties not directly involved with the work of the city. With prior permission of the _______________ [insert title of appropriate individual], employees may transport spouses in city vehicles when attending conferences or meetings. Employees will be allowed to take home a city vehicle for “on-call” purposes only as designated by his or her department director.

Employees using city vehicles are individually responsible for all fines or penalties assessed to the employee as a result of speeding tickets or other traffic offenses for which the employee is cited while using a city vehicle.

Thefts or accidents involving city vehicles must be reported immediately to the police and _______________ [insert title of appropriate individual]. The improper, careless, negligent, destructive, reckless, or unsafe use of city equipment or vehicles may result in disciplinary action.

6.14 POLITICAL CAMPAIGNS

No city employee shall campaign on city time for any candidate or ballot measure at a federal, state, or local level. Employees are prohibited by law and this policy from using city equipment, property, funds or other resources to campaign for a candidate or ballot measure. After working hours, employees are free to campaign and support candidates and ballot measures in federal, state, county, and local campaigns as long as they do not use city property, funds, equipment or resources. No campaign banners, campaign signs, or other campaign literature shall be placed on any cars, trucks, tractors, or other vehicle belonging to the city.

6.15 DISCIPLINARY ACTION

Should an employee's performance, work habits, overall attitude, conduct, or demeanor become unsatisfactory including, but not limited to, violations listed in this handbook, or any other city policy, rule, regulation, or directive, the employee may be subject to disciplinary action up to and including dismissal.

Disciplinary action may include, but is not limited to:

- Warning or Reprimand. A warning or reprimand is action used to alert the employee that his or her performance is not satisfactory or to call attention to the employee's violation of employment rules and/or regulations. City employees may be officially reprimanded orally or in writing.
- Suspension. Suspension involves the removal of an employee from his or her job. An employee may be suspended with or without pay.
- Demotion. A demotion is an action that places the employee in a position of less responsibility and less pay.
- Termination. A termination is a removal of an employee from city employment.

6.16 PROCEDURE FOR REVIEW OF DISCIPLINARY ACTION

[NOTE: Some cities maintain some level of appeal or a grievance procedure for employees who have been disciplined and/or terminated. It is recommended that any such procedure be eliminated from your manual and/or practices. Prior to the elimination, notice should be given to your employees. If you are still inclined to have such a procedure, then it is recommended that the procedure require the employee, within a time certain, to file a letter requesting the appeal, and that the specifics of the appeal process be clearly and concisely laid out in your manual. Those procedures should be very simple and should involve as few steps as possible.]
CHAPTER 7

MISCELLANEOUS INFORMATION

7.1 POLICY STATEMENT
The City of ______________ possesses the sole right to operate and manage the affairs of the city.

7.2 CONFLICTS
The policies in this handbook will be followed unless they are found to conflict with federal, state, or local laws, which shall take precedence.

7.3 SEVERABILITY
Should any of the provisions contained in this handbook be found contrary to federal, state, or local law, the remaining provisions of this handbook shall remain in full force and effect.

To the extent that any law provides additional or different benefits or rights to employees, the provisions of this handbook shall be deemed to include those statements of law.

7.4 POLICY CHANGES
The City of ______________ reserves the right to suspend, revoke, or revise any of the policies contained this handbook at any time.

7.5 CHANGE OF ADDRESS
Employees changing their home address or telephone number must notify his or her department head of this change so that personnel files can be kept current. This is important in case the city must mail the employee any information or documents, such as tax statements. Also, if there is any change in the employee's marital status, the employee should report it to his or her department head.
RECEIPT OF CITY OF ___________________ PERSONNEL HANDBOOK
(To be placed in employee’s personnel file)

I, _____________________________, acknowledge receipt of the City of ____________ Personnel Handbook.
I understand that this handbook is not a contract.
I understand that reading this handbook constitutes one of my job duties and that I am required to perform my job duties in accordance with the policies contained in this handbook and any additional rules, regulations, policies or procedures which may be imposed by the city or the department in which I work whether or not I read this handbook. I understand that my failure to read this handbook, as required, does not excuse me from being covered by or complying with its provisions.
I understand that if I have any questions about the provisions contained in this handbook, I should direct them to ____________________ [insert title of appropriate individual, i.e., supervisor, city attorney, mayor, personnel director].
Signed _____________________________________
Date _____________________________________

I, _____________________________ [insert name and title of individual], provided a copy of the City of ________ Personnel Handbook to ______________________________ on this _______ day of __________, 20__.
Signed _____________________________________
Date _____________________________________
APPENDIX B

EMPLOYMENT RECORDS RELEASE

TO: _____________________________

You are hereby authorized and requested to give to ________, or to any of its duly authorized representatives, any and all employment information whatsoever including, but not limited to, copies of my personnel file, including disciplinary reports, memos, statements, results of or physicals, drug testing results, and any and all other information which they may request concerning my employment.

You are authorized to release any information relating to my employment, including but not limited to, any information relating to my employment or otherwise maintained by you during the entire term of my employment relationship with you. This authorization is continuing in nature and does not expire unless you receive written, signed and acknowledged notice from me or my authorized agent. A photocopy of this release shall be as valid as an original.

EMPLOYEE (Signature) __________________________________________

EMPLOYEE (Printed Name) __________________________________________

STATE OF ARKANSAS
COUNTY OF __________________________

Subscribed and sworn to before me this _____ day of _______, 20___.

________________________________________
Notary Public

My Commission Expires: __________________________

[NOTE: This Release should be used to obtain information from previous employers in order to make informed hiring decisions. A similar release should be used for current or past employee to sign when he or she wishes for you to release information to another prospective employer.]
Understanding Municipal Personnel Law and Suggestions for Avoiding Lawsuits

Arkansas Municipal League
Revised May 2019
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INTRODUCTION

Today’s municipal officials must know more about personnel law than ever before. New civil rights laws, regulations, and court decisions force municipal officials to remain alert to their legal responsibilities.

*Understanding Personnel Law and Suggestions for Avoiding Lawsuits* is designed to help you as a municipal official to better understand and effectively deal with personnel issues.

*Understanding Personnel Law and Suggestions for Avoiding Lawsuits* is not intended to be a substitute for continuous long-term legal advice. As with all legal matters, municipal officials facing important personnel decisions must consult with their city attorneys. Neither this document, nor any other singular document, can clarify the muddy waters of public labor law. Your city should commit the financial resources to continuously train full-time city employees in these areas and fully remunerate your city attorney to ensure your city’s compliance with the law. Without such commitment no series of forms, guidelines or suggested policies will ever be enough to supplant an informed and educated staff combined with effective legal counsel.

DISCLAIMER

The information contained in this book is not intended as legal advice for any specific case. Readers are responsible for consulting with legal counsel when actions arise concerning the application of the law to a particular set of facts. This book is intended solely for educational and informational purposes.
**Administrative Remedy**—Non-judicial remedy provided by an agency, board, commission, or the like. In most instances, all administrative remedies must have been exhausted before a court will take jurisdiction of a case. For example, U.S. District Courts will not consider a claim of employment discrimination arising under Title VII until all proceedings before the Equal Employment Opportunity Commission (EEOC) have been exhausted.

**Adverse Impact**—Used to describe a substantially different rate of selection in hiring, promotion, transfer, training, or other employment decision that works to the disadvantage of members of a protected class.

**Affirmative Action Plan (AAP)**—Written employment program or plan required by federal statutes and regulations. Such plans are to eliminate discrimination and to create systems and procedures to prevent further discrimination. They apply to hiring, training and promotion policies that consider race, color, sex, creed, national origin, and handicap.

**At-Will Employment**—A traditional American policy stating that the employer may terminate an employee for any reason or for no reason at all and the employee may leave employment for any reason or for no reason at all. This principle is honored in Arkansas law.

**Bona Fide Occupational Qualification (BFOQ)**—“Bona fide” means genuine, honest, or in good faith. The employer who regards sex, age, religion, or other protected characteristics as a bona fide qualification for a job must demonstrate that the BFOQ is reasonably necessary to the normal operation of the enterprise. For example, being female is a BFOQ for a jail attendant for female prisoners. Sex is not a BFOQ, however, for heavy physical work, since some women are physically strong. Customer or employer preference may not be considered in determining BFOQ. There is no race BFOQ.

**Business Necessity**—Policies or practices essential for the safety or efficiency of an organization. If an employer’s practices or policies tend to result in a disparate impact affecting members of a protected class, then the employer must demonstrate that these practices or policies are a compelling (i.e., essential for safety or efficiency) business necessity. The employer may also be required to show that no alternative, non-discriminatory practice with a lesser impact can achieve the same required business results.

**Civil Case or Civil Action**—A lawsuit brought by private parties to enforce or protect private rights (such as medical malpractice, divorce or breach of employment contract). A civil suit carries a lesser burden of proof than does a criminal case, in which the state or federal government charges a defendant with a public wrong or violation of criminal law, such as murder.

**Class Action**—A lawsuit in which one or more persons sue, or are sued, as representatives of a class. The lawsuit is brought on behalf of, or names as defendants, others in similar circumstances. Members of the class must be so numerous that it is impractical to bring them all before the court. Named representatives must fairly and adequately represent the members of the class.

**Common Law**—The body of principles and rules of action, relating to the government and security of persons and property, which come solely from traditional usages and customs. This “unwritten law” is recognized, affirmed and enforced by court decisions. Common law in the United States was inherited from England and enlarged and changed by our courts. The rule, “one is presumed innocent unless proven guilty beyond a reasonable doubt,” is from the common law, as is the “employment-at-will doctrine.”
**Constructive Discharge**—An end of employment caused by actions of an employer, or employer’s representative, which make an employee’s job so unbearable or onerous that the employee, acting prudently, has no other reasonable choice but to quit. Demotions involving a substantial reduction in compensation and status have been ruled in some jurisdictions to be constructive discharge.

**Contract**—An agreement for an exchange of consideration between two or more persons or entities which creates an obligation to do or not to do a particular thing. Contracts are the body of law that regulates the agreement process in business. Some kinds of contracts are:

- **Implied Contract**—An agreement that is implied by the acts or conduct of the parties, and not evidenced by express agreement. The circumstances surrounding the transaction imply that the parties understood a contract or agreement existed. In some states, courts have held that a long period of employment combined with the absence of employer criticism of employee behavior or performance gives rise to an implied contract of continued or permanent employment.

- **Written Contract**—A contact which has the major terms and conditions set down in writing. An example is a collective bargaining agreement between a union and an employer. In many states, the employee handbook is considered a written contract.

- **Oral Contract**—A contract that depends on spoken words for a majority of the agreement. It can be a written contract that has later been orally amended. Offer and acceptance of employment in an interview is an example of an oral contract for which the employer can be held responsible. Similarly, representations by a manager that contradict the employee handbook may amount to the oral modification of a written contract.

**Defamation**—Holding up of a person to ridicule, scorn or contempt in the community; that which tends to injure the reputation. Defamation is a civil wrong and includes both libel and slander, and if the defamation occurs during the termination proceedings of an employee, it can also serve as the basis for a Fourteenth Amendment liberty violation.

- **Libel**—Defamation by means of print, writing, pictures, or signs; publication that is injurious to the reputation of another.

- **Slander**—The speaking of false, malicious and defamatory words harming the reputation, trade, business, or means of livelihood of another.

- **Fourteenth Amendment Liberty Violation**—A libel or slander committed during the termination proceedings or the events leading up to the termination of an employee.

**Designated Caregiver**—Employee who has agreed to assist a physically disabled qualifying patient with the medical use of marijuana, and who has registered with the Department of Health under the Arkansas Medical Marijuana Amendment.

**Discrimination**—As generally used in personnel law, discrimination refers to the adverse treatment of an employee or group of employees, whether intentional or unintentional, based, for example, on race, color, national origin, religion, sex, mental or physical disability, age, or veteran status. The term also includes the failure to remedy the effects of past discrimination.

**Disparate Impact**—The same as Adverse Impact. The result of an employer’s action or policy that is not unlawful on its face, but affects one or more classes of employees differently.
Disparate Treatment—Differential treatment of employees or applicants based directly on race, religion, sex, national origin, mental or physical disability, age, or veteran’s status. This is usually an individual case focusing on the employer’s intent or motive.

Equal Employment Opportunity Commission (EEOC)—A federal enforcement agency created by Title VII of the Civil Rights Act of 1964. The purposes of the Commission are to end discrimination based on race, color, religion, age, sex or national origin in hiring, promoting, firing, wages, testing, training, apprenticeships, and all other conditions to put equal employment opportunity into actual operation.

EEOC Guidelines—Opinions expressed by the EEOC that don’t have the force of law when issued, but tend to be supported by the courts. These positions are outlined in various EEOC publications such as Discrimination Because of Sex, Discrimination Because of Religion, etc. The courts have adopted a large portion of these positions in whole or in part.

EEO I Report—The Equal Employment Opportunity Information Report, an annual report filed with the Joint Reporting Committee (composed of the Office of Federal Contracts Compliance Programs [OFCCP] and the EEOC) by employers subject to Executive Order 11246 or to Title VII of the Civil Rights Act of 1964. The EEOI report details the race, sex and ethnic composition of an employer’s workforce by job category.

Exempt—A term used to describe the status of employees whose positions meet specific tests established by the Fair Labor Standards Act (FLSA). Employees who meet these certain tests or standards are not subject to (i.e., exempt from) overtime pay requirements.

Good Faith and Fair Dealing—A concept employers use that has no technical or statutory definition. Basically, it means acting on the basis of honest intentions and beliefs. Employers who are thought to act in bad faith may have a suit brought against them. In such a case, the court looks to see that the employer did not act out of malice toward the employee and that there was no attempt to defraud or seek unconscionable advantage over the employee.

Hostile Work Environment—Work environment that is offensive and abusive to a reasonable female person (if a sexual harassment suit then the standard is a reasonable female or individual of a “suspect” class) and that in the work environment there was no practical way in which to effectively work. This is most often used in sexual harassment situations, but has also been applied by courts to persons with disabilities.

Individual with a Disability—Under federal law, any person who (1) has a physical or mental impairment that substantially limits one or more of his/her major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment is considered disabled. A disability is substantially limiting if the individual is unable to perform a major life activity that the average person can perform, or is significantly restricted as to the condition, manner, or duration under which the individual can perform a particular major life activity as compared to the average person. The term Otherwise Qualified Individual with a Disability refers to a person with a disability who is capable of performing the essential functions of a particular job with or without a reasonable accommodation to his/her disability, being made by the employer.

Insubordination—Where an employee refuses to obey a reasonable directive from the employer.
**Just Cause**—A good and sufficient reason, related to the needs of administrative operations and supported by demonstrable fact to take employment action against the employee. Note: In Arkansas by using the term “cause” in any employment manual or documents the city vests a property right in the employee’s job, thereby creating the necessity for due process before employment action is taken.

**Non-Exempt**—A term used to describe employees whose positions do not meet Fair Labor Standards Act (FLSA) exemption tests, hence must be paid one and one-half (1½) times their regular rate of pay for hours worked in excess of 40 hours per week. Such rates are to be computed at an hourly rate.

**Protected Class**—Any group or member of that group specified in, and therefore protected by, antidiscrimination laws, such as persons belonging to a minority race, or gender, age, or person with a disability.

**Public Policy**—Generally, this term refers to standards for behavior that the court believes are necessary to support the common good and maintain the fabric of our society in its critical dimensions. Public policy is often reflected in a statute, a constitution, case law, or, less clearly, in commonly accepted values. It is perhaps the most vague and unpredictable standard in personnel law today because the definitions of public policy change as society changes.

**Punitive Damages**—Punitive damages are sums of money awarded by a court to punish a party because of that party’s acts of violence, oppression, malice, ill will, spite, hatred, fraud, or wanton and willful conduct. They are, in part, intended to provide solace to the wronged party. Unlike compensatory or actual out-of-pocket damages, punitive damages are based upon a different public policy consideration—that of punishing a defendant or of setting an example for similar wrongdoers. Punitive damages are usually awarded in addition to compensatory or actual damages, and generally punitive damages are not covered under the provisions of insurance policies. (Municipal governments are not liable for punitive damages; however, municipal employees are liable.) (Punitive damages are not covered within the Municipal Legal Defense Program.)

**Qualifying Patient**—Employee who has been diagnosed by a physician as having a qualifying medical condition and who has registered with the Department of Health under the Arkansas Medical Marijuana Amendment.

**Reasonable Accommodation**—Alterations, adjustments or changes in the job, the workplace and/or terms or conditions of employment that will enable an otherwise qualified individual with a disability to perform a particular job successfully, as determined on a case-by-case basis, depending on the individual’s circumstances.

**Systemic Discrimination**—Systemic discrimination relates to a recurring discriminatory practice that is pervasive in the employer’s organization rather than to an isolated act of discrimination. Intent to discriminate may or may not be involved.

**Torts**—The law of private wrongs, other than breach of contract, governing the behavior of persons and setting out their obligations to each other. The courts provide a remedy for these wrongs in the form of civil actions for monetary damages. Assault is an example of a tort, as is intentional infliction of emotional distress, personal injury, etc. Civil suits can be filed for such wrongs.

**Validation**—The study of an employer’s tests or selection standards which proves that those who score high turn out to be successful on a specified job and those who score low turn out to be unsuccessful. The study requires a large sample of applicants and must include representatives of protected groups in the employer’s labor market.
Chapter One

The Importance of Written Personnel Policies

The Employee Handbook

Tips on Writing Employee Handbooks

Common Mistakes in Employee Handbooks

Suggestions for Establishing City Standards of Performance and Conduct

Prohibited Conduct

Record Keeping

Helpful Observations about Government Agencies and Personnel Law
THE IMPORTANCE OF WRITTEN PERSONNEL POLICIES

Until recently there was a trend among municipal employers not to write or formally adopt employee handbooks. Municipal officials reasoned that if a policy or procedure is in writing, then the city would be bound to adhere to the policies under all circumstances. However, because of federal legislation and recent court cases that decided in favor of employee rights, loosely written and impractical personnel policies became a fertile ground for litigation.

Therefore, it is recognized that a well-drafted personnel handbook that includes a signed disclaimer will support the city’s position that employment was and is at-will. In addition, the handbook has several useful purposes. They are:

1. It is an important element in a city’s defense against equal employment opportunity charges because, with proper application, it ensures consistency. When the city’s policies are stated in writing, agencies investigating charges will usually give more credibility to the city’s position.

2. The handbook is useful to train supervisors to carry out the policies.

3. Oral assurances as well as practices by elected officials are often held by the courts to be binding. More often than not this can be avoided by eliminating the validity of oral assurances by so stating in a handbook.

4. A personnel policy handbook will help city employees avoid any misunderstandings or false statements of policies or benefits.

Cities that adopt employee handbooks must be aware that several recent court decisions based their damage awards on the employer’s failure to follow its own written policies or procedures. The best means of a city’s avoiding this liability is for the city to follow its own policies. A city must not adopt a policy that it cannot or will not follow. Finally, you must ensure that these policies are well conceived and legally defensible before adoption. If not, then do not adopt the manual.
THE EMPLOYEE HANDBOOK

Should you choose to reduce your personnel policies to writing, then all personnel-related ordinances, regulations and/or writings should be incorporated into a single handout for distribution to members of the city’s governing body and the entire municipal workforce. Each employee should be required to sign a form acknowledging that he or she received the handout. Plans should be implemented to study, modify, adopt and redistribute the handbook on a regular basis. This will help to account for changes in the law and organizational changes as well.

Listed below is a general guide to the type of information that can be included in an employee handbook. In addition to the employee handbook, city employees should follow the rules and regulations of their respective departments after they have been adopted by the city council or city board of directors. Administrative rules need not be made part of the handbook.

Seven key organizational sections of an employee handbook follow:

1) Introduction
2) Employment policies
3) Compensation benefits
4) Leave benefits
5) Fringe benefits
6) Employee conduct
7) Employment separation

Details of the contents of an employee handbook are in the League publication Sample Personnel Handbook for Arkansas Cities and Towns (December 2016).

TIPS ON WRITING EMPLOYEE HANDBOOKS

In writing an employee handbook avoid common mistakes. Follow these points to help ensure that your handbook communicates the right information in the right way.

- Limit each sentence to a single idea.
- Use 25 words or less per sentence.
- Avoid using terms your readers will not understand. Use terms familiar to everyone in every department.
- Don’t use the word “permanent” to describe employees; it means enduring or forever. No one has a permanent job. Instead, when appropriate, use “regular” or “full-time.”
- Avoid using mandatory wording. Only use the word “will” when you are referring to an absolute in every case.
- Don’t use the term “probationary” when referring to any employee.
- Use the word “you.” Writing in familiar terms reminds readers that the policy applies to them.
- Identify the city’s purpose of each policy to help employees understand the reasoning behind the policies.
• Don’t borrow handbooks from other cities and adopt them “whole cloth.” This could be dangerous. The book may not meet your city’s needs.

• Use a disclaimer stating: The handbook can be changed at any time (consider including an explanation of how employees will be notified of changes). An example of such a policy reads: “All city employees should understand that this handbook is not intended to create any contractual or other legal rights. It does not alter the city’s at-will employment policy nor does it create an employment contract for any period of time.”

• Only the city council has the authority to alter the handbook.

• The contents are for informational purposes only and should not be interpreted as a contract. For example: “The information contained in this handbook applies to all employees of the city. This Handbook does not represent an employment contract or any aspect of an employment contract and should not be construed as such.”

• Think twice before abandoning at-will employment. This may increase your exposure to lawsuits.

• Be sure to screen your employee handbook for statements that suggest that employment guarantees are being offered to employees. Examples of language to watch for include: “An employee will be discharged only if he or she fails to properly perform the job assigned.” “Good performance is your best guarantee of job security.”

**Common Mistakes in Employee Handbooks**

Listed below are several of the most common mistakes found in employee handbooks. Cities are advised to avoid these mistakes.

1) Not having an employee handbook or never updating it.

2) Borrowed handbooks: Unique standards/rules missing and policy adopted by mistake.

3) Important terms not defined; the use of dissimilar terms.

4) Irrelevant content.

5) Impersonal, third person, “contract-like” language.

6) No verification of receipt from city employees or other mechanism to provide notice.

7) Implied promises of employment security (“permanent employee,” “cause,” “just cause”).

8) Expresses promises of employment security (“You’ll have a job here as long as you perform well.”).

9) Guarantees of due process that the city may later disregard.

10) Grievance process that the city may later disregard.

11) Mandatory wording: “shall” and “will” convey a commitment; consider discretionary words, such as “may.”
SUGGESTIONS FOR ESTABLISHING STANDARDS OF PERFORMANCE AND CONDUCT

Performance Versus Conduct—Know the Difference

Cities often make the mistake of treating performance rules the same as behavioral rules. In fact, the administration of the rule differs markedly, as does action taken with the employee when shortcomings occur. Remember: proper conduct in the workplace is important for good order and discipline. Policies regarding conduct are included in handbooks to make employees aware of the rules governing their employment with the city.

As a general rule, the city is free to establish any personnel policy or rule it deems to be within the scope of its interests. However, certain policies or rules may not be established, including those that:

- Are prohibited by statute, administrative regulations, or court decisions.
- Conflict with a contract (common example: a collective bargaining agreement).
- Would jeopardize the health and safety of employees or the public. (An employee may reasonably refuse to obey an order that he or she reasonably perceives as dangerous to health or safety.)
- Conflict with public policy.
- Are not reasonably related to the operation of city business.
- Have performance standards that are not supported with job descriptions or similar instruments.
- Have performance appraisals based on poorly written job descriptions.

Performance (knowledge, skill, ability) shortcomings can often improve. On the other hand, there is no learning curve to behavior.

It is unwise to establish a standard or rule that cannot (or will not) be enforced. The two tests to remember are: Could the city, with proper documentation, sustain the discharge of an employee? Will the city accept the consequences of the discharge of a good employee over the issue of enforcement of the rule? Cities should establish standards at the level at which they are certain to be enforced uniformly throughout the organization.
COMMONLY ESTABLISHED STANDARDS OF EMPLOYEE CONDUCT

City employees can be expected to accept certain responsibilities and follow acceptable principles regarding matters of employee conduct. Some commonly established areas of employee responsibility are listed below.

- Maintenance of production/service standards—quality, quantity, and priorities
- Responsible use of working time for self and other employees
- Cooperation with supervisor and other employees
- Observance of safety and health rules
- Proper use and maintenance of city equipment and materials
- Respect for other employees and their property
- Attendance standards, including proper notification for absences
- Maintenance of housekeeping standards
- Personal appearance or dress

PROHIBITED CONDUCT

Cities establish rules that are not all encompassing, that if violated result in disciplinary action. Following is a list of inappropriate conduct adopted by most cities. Please note that this is not an exhaustive list.

- On-the-job use or possession of alcohol/drugs (or being under the influence of prohibited substances)
- Possession of firearms or knives with blades over three (3) inches in length
- Sexual harassment
- Insubordination
- Gambling
- Theft (or unauthorized possession)
- Smoking in restricted areas
- Falsification of records
- Discrimination based on race, religion, sex, national origin, mental or physical disability, age, or veteran status
Record Keeping

Record Retention Requirements

What is an employee personal history file? Documentation relating to records or treatment of employees in regard to terms and conditions of employment comprises an employee’s personal history file. (Note: the Arkansas Municipal League has a sample personnel file that is available at the League offices.) The mere recording of events (for instance, a supervisor’s log book) without the intention to use such information in a transaction is probably not a personnel file, but may be subject to disclosure via the Freedom of Information Act (FOIA) or during litigation.

Cities should consider a filing/retention policy that includes at least six (6) types of personnel records:

- Recruiting and selection
- Employee history
- Medical history (as governed by the Americans with Disabilities Act)
- Immigration act forms
- Investigations
- Job performance/evaluation

A city’s record-retention policy will probably depend upon the step in the employment cycle process. These steps include:

- Recruiting and selection
- Job performance
- Separated employees

City officials often ask when they should destroy old hard-copy personnel files. There are numerous state and federal statutes applying to various types of employment records. However, a five-year retention period would comply with all of these retention laws. Given another federal law, however, it is advisable to keep records for a much longer period:

The federal Lilly Ledbetter Fair Pay Act of 2009 altered Title VII (the general federal employment discrimination law), the Americans with Disabilities Act, and the Age Discrimination in Employment Act by renewing the statute of limitations after each new paycheck is issued, rather than limiting it to 180 days after the decision to discriminate on the basis of pay was made. It is not yet clear what effect this has on record retention requirements, but at a minimum it would be advisable to keep personnel records for as long as an employee works for you, plus five years for breach of contract claims. In addition, some commentators have suggested you should extend this period for pensioners, since each pension payment might also trigger a new filing period.
WHERE SHOULD EMPLOYEE FILES BE MAINTAINED?

It is probably best to maintain one central file in the Human Resources or Personnel Department. For cities without such departments, the city clerk’s or recorder’s office is ideal. The file should be strictly controlled in terms of access. “Local” files in the hands of supervisors should be limited to copies. Why?

- To help maintain control of document production.
- To help guide uniform treatment of employees.
- To help the Personnel Department spot recurring problems and training needs.
- To help accurately assess and maintain the strength of the city’s position with regard to legal protection.
- To help with the consistent maintenance of those files.
- Cities can sometimes benefit from a written policy on record keeping.
- Written policies help produce internal consistency.
- Such policy could prove desirable in support of a defense that your organization has followed consistent practice.

Microfilm/microfiche, CD ROM, or other digital formats are acceptable documentation.

HELPFUL OBSERVATIONS ABOUT GOVERNMENT AGENCIES AND PERSONNEL LAW

Many municipal officials mistakenly assume that governmental agencies are neutral on personnel issues. Government agencies are not paid to be neutral. Personnel laws have been passed to protect the employees. Governmental agencies are set up to enforce the law. Therefore, government agencies, such as the EEOC, are in the business of protecting employees. They are not neutral and certainly not pro-employer. With this in mind, remember that when your case goes before a governmental agency or into a court of law that:

1) The city is presumed to have kept accurate, up-to-date records.
2) An ambiguous, poorly worded, unclear personnel policy handbook, performance appraisal, employment offer letter, and other types of personnel policies or documents will generally be interpreted in the employees’ favor.
3) The city and its policies should operate under the assumption that an employee cannot waive statutory rights.
4) More and more often employment lawsuits are being tried before juries. Juries have added a new dimension to judgments about your personnel practices. Remember, juries are often:
   - Composed of employees.
   - Upset by discrepancies, appearance of hidden motive, and lack of good faith on the part of the employer.
   - Equate “unfair” with “illegal.”
5) When part of a personnel policy is governed by both federal and state law, federal law will prevail unless it provides the minimum requirement(s). Where this is the case and state standards exceed federal law, the state standard will also apply. The practical result: the employee gets the best of either law.
Chapter Two

Discrimination—What Is It?

Pre-employment Liability

Recruitment

The Application Form

Pre-employment Testing

The Interview Selection Process

Discriminatory Hiring Practices: What to Avoid
Discrimination—What Is It?

The League contends that if municipal officials understand the very basics of discrimination law, then they can assist their cities by taking action to avoid costly litigation. For over 100 years in the American workplace at-will employment status has been in effect. At-will employment means that the employer is free to dismiss an employee for any reason and that the employee is free to leave employment for any reason or for no reason at all.

The tradition of at-will employment began to fade in the 1930s when Congress passed a law exempting employees covered by a union agreement. Thus, employees still were assumed to be at-will except those with union contracts were given collective bargaining rights. In 1964 with the passage of the Civil Rights Act, a new group of employees joined the list of “protected class.” These included race, religion, sex, disability, color, national origin, or pregnancy. In years to follow Congress added to this list veterans and members of the military and national guard; people over 40 (Age Discrimination Act); and more recently, with the passage of the Americans with Disabilities Act, those Americans with disabilities.

While homosexuality is not a class protected by a federal or Arkansas statute, courts have granted protection in two ways: first, on the basis of “sex” when employees are discriminated against on the basis of “stereotyping.” This means, for example, that an employer or harasser thinks that a female employee is “too masculine” in some way or vice versa. Second, the courts have extended protection under the equal protection clause of the constitution, which requires that all citizens be treated equally by their government. The law has also added protections to employees because of genetic information (discussed further later in this document).

While at-will employment is still in effect, many municipal employees belong to a “protected class.” What this means is that you must very carefully follow strict and consistent procedures when handling employee personnel matters. It is against the law to violate an employee’s civil rights. Federal and state laws prohibit discrimination. It is important to understand three very common types of discrimination and how you might be guilty of employee discrimination. They are disparate treatment, disparate impact and retaliation.

Disparate Treatment is differential treatment of employees or applicants based directly on the person’s protected class status. In other words, you deliberately treated someone adversely because the employee or applicant was a minority, woman, veteran, etc. This would be a flagrant violation of the law.

Disparate Impact does not involve intent. However, it is the result of an employee action or policy that is not unlawful on its face, but adversely affects one or more classes of employees differently than other classes of employees. Cities may have what they think is a neutral policy that was evenly applied but has a statistically significant adverse impact on a protected class. For instance, a city policy that says all police officers must be six (6) feet tall and weigh 175 pounds could be evenly applied, but it would have a statistically adverse impact on Asian Americans and women and thus be potentially discriminatory.

Defending disparate impact cases can be difficult because the burden of proof is on the employer (city) to prove that the city’s actions or policies were a “business necessity” or essential for safety or efficiency. The city, in all likelihood, will have to prove that no “alternative non-discriminatory practice with a lesser impact” can achieve the same required business results.

Arkansas remains a true at-will employment state. Public employees can be terminated at any time for any reason or no reason at all. (Note: civil service employees have a series of procedural mechanisms required by state statute for any adverse employment action.) An at-will clause that clarifies the terms and conditions of employment to an employee and informs them that there is no expected or implied employment contract is one important protection that is available to cities. Therefore, it is critical that language that could be interpreted as granting “property interests” be eliminated from personnel manuals.
Statements of implied employment security such as “permanent employee” or “You will have a job here as long as you perform well” should not be a part of any municipal personnel handbook. Further, all statements that employment can be terminated for “cause” or “just cause,” as well as employment contracts for time, must be eliminated if your city’s at-will status is to remain in effect.

Do not assume that at-will employment status means that you can violate an employee’s civil rights. **Discrimination is against the law.** Keep in mind that when dealing with employees in a “protected class” you must be sensitive to the issues of equality and fairness. If you intend to fire a member of a “protected class,” take extra care to make sure that the reason for his or her discharge has been applied evenly and fairly to all employees. If, for example, you intend to fire a member of a “protected class” for driving a city vehicle while under the influence of alcohol, but recently gave only a warning to a white male for the same action, then chances are the discharge will be considered discriminatory.

**Retaliation** occurs when an employer takes adverse action against an employee for the employee’s exercise of rights under the law. This often occurs when an employee complains to a federal or state agency about discrimination or some other violation (such as wage and hour issues, for example). Even if the original complaint is found to be untrue, it is still unlawful to retaliate against the employee for making it. It is not uncommon for employers to be found innocent of the discrimination but liable for retaliating.

**Pre-employment Liability**

One of the major tasks for every city is the recruitment and selection of qualified applicants. These areas are especially affected by anti-discrimination laws. The anti-discrimination statutes do not specifically state what type of recruitment or selection process must be used, so we must look to court decisions, policies and agency guidelines for direction. This chapter is designed to alert elected officials and supervisors to the requirements (in the selection process) of federal and state anti-discrimination laws. Many illustrations are included in this chapter to provide examples of what we consider legally viable forms.

**Recruitment**

The recruitment process is the preliminary step to the selection procedure.

Recruitment is a two-step process. First, the city must announce a job opening to a labor market area that contains applicants capable of responding. Second, those people capable of responding must become aware of, and be encouraged to answer, the announcement.

Recruitment procedures that list all new job openings with state employment agencies, advertisements placed in local papers, and with local radio stations that have an adequate minority, female, and disabled audience should withstand EEOC challenges. Therefore, cities are advised to advertise for all new job openings with the “protected class” audience in mind.

Sample Job Notice Forms can be found in Appendix B.

**The Application Process**

The application form is an important document from which hiring decisions are made. A poorly written, outdated, illegal application will present potential discrimination problems and can form the basis for damaging lawsuits. If the application form has a disparate impact upon the hiring process, then it will be considered wrongful and probably will be challenged.

Unstructured pre-employment inquiries present the greatest exposure to liability in the selection process. Unless such inquiries have a purpose, the regulatory agencies or the courts may require the city
to show that no discriminatory purpose exists. The absence of a business purpose is taken as discrimina-
tory intent. Specific areas where questions may lead to liability include: arrests and conviction, age, height
and weight, marital status, physical characteristics, race, sex, religion, disabilities, etc.

The Application Form

After your city implements a personnel system and adopts the policies and procedures in the
employees’ handbook, you should analyze the city’s application form.

The most important element of this review is your determining whether the application form contains
job-related questions. The applicant should not be requested to answer questions that are not job-related.
Determine the purpose of each question and how the information will be used. If there is a discrimina-
tory purpose for any question, then business necessity must be shown.

Sample Application Form is in Appendix B.

Pre-employment Testing

If the results of a pre-employment test adversely impact a protected class the test may be considered
discriminatory even if there is no wrongful intent on your part. If you can prove that the test is job-related
or show statistical proof that success on the test indicates success on the job, then the chances are that the
test will not be considered discriminatory regardless of the failure rate. A good example of a valid pre-em-
ployment test is a typing test for prospective secretaries. An English language proficiency test for motor
grader operator job applicants would likely be viewed as problematic and potentially discriminatory.

The Interview/Selection Process

The advent of employment lawsuits has caused changes in the selection of applicants for many
organizations. The key new element is that the evaluation of the applicant must be objective. If the selec-
tion procedure is to fulfill its major objective of hiring qualified applicants, it is necessary to establish
appropriate job specifications taken from well-written job descriptions. The interview questions should be
structured from the job descriptions. Under anti-discrimination laws, the selection procedure is subject to
the EEOC Employment Guidelines, enforcement agencies and scrutiny of the courts. Selection procedures
must be modified to eliminate exposure, but still be effective in selection of the best qualified applicant.

The minimum criteria for pre-screening applicants should include: (1) completed application, (2)
employment eligibility verification (as required by federal law), (3) criminal background checks, (4) post-
offer medical examinations when job-related, and (5) personal interview.

As the interviewer, you should also be concerned about lawful and unlawful inquiries during the ap-
plication and interview process. Some selection procedures could be alleged to cause adverse impacts such
as tests, including lifting requirements, paper tests, and honesty tests, and employee referrals for hiring,
high school diploma requirements, height/weight thresholds, interviews, or criminal record inquiries.

Recommended interview guidelines can be found in Appendix B.
Discriminatory Hiring Practices: What to Avoid

Listed below are some common practices that sometimes lead to trouble with EEOC and the courts.

Recruiting

- Failure to consider the local labor market area and failure to consider organizations representing a protected class when announcing and advertising a job opening.
- Failure to follow the city’s own hiring and promoting guidelines.
- Failure to consider recent applicant files when consideration was promised.
- The use of sex, age, disability, and other non-job-related language (“pretty,” “young,” “whole-some”) in job announcements and job specifications.

Application and Resumé Review

- The use of age, sex, and/or disability-related questions on the application.
- Inconsistent handling of resumés/applications (i.e., background checks for minority female applicants only).
- Failure to ask for job-related knowledge, skills, and ability functions on job application forms.

Interviewing

- Failure to train interviewers on legal interview methods and subjects. Interviews should be “structured.”
- The asking of questions that are not job-related (“Do you have any children?” “Are you married?” “What does your spouse do?”).
- The use of biased language (“girl,” “honey,” “boy”) are considered offensive and could be evidence of discriminatory practice.
- Inconsistent standards among interviews. (Those in a protected class are asked questions not asked of others.)

Selection Decisions

1) Failure to objectively evaluate all applicants without regard to race, color, religion, sex, national origin, age, marital or veteran status, political affiliation, disability status, or any other protected status.

2) Failure to be flexible in offering or providing reasonable accommodations for disabled applicants.

3) Failure to screen or evaluate every applicant by the same structured criteria.
CHAPTER THREE

The Importance of Documentation

Administering Disciplinary Action

Warnings and Suspensions

Suggestions on How to Terminate an Employee

Reducing the Risk of a Termination Lawsuit

Suggestions for Achieving Internal Consistency

Reducing the Risk for Discrimination Lawsuits
The Importance of Documentation and Discipline

Discipline in any city organization is necessary to keep the city running efficiently. Although the word discipline may bring with it many negative connotations, swift, effective, and fair discipline can be very constructive. Numerous concerns including the possibility of decreased morale and increased liability make the importance of proper discipline imperative. However, the most minor infraction or the most serious offense that requires any type of disciplinary action must be approached with care.

Accurate, properly maintained documentation is one of the most important aspects of discipline. Documentation consists of your writing down events in detail, then maintaining those written records, as well as updating the information as necessary. “Documentation” usually refers to a written record (most often in a memo form) of important facts in a person’s employment history. It becomes part of the employee’s personnel file.

One reason to document is cities may need proof of the logic and equity of their personnel decisions in order to substantiate their actions. Such proof may be necessary in the event of a complaint or legal action of bias filed under anti-discrimination laws or to avoid unwarranted unemployment insurance charges. Cities can improve the effectiveness of their documentation by following these guidelines:

- Cities should promptly follow important personnel action with documentation while memories are fresh. A good rule of thumb is, “If it’s worth remembering, it’s worth writing down.”
- Don’t postpone documentation merely because of insufficient time to create a perfect memo. Facts are more important than grammar, punctuation or sentence structure. Handwritten memos dated and signed will suffice if the facts are accurate. These are contemporaneous notes and they document the accuracy of the facts the city administration uses to support its actions.
- Ignore minor issues and focus on important incidents and behaviors that reflect significantly on employee job performance and conduct.
- Establish an internal system to check for consistency of action between supervisors of various departments. A simple idea that works: a disciplinary action log maintained by the personnel director or a regular meeting.
- Focus on job-related standards and behaviors. Stick with facts. For example, you may record chronic lateness, but don’t record opinions about personal characteristics that may cause the employee to be frequently late.
- Get the employee’s side of the story on record. This helps to demonstrate your concern. It also reduces risk that the employee’s story will change later.
- Avoid the risk that documentation will create the impression of retaliation. Some forms of retaliation, where the employee’s actions are directly or indirectly protected by statute or public policy, can lead to expensive consequences for the city. Let the memo reflect your good faith attempts to salvage the employee. Seldom does “building a case” against an employee create helpful documentation since such a process reflects a pre-determined decision to discharge the employee.
- When initiating a written documentation practice for the first time (or beginning a new practice following a period of laxity), take action to bridge past warnings. In the first written warning, make reference to past oral warnings issued.

REMEMBER: Jurors can’t take a transcript of court testimony into the deliberation room, but they can take your documentation.
Get the Employee’s Side of the Story

In those instances when problems develop in the performance or behavior of an employee, we advise cities to carefully listen to, and document, the employee’s side of the issue. This practice has two objectives, one behavioral and one strategic.

The behavioral objective is to take every opportunity to understand the employee and the reasons he performed or behaved as he did. Thus, chances are improved for the city administration to help effect a positive change.

The strategic objective is to create an accurate historical record of the facts in the situation. This increases the likelihood that management will act on the basis of the best information available.

Additionally, such documentation greatly reduces the risk that the employee can subsequently create new “facts” in the situation to help support his position. In some cases, imaginative rethinking such as this has taken place in an attorney’s office, months after a discharge took place.

Administering Disciplinary Action

As you conduct progressive discipline, the chances of reconciling the problem and improving employee performance grow fainter. Use discipline effectively: it is important to match the disciplinary action with the behavior and/or incident; some actions may require only a verbal warning, while others may necessitate suspension upon first offense.

There are three (3) criteria to consider in deciding where to begin the process of progressive discipline:

- The severity of the offense
- The employee’s past record—both positive and negative
- The length of time the employee has spent in the city’s service

With these criteria in mind, choose the disciplinary action that seems best suited to the incident, and implement the action, according to the following steps:

Step 1. Briefly describe the facts of the incident. Be careful at this stage not to use judgmental language. Instead, state the facts as you see them, emphasizing that your purpose is to solve the problem or help the employee to improve his/her performance. For example, say, “Joe, I’d like to talk to you about something that concerns me. Yesterday, I noticed you left work an hour early. What happened?”

Step 2. Listen to the employee’s side of the story. Be sure to listen carefully and to paraphrase what you hear. By listening, you can show the employee that you are open to his/her perspective, and you can defuse any defensiveness he/she might feel. Make sure that you and the employee agree about the most important facts in the incident (what actually happened) before proceeding to the next step. It’s also helpful to ask the employee if he/she feels it is a problem. Until he/she agrees it’s a problem, you can’t reach a mutual decision.

Step 3. Give your point of view about the problem. The disciplinary process can become difficult at this point, particularly if you feel that further disciplinary action is required. Listen to the employee’s reaction, and try to find at least a few points on which you can agree. Tell the employee you’d like to share your point of view—why it is of concern to you. Explain how his/her performance has impacted others and why it matters. Remember not to lecture; you are sharing information and perceptions. Watch carefully for his/her defensiveness. When you see it, go back to Step 2 and paraphrase.
Step 4. Commit yourself to a problem-solving approach. Avoid judgment or blame whenever possible; instead, try to work with the employee to solve the problem at hand. You might ask, “What can we do to prevent incidents like this in the future?” Ask the employee for his/her ideas and give each idea fair consideration.

Step 5. Acquire the employee’s commitment to improve performance. Once you have worked through the problem, state your expectations clearly and request the employee’s cooperation, providing specific objectives and time frames. In response to your request for commitment, you may receive any one of the following:

- A promise to meet your expectations. If you acquire a promise, be sure to monitor progress toward established goals.
- A counter-offer regarding performance. You will have to negotiate with the employee to strike an agreeable compromise.
- A promise to consider your expectations and respond later. If an employee wants to think about the choices you have provided, make sure you establish a time to meet and discuss the issue again.
- A refusal to meet your expectations. In some cases, employees may say “yes” to your expectations when they actually mean “no.” Be sure you understand what their real position is. If the employee’s refusal is outright, acknowledge that refusal and indicate what the consequences may be.

There are a number of common problems that city administrations may encounter, and, for each situation, there are different considerations and appropriate actions.

On the following pages we discuss many common personnel problems facing municipal officials and suggest ways to deal with these problems. Two of the most common personnel problems are:

- Warnings and Suspensions (Helpful Hints)
- How to Terminate an Employee

**WARNINGS AND SUSPENSIONS**

In today’s legal environment, a well-documented file of written warnings may help the city avoid a wrongful discharge lawsuit. Several key points should be considered when preparing a written warning to an employee. Key points to remember include:

1) Provide detailed descriptions, dates (i.e., who, what, when and where) and any other facts that will help employees precisely comprehend the problem. Be specific with examples of shortcomings and infractions.

2) Give employees the chance to explain their actions and to describe the causes, including your performance as a supervisor. Listen and make sure you take into account their version.

3) In discipline, as in every other aspect of supervision, you should deal with your employees in a mature fashion. Avoid condescension, lecturing, and scolding; and above all, do not lose your temper. Show your employees respect.

4) If you are asking for improved performance, make sure employees understand what benefits they can expect as a result of improvement and what risks they run if their performance remains unchanged. These consequences should be clear and specific.
5) Employees often need extra coaching and guidance in order to improve their performance. Be sure to offer this assistance to help employees meet expectations. Remember that you must work with employees to help them meet city expectations.

6) It is good to remember that positive reinforcement is always more effective than negative. Note all improvements in employee performance and encourage continued efforts to meet expectations.

7) One-time performance problems can disappear for good if you deal with them in a positive manner and leave them behind. Be careful you do not hold a grudge against an employee simply because he/she has demonstrated a performance problem in the past. As much as possible, start with a “clean slate” after corrective action has been initiated.

Suspensions

There are usually two types of suspensions: investigative and disciplinary.

1) Investigative—Allows you to remove the employee from the workplace (with pay) for a given period of time (usually no more than five days) in order to investigate the circumstances surrounding a given incident.

2) Disciplinary Suspension—Allows you to remove the employee from the workplace (without pay) as a punishment for a given action or behavior.

Suggestions on How to Terminate an Employee

Discharging an employee is a last resort measure. Caution is urged to avoid “wrongful discharge” lawsuits. City employees should ask themselves if any of the following factors influenced their decision to discharge the employee:

- Race, color, sex, national origin, genetic background
- Religion
- Pregnancy
- Age (above 40)
- Physical or mental disability
- Military or national guard duty and veteran status
- Political activity or opinion
- Involvement with workers’ compensation proceedings
- Whistle blowing (reporting violations of law to a government agency)
- Retaliation
- Speaking on matters of public concern or other exercise of constitutional or legal rights.
- Unequal treatment under the law without a rational basis

Terminating an employee for any of the previous reasons or being influenced by the previous reasons will likely guarantee a successful wrongful termination lawsuit. Please remember to limit your decision to terminate an employee only to business-related reasons (i.e., absenteeism, rule violations, insubordination, safety violations, etc.).

If the employee is a member of a protected class (minority, female, disabled, over 40, etc.), take extra care to make sure the reason for his/her discharge has been applied evenly and fairly to all employees.
Be Cautious in These Areas:

- Obtain advice of your city attorney when the possibility of a discharge looms. The discussion should cover reasons, record, uniform treatment and separation terms and should be held before a decision is made.
- Assume that the employee being discharged has probably seen a lawyer.
- The way you handle the discharge must be just as defensible as the reasons for the discharge. Give thought to ways in which you can guard against unnecessary emotional conflict and bolster the humanistic elements of the episode.
- On-the-spot discharges are extremely dangerous. Prohibit them in your policy and substitute “suspension-pending investigation.”
- Transferring employees from department to department who manifest behavioral problems to give the employee “another chance.” This seldom works.

Before the Discharge Interview: Be certain you’ve checked every possible angle. Be certain you’ll encounter no surprises. Are you certain you have heard the employee’s entire side of the issue?

The Discharge Interview—Two Parts

Part One: The Discharge Statement

Come directly to the point.

Don’t argue.

Give all the real reasons, but don’t throw in each and every shortcoming that comes to mind (a tendency among ill-prepared managers). Provide only the reasons you can defend. If you’re not honest when you tell the employee, it will be difficult to convince a jury you’re being honest.

Part Two: Future Events

This includes such things as unemployment insurance, out-placement services (if provided), Consolidated Omnibus Budget Reconciliation Act (COBRA) rights, office support (if provided), etc.

Following the Discharge

What to tell other employees. Limit communications about the event to that which is absolutely necessary to meet reasonable business purposes. Never attempt to make an “example” out of the discharged employee.

Give the person an exit interview. The discharged employee should be given an opportunity to “vent” with a management person of rank. Management’s attitude should be understanding but not apologetic.

A sample form of a mayor/manager’s termination checklist is in Appendix B.
Reducing the Risk of a Termination Lawsuit

Discuss these ideas with your city attorney, in order to build the best policy guidelines. Remember:

1) Employees should be given the opportunity to avail themselves of personnel policies created for their benefit.

2) Audit and update job descriptions describing essential job functions and ensure that attendance requirements are included.

3) Establish clear, written behavioral standards. Every employee must know that infractions can lead to discipline and discharge.

4) If discipline is necessary, deal with the worst cases first.

5) Use a disciplinary system, including warnings, chances to be heard, and possibly disciplinary suspensions.

6) Document each step of the disciplinary process.

7) Investigate the facts before you act. Give the employee an opportunity to explain his/her side of the issue.

8) Be consistent. Like cases should be treated alike.

9) Before taking action, review the employee’s personnel file. Ask yourself if it would look like “fair dealing” to a regulatory official, jury, or labor arbitrator.

10) If you must fire someone, consult your city attorney at the earliest opportunity.

11) Conduct discharge interviews and exit procedures in a sensitive, humane, and considerate manner.

12) Restrict knowledge of the reasons for discharge to those with a clear business need to know.

13) Adopt a policy of simply confirming information when you are asked for references.

14) Conduct exit interviews upon all resignations or discharges.

15) Develop and implement a strong anti-retaliation policy and promptly investigate all claims of retaliation.

16) Consider pursuing all unjustified unemployment insurance claims with the assistance of legal counsel.

17) Obtain the employee’s signature on an “at-will” agreement on occasion of significant transactions in the employee’s history, where employment status is being redefined.

18) If the employee is not at-will, you must take the appropriate steps to comply with federal due process requirements. Consult the city attorney before taking any action.
Suggestions for Achieving Internal Consistency

Consistent action in addressing employee personnel matters is very important.

1) It decreases the likelihood of a charge of disparate treatment.

2) It strengthens the administration’s will to act when tough decisions are called for:
   a. The administration often becomes extra sensitive in dealing with an individual from a protected class when internal consistency is absent. A past record of internal consistency enables the city to act, even though timing may not be perfect.
   b. Helps avoid retaliation charges.

Internal Consistency Helps to:

- Avoid compromises to the employer’s defense against future charges. Failure to achieve internal consistency in personnel decisions is tantamount to building a case against yourself.

Internal Consistency Is Measured in Three Dimensions

1) From manager to manager.

2) Over the course of time.

3) In the execution of announced policy, the city should carry out policies consistent with its publication (oral or written). Where published standards have been allowed to slip, the city cannot rely upon published policy.

What Are the Reasons That a Lack of Internal Consistency is Not Easily Remedied?

1) Failure of human resources management to make a coherent case.

2) Old habits.

3) Department heads are often granted “local autonomy” over established personnel decisions.

4) Favoritism.

5) The employer’s fear of bureaucracy.

Three Exceptions to an Absolute Requirement of Internal Consistency

1) Reasonable accommodation required by disability and religion protection.

2) Consistency blind to compelling need for exception on behalf of employee or employer.

3) Change in policy to meet future business.
How to Achieve Internal Consistency

1) Reduce your policies to writing only if you intend to follow them. Keep them simple.
2) Conduct management meetings/training.
3) Use a disciplinary action log to track past administrative practices.
4) Provide for advance notice of specified actions.
5) Use this employee performance appraisal criterion for supervisors: “Carries out company policies as required, including employee performance appraisal and employee disciplinary action.”

Reducing the Risks for Discrimination Lawsuits

To help make sure that your city government does not knowingly discriminate against employees, take the following precautionary measures:

- Consult your city attorney prior to any action you take that might result in legal action.
- Any changes you make to the Employee Handbook must be approved by the city council and communicated to the employees. You should require your employees to sign a form acknowledging they understand new changes.
- Job advertisements should be worded very carefully to avoid any references to sex, physical ability, age or race. For example, an advertisement stating “young men needed for physical labor” could be evidence of gender or age discrimination.
- Indicate on the application that the job is an employment-at-will position and at every other step of the hiring process where it is practical. Courts have ruled that an implied contract exists unless documents and subsequent action clearly inform the employee that a property interest does not exist and that the position is subject to termination.
- Anything said during a job interview, even in casual conversation, may be taken as an implied contract. If an interview makes unrealistic promises to an applicant who is hired, then the applicant discovers that the promises will not be kept, a court may order that the promise be kept.
- During an interview, do not ask any questions related to age, disability, marital status, or religious affiliation, even casually. Although such questions probably have no bearing on whether the person is hired, they could be used as a basis for a lawsuit if the person is not hired.
- When making a job offer, either orally or in writing, do not mention job duration unless the position is definitely temporary, such as a lifeguard job during the summer. Even references to “permanent employment” could be construed as an implied contract.
- If your city government has an employee handbook or policy manual, make sure that all elected and appointed officials follow the rules, especially sections that define discipline and termination procedures. A manual can consist of two pages of rules stapled together, but it can cause problems if you do not follow it.
• Job descriptions should be used to establish minimum performance standards for each position. If employees do not meet the standards, the job description can be used to support dismissal. However, if the standard is met, it will be difficult to fire an employee for poor performance. Written employee evaluations can be your best defense, or worst enemy. A regular evaluation procedure is effective for judging job performance, but make sure the evaluations are fair and accurate. You may not be able to justify firing a worker for poor performance if all his or her evaluations have been excellent.

• Good documentation is crucial. Make sure that elected or appointed officials write down all disciplinary actions and examples of poor performance. This includes all verbal reprimands, instructions and criticism. Good performance should be documented also.

• Ask your city attorney to review all application forms, employee handbooks, and policy manuals to detect any discriminatory wording.
Chapter Four

Unlawful Harassment

Sexual Harassment

Insubordination

Absenteeism and Tardiness

Negligence/Carelessness

The Drug-Free Workplace Act

Drugs, Drug Testing, and Alcohol

A Checklist for Implementing a Drug and Alcohol Policy

Dealing with an Intoxicated Employee

Complying with the ADA

Family Medical Leave Act
Unlawful Harassment

Harassment is any annoying, unwanted persistent act or actions that single out an employee, over that employee’s objection to his or her detriment, because of that person’s membership in a protected class such as race, sex, religion, national origin, age (over 40), or disability. Harassment may include, but is not limited to the following actions:

1) Verbal abuse or ridicule;
2) Interference with an employee’s work;
3) Displaying or distributing sexually offensive, racist, or other derogatory materials;
4) Discriminating against any employee in work assignments or job-related training because of one of the above-referenced bases;
5) Intentional physical contact with either gender specific portions of a person’s body or that person’s private parts;
6) Making offensive sexual, racial, or other derogatory hints or impressions; and/or
7) Demanding favors (sexual or otherwise), explicitly, as a condition of employment, promotion, transfer, or any other term or condition of employment.

It is every employee’s and official’s responsibility to ensure that his or her conduct does not include or imply harassment in any form. If, however, harassment or suspected harassment has or is taking place:

1) An employee should report harassment or suspected harassment immediately to the department head. If the department head is the alleged harasser, then the complaint should be reported to the supervisor in the chain of command. This complaint should be made in writing.
2) Anytime an employee has knowledge of harassment the employee should inform the department head in writing.
3) Each complaint must be fully investigated, and a determination of the facts and an appropriate response made on a case-by-case basis.

Sexual Harassment

A workplace free from the effects of sex discrimination is a right guaranteed by law to American workers. Sexual harassment can occur in two separate ways, both of which are recognized within the EEOC guidelines. One form is *quid pro quo* in which an employee claims that sexual advances have been made and rejected and she has suffered some employment consequences (e.g., she has been fired, not promoted, demoted or lost her job). The other form is hostile work environment, where the sexual conduct falls short of causing the employee a tangible job detriment, but still creates an intimidating or hostile or offensive work environment, judged from the perspective of a reasonable person. Pay inequity or refusing to promote someone because of his or her sex are forms of sex discrimination. While victims of sexual harassment are typically women, nearly 15 percent of men will be sexually harassed in their careers. Though significant, this percentage appears slight, however, when compared to the number of women who are affected. Between 42 and 90 percent of women have experienced sexual harassment in the workplace.

Sexual harassment is debilitating, intimidating, and demoralizing for its victims, regardless of whether they are men or women. The problems which victims experience as a result of sexual harassment affect their personal lives, their interpersonal relationships and their ability to perform their jobs. Studies have shown that the personal effects on victims of sexual harassment include interference with clear
thinking, problem-solving ability, and judgment. Some victims develop a confused mental condition and the inability to concentrate. Others experience extreme mood swings, eating disorders, and sleep disturbances; sexual harassment can also produce depression and even self-destructive behavior. Additionally, the workplace effects for victims of sexual harassment include increased absenteeism and tardiness, as well as uncooperative attitudes. Some victims become accident-prone. Others exhibit marked decreases in productivity and sometimes dramatic changes in behavior.

The law provides stiff penalties and a growing willingness to make employees who sexually harass others answer for their behavior in a court of law. An employer will always be responsible for harassment by a supervisor, if that harassment culminated in a tangible employment action. According to the EEOC, a “tangible employment action” means “a significant change in employment action” such as hiring, firing, reassignment, etc. If the harassment does not result in a tangible employment action, then the employer can be found not liable, if they prove they (a) exercised “reasonable care” to prevent the harassment, and (b) the employee unreasonably failed to complain to management or to avoid harm otherwise. Courts are now likely to make managers and employees, rather than the city, pay for their own misdeeds.

Sexual harassment, simply stated, is any unwelcome sexual advances, requests for sexual favors or verbal or physical conduct of a sexual nature. These varying forms of sexual harassment are not always evident or intentional and can include:

- Comments of a sexual nature in the workplace.
- Dirty or vulgar jokes told in mixed company.
- Wall calendars, magazines, or other materials depicting full or partial nudity.
- Repeated requests for dates when it is clear the other person does not wish to be asked.
- Unwanted touching.

**EEOC Guidelines**

After the courts held sexual harassment to be a violation of Title VII, the Equal Employment Opportunity Commission (EEOC) issued guidelines on sexual harassment. These guidelines apply on a case-by-case basis to sexual advances made inside or outside of the working environment during social or business occasions.

The EEOC’s Guidelines are:

- Harassment on the basis of sex is a violation of Title VII, Section 703 of the Civil Rights Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
  
  a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment.
  
  b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
  
  c. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.

- In determining whether alleged conduct constitutes sexual harassment, the EEOC will look at the totality of the circumstances—such as the nature of the sexual advances and the content in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.
• The city is responsible for its acts and those of its supervisory, managerial, and executive employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the city and regardless of whether the city knew or should have known of their occurrence. The EEOC will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

• With respect to conduct between fellow employees, a city is responsible for acts of sexual harassment in the workplace where the city (or its supervisory, managerial and executive employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

• The city may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the city (or its supervisory, managerial and executive employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the EEOC will consider the extent of the city’s control and any other legal responsibility that the city may have with respect to the conduct of such non-employees.

• Prevention is the best tool for the elimination of sexual harassment. The city should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, developing methods to sensitize all concerned, and having a written harassment policy.

• Other related practices: Where employment opportunities or benefits are granted because of an individual’s submission to the employer’s requests for sexual favors, the city may be held liable for unlawful sex discrimination against other persons who were qualified for but denied the employment opportunity or benefit.

**What the Courts Have Said**

Since 1980 when the EEOC issued its guidelines on sexual harassment, hundreds of cases involving these problems have been tried nationwide and they have provided us with important and helpful guidance on the subject. The outcomes of these cases tell us what our ever-changing society thinks sexual harassment is.

Requests for sexual favors bring to mind requests for sexual intercourse in return for some work-related benefit. The idea of the casting couch fits here. But the cases tell us that sexual favors include requests for sexual contact other than intercourse. They include, for example, repeated requests for dates or other social events.

The cases tell us that verbal conduct of a sexual nature includes such acts as comments about a woman’s body or physical appearance; her clothing or sex life; wolf whistles, and sexual jokes and sexual innuendos. They also include comments about the perpetrator’s sex life and sexual remarks about women (not necessarily the victim).

Physical conduct of a sexual nature includes exposing oneself, leering, gestures of a sexual nature, attempting to look down a woman’s dress or blouse, displays of nude pictures, touching or adjusting the victim’s clothes, unwanted kisses and hugs.
Investigating Claims of Sexual Harassment

When an employee tells you that he or she has been harassed sexually by another employee, you have a legal duty to investigate the complaint. Failure to investigate the incident and to take prompt and effective action against the harasser could exacerbate your liability for the harassment by making it appear that the city sanctions or ignores such activity. On the other hand, an overzealous or mishandled investigation may expose the city to further liability for libel, slander, invasion of privacy, and wrongful discharge.

- Courts agree that certain rules apply to every sexual harassment investigation. They are:
  - Act promptly—Don’t assume “time will heal all wounds.” By failing to act with dispatch, you may give up the defense that you vigorously enforced your sexual harassment policies.
  - Take all complaints seriously—Embarrassment or fear of reprisal often causes a complainant to understate the incident.
  - Document the investigation—Attempt to record or memorialize all interviews. Cities have successfully used evidence gathered during their investigation to support their action or inaction against the accused.
  - Conduct interviews in private—if bystanders overhear, parties may claim you negligently publicized the incident and invaded their privacy.
  - Maintain confidentiality—you may face liability if you over-publicize.
  - Allow the accused the opportunity to rebut the charges—Tell him or her the allegations and the results of your investigation, and let him or her respond on his or her own behalf.

To assess the credibility of the complainant, consider the following:

- How did complainant react to the incident? If he or she was not too upset, the complaint may be trivial. But the apparent mildness of his or her reaction may be attributable to embarrassment or fear.

- Did complainant willingly participate in the incident? Courts often discount harassment claims where there is evidence that the victim willingly participated in the horseplay or banter to which he or she now objects.

- What is the character of the accused? If the accused is a womanizer, or has been the subject of prior complaints, it bolsters this complainant’s credibility.

Managing sexual harassment problems after they occur requires sensitivity, courage, and common sense. A proper investigation may serve to dissuade a complainant from bringing suit and may, in addition, discourage future harassment in your workplace.

A sample harassment policy that should be adopted by all cities can be found in Appendix B.
**Handling Insubordination**

As a general rule, the employee is obligated to follow business and job-related instructions of the city. Outright refusal or excessive delay in his/her carrying out instructions may be considered insubordination. Insubordination could include flagrant lack of cooperation or willful refusal to work at a reasonable pace.

If a case of insubordination arises, make sure that:

- The supervisor’s instructions or orders were clear.
- The supervisor or other individual was authorized to give “orders,” “directions” or “instructions” and the employee understood that this individual was so authorized.
- The employee understood that the order was not just a mere suggestion or request.
- That there was a clear refusal to perform the task, not just a protest, discussion or disrespectful attitude manifested.

Other points to consider:

- Were other employees present when the incident transpired?
- Did the “order” require the employee to commit an unlawful act or place the employee in immediate danger?
- Was it unusual or unnecessary for this employee to be assigned this particular task?

If the employee offered justification for his or her action, was it reasonable (i.e., conflicting orders) and was it investigated? Generally, the city has a right to control on-the-job speech where intemperate speech causes:

- A detrimental effect on workforce morale, or a
- Loss of management (supervisory) control.

However, federal and some state laws and court cases provide certain exceptions:

- Under many circumstances, employees have a right to engage in social conversations in any language. Requiring proficiency in English, or “English Only,” in the workplace may violate Title VII’s national origin discrimination prohibition.
- Employees also have a right to complain about conditions of employment in which employees have rights (i.e., safety, sexual harassment, etc.).

Be sure to maintain well-publicized channels for employee complaints to be registered. The city can require employees to follow designated channels rather than select their own methods of complaint.
Reducing Absenteeism and Lateness

Here are several useful ideas to reduce attendance problems:

Establish and maintain standards. Enforce the standard at the exact level established. There should be a policy outlining your city’s standards on attendance and punctuality. This policy should be in your Employee Handbook.

Separate sick leave from attendance standards. Sick leave is an employee benefit, the sole purpose of which is to help employees deal financially with transient disabilities. Sick leave allowance is not a useful tool in measuring absences.

There should be a progressive counseling policy for violation of standards. Absenteeism and lateness must be dealt with as the occasion demands. Discipline must be applied uniformly and without discrimination.

Publicize your interest in good attendance and punctuality.

Strive for consistency:
- Over a period of time
- Within a department
- Between departments

Formulas for calculating disciplinary action for absence and lateness are often used. They usually don’t work. The reason? They are too rigid to take into account variables such as length of service, interval since last warning or related problems.

Consider providing incentives for employees to be at work on time. For example, give annual awards to the employees with the best records, etc.

Negligence / Carelessness

Consider these questions before disciplining a negligent employee:

- Was there a negligent act? (By what standards was the act considered to be negligent?)
- Were safety rules posted?
- Were employees instructed in the proper use of equipment?
- Did the employee have a past record of carelessness? (Were past infractions recorded and disciplined?)
- Was the negligence attributable solely to this employee or were other factors or employees involved?
- What was the result of the careless act? (Was anyone hurt? Seriously? Was property damaged?)
- Were there any other mitigating factors? (Was the employee ill? Had the employee worked a great deal of overtime?)
- Were employee’s excuses or justifications investigated?
Drug-free Workplace Act of 1988

The Drug-free Workplace Act (DFWA) of 1988 was enacted by Congress as part of the Drug Initiative Act of 1988. This act does apply to city government. The DFWA requires grantees of federal funds to develop and distribute policies that address drugs in the workplace.

The DFWA requires employers to inform employees that “the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited” in the workplace. Employers are further required to develop “drug-free awareness” programs. These programs are intended to educate employees on the dangers of drug abuse in the workplace, the employer’s policy concerning drugs, the availability of counseling and the penalties that apply for violations of the policy.

An example for a model of what a DFWA compliance policy should include to meet the “drug-free awareness” program requirement is in Appendix B.

The Omnibus Transportation Employee Testing Act of 1991

The Omnibus Transportation Employee Testing Act of 1991 requires alcohol and drug testing of safety-sensitive employees in the aviation, motor carrier, railroad and mass transit industries.

The Act applies to every person (driver) who operates a commercial motor vehicle (CMV) in interstate or intrastate commerce and is subject to the commercial driver’s license (CDL) requirements. A driver is any person who operates a commercial motor vehicle (CMV). This could include:

- Full-time regularly employed drivers;
- Casual, intermittent or occasional drivers;
- Leased and independent drivers; and
- Owners/operators.

A driver is considered your employee if your city has the ability to directly hire or terminate this person.

All city employees with a CDL fall under the requirements of this Act. The Act requires pre-employment drug testing, post-accident drug and alcohol testing, reasonable suspicion testing, random and return-to-duty and follow-up testing.

Employees must be properly notified and educated about the provisions of the Act. The city must provide employees with a written policy explaining the cities’ policies and procedures with regard to methods of complying with the Act. Municipalities must provide information on drug use and treatment resources to all their employees in safety-sensitive positions. All supervisors and officials of local government departments with safety-sensitive employees must attend at least two (2) hours of training on the signs and symptoms of drug and alcohol abuse.

“Ten steps to Compliance with the Omnibus Transportation Act of 1991” can be found in Appendix B.

The League’s Legal Defense Program acts as the Administrator of a statewide municipal consortium. This will allow Arkansas municipalities to pool resources, personnel and expenses. This should be of significant benefit to Arkansas municipalities who may lack the financial and organizational capabilities necessary to meet all of the requirements.

The Municipal Legal Defense Program contracts for laboratory testing services, training programs, specimen collection services and medical review of officer services. Furthermore, as the Administrator
of the statewide municipal consortium, the League will assist you with compliance by preparing sample personnel policies and a compliance resolution establishing your drug and alcohol testing requirements. The League will always be available to provide information, advice, and recommendations on compliance policies and procedures.

**Drug Testing for Non-CDL Employees**

As a result of the Omnibus Transportation Employee Testing Act of 1991 that requires drug and alcohol testing for all city employees with a commercial driver’s license, many cities feel compelled to test all their employees. However, the Fourth Amendment of the U.S. Constitution forbids random drug testing of certain employees who do not hold safety- or security-sensitive jobs. Further information may be obtained from the League’s drug testing publication available on the League’s website www.arml.org.

**Don’t Wait Until an Incident Occurs to Decide City Policy with Respect to Drug and Alcohol Testing**

If the city is going to engage in drug and alcohol testing, develop a policy and plan well in advance of any incident. The policy should be carefully developed, reviewed by the city attorney, and communicated to employees. Employees should consent both in advance and at the time of the incident to any testing. “Spur of the moment” decisions to subject an employee to drug or alcohol testing may expose the city to serious liability.

If the city does implement a testing policy, the city should work hard to make the testing policies as fair as possible. Once the policy is implemented, communicate the policy to employees, explaining the reasons for the policy’s implementation and the city’s emphasis on fairness. Explain what will happen if an employee is tested, and be open to answer any questions he/she has. Employees who feel that the city is trying to be fair are less likely to bring a lawsuit against the city.

**Dealing with an Intoxicated Employee**

The best advice for dealing with the intoxicated employee at work, as in the case of most employment situations, is for the city to keep in mind how their actions will appear to a jury if litigation is initiated. Cities will want their actions to appear reasonable; those actions should demonstrate both concern for workers’ safety and for the suspected individual. While it is impossible to anticipate every factual situation, the following tips will go a long way toward putting the employer in a good light if litigation ensues.

**Deal with the Situation in Private**

Do not confront the employee in the presence of his or her co-workers. Instead, calmly approach the employee and say something like, “I need to talk to you about something. Could you come with me, please?” If the employee refuses this reasonable request, such aberrant behavior may be evidence of intoxication and will justify an inquiry in front of others.

Whether the employee accompanies you to a private area or insists upon a public confrontation, do not accuse the employee of intoxication. Instead, ask the employee if he has been drinking or is under the influence of some drug. If the employee is in fact intoxicated, you will be surprised that he or she will, because of lowered inhibitions, often admit that fact. If the employee denies having consumed alcohol or drugs, describe the symptoms that led you to ask the question and ask the employee if there is any explanation for these symptoms. Assuming no satisfactory answer, advise the employee that you cannot permit him or her to continue working that day, and that he or she should report to the office the following day to discuss the matter further. Defer any decision on discipline.
Do Not Let the Employee Drive

If the employee is intoxicated, the city may have a duty to take all steps that are reasonable and prudent to prevent the employee from driving. Advise the employee that the city will drive him or her home, and insist that he or she not drive. Alternately, you may offer to pay for a taxicab or to call a relative or friend. If the employee insists on driving despite these offers, advise him or her that because of your concern for his well-being and that of others, you will have no choice except to call the authorities if he or she attempts to drive.

Physically restraining the employee may result in assault and false imprisonment claims by the employee. Accordingly, it is preferable to report this matter to the authorities. Any report should be factual.

The Medical Marijuana Amendment of 2016

Arkansas voters passed the Medical Marijuana Amendment which makes the regulated medical use of marijuana legal under Arkansas state law, while recognizing the drug remains illegal under federal law. The amendment establishes a system for growing, acquiring and distributing marijuana for medical purposes.

The amendment provides protection for qualified patients, caregivers, growers, providers and doctors from arrest, prosecution, penalty or discrimination under Arkansas law. It does not offer protection from federal law.

The amendment does not permit a person to possess, smoke, or otherwise engage in the use of marijuana in a public place. Act 593 of 2017 allows employers to establish and implement a drug-free workplace policy and allows employers to prevent employees from working under the influence of marijuana on employer premises or during employment hours.

Complying with the Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was signed by President George H.W. Bush on July 26, 1990. On September 25, 2008, President George W. Bush signed the ADA Amendments Act (ADAAA) as a response to a number of decisions by the Supreme Court. In basic terms the ADA will prohibit discrimination—in employment and in access to public services—based upon disability, much as Title VII forbids discrimination based upon race, color, religion, sex, and national origin.

The Act contains five (5) titles.

TITLE I deals with Employment and Hiring Practices. Cities of all sizes are prohibited from using any qualification standards, employment tests or other selection criteria that would screen out individuals with disabilities, unless the criteria are job related. Identifying essential job functions is critical for complying with the ADA because an individual's disability may be taken into consideration when making employment decision only if, even with reasonable accommodations, it prohibits performing essential job functions. Written job descriptions proposed prior to advertising or interviewing applicants will be accepted as evidence of which job skills are essential. Written job descriptions will play a significant role in determining whether an individual can perform the position held or desired with or without “reasonable accommodations.” Employment tests will also be considered discriminatory under ADA if they are designed and administered in a manner that prevents persons with disabilities from taking them.

The ADA does allow the city to require a medical examination, but only after a job offer has been made although it may be prior to the date the applicant is to begin work. The position may be offered to an applicant with the understanding that the job offer is predicted on the outcome of the medical test.
Such medical examinations may be required; only if all applicants for that job, regardless of disability, must take and pass them. Employees with disabilities must be offered the same insurance coverage offered to other employees.

TITLE II prohibits state and local governments from excluding a person with a disability from participating in public programs or denying benefits of public service. Individuals with disabilities have the same rights and privileges as all other members of the public with regard to recreation, youth or senior citizen programs, libraries, museums, voting, permits and licenses, utilities, public meetings, public celebrations, public transit, etc. This could require providing communication assistance for the hearing or visually impaired. In addition, the U.S. Court of Appeals for the 8th Circuit, which includes Arkansas, has held that Title II applies to disabled persons who are arrested. Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998). Thus, the police must have adequate facilities, for example, to transport a person who is confined to a wheelchair.

For more information see the League’s Americans with Disability Act Title II Compliance Guide available at www.arml.org/services/publications/publications-for-free.

TITLE III primarily addresses public accommodations offered by the private sector. However, subpart F of Title III establishes procedures for the certification of state and local building ordinances that meet or exceed the new construction and alteration requirements of the ADA. Certification will be made by the Assistant Attorney General Civil Rights (Department of Justice) upon application of a state or local government. Title III also mandates that cities and other public entities remove structural, architectural, and communication barriers in existing vehicles used for transportation if such removal is “readily available.” Alternative methods of providing the same service must be provided if removal of the barrier is not feasible.

TITLE IV guarantees that speech and hearing-impaired citizens will be provided with telephone services functionally equivalent to those offered to hearing individuals. This part of the act primarily affects the telecommunication industry.

TITLE V contains miscellaneous provisions which clarify several issues about the operation of the ADA in specific circumstances.

The provisions of the ADA will be clarified through regulations and through test cases in courts. It is important to note that the ADA made important changes to the definition of the term “disability” by rejecting the holding of several Supreme Court decisions in order to broaden the class of people who fall under the ADA’s protection. Persons claiming employment discrimination under the ADA may follow the same procedures and may receive the same remedies found in Title VII of the 1964 Civil Rights Act.

**Avoiding ADA Litigation**

Cities may reduce the likelihood of employment ADA litigation by taking the following steps:

1. **Update your Job Descriptions, Application Forms, and Interview Methods**

   The courts will consider job descriptions as evidence of “essential functions.” Job descriptions should precisely and accurately describe the essential functions of each job that each city employee performs. The ADA says you may not discriminate against a person with a disability in hiring if the person is otherwise qualified for the job. Job applications should ask only questions that are job related.

   An interviewer may ask about an applicant’s ability to perform a job, but the interviewer cannot inquire about disabilities or conduct tests that screen out people with difficulties. You may not ask questions about an applicant’s medical history or about addiction to alcohol or drugs.
2. **Actively Participate in the Interactive Process**

The Interactive Process is the process through which an employer and employee with a disability identify any reasonable accommodations that may be necessary. Both parties must work together in good faith. Through direct communication you should identify the essential functions of the job, determine what limitations interfere with the employee’s ability to adequately perform the essential functions of the job, and identify any accommodations and the reasonableness of those accommodations. Unreasonable job accommodations are those accommodations that would cause an undue hardship.


3. **Separate Medical Records from Personnel Records**

Collect and maintain all medical information obtained from medical examinations and inquiries on separate forms, in separate medical files and treat the information as confidential. The medical information cannot be kept in an employee’s general personnel file. Rather, a separate medical file must be maintained for all employees. Pre-employment medical examinations are prohibited under ADA, although a medical examination may be required once a conditional job offer has been extended. However, an employer may not refuse to hire the person based on the medical exam, except for a job-related reason that is justified by a business necessity.

4. **Designate an ADA Coordinator**

The coordinator should be a responsible employee who coordinates the city’s ADA compliance effort and investigates complaints. The name, office address, and telephone number of the ADA coordinators are public information. The U.S. Department of Justice requires cities with 50 or more employees to designate an ADA coordinator. The Arkansas Municipal League strongly recommends that all cities, regardless of size, designate coordinators.

5. **Post Public Notices**

All cities and towns must distribute information about their compliance efforts. Equal employment opportunity notices should be posted in conspicuous places and provided to employment agencies that assist sight-impaired and other disabled people. Publish nondiscrimination clauses on all employment-related documents, applications, and statements.

6. **Prepare a Self-Evaluation Plan**

The League recommends that each mayor appoint a self-evaluations committee to work with the ADA coordinator to propose a self-evaluation plan. All cities should have conducted a self-evaluation plan by January 26, 1993. A city’s plan should evaluate a city’s programs and services in light of equal opportunity and equal access. You should ask, do people with disabilities have the opportunity to enjoy the services and participate in programs that your city offers? The plan must be distributed for public comment, then retained for a year for cities with fewer than 50 employees and three years for cities with 50 or more employees. The League recommends that the evaluation be kept as a permanent record in the event it is needed to defend the city in litigation.

7. **Prepare a Transition Plan**

Mayors should appoint a committee to work with the ADA coordinator to prepare a transition plan. This is a must for cities with at least 50 employees. Committees should include individuals with disabilities. The plan was to be finalized by July 26, 1992. It identifies all structural changes needed in public facilities such as city hall, public playgrounds, swimming pools, library, walkways and public restrooms.
The transition plan should describe in detail methods and dates that will make the facilities accessible. The person responsible for implementing the plan must be named.

8. Adopt a Formal Grievance/Complaint Procedure

This is a must for cities with at least 50 employees. The procedure must provide prompt and equitable methods for resolving complaints alleging ADA violations. Each city’s grievance procedure must be adopted and published as soon as possible.

9. Purchase Tele-Typewriter telephones (TTYs) for Emergency Services

Cities must equip emergency systems to receive calls from TTYs and computer modems. The Justice Department encourages cities to provide TTYs where telephones are a major function of the department, such as city hall, city utility offices, and the public library.

10. Adopt a Compliance Resolution

After cities name their ADA coordinators, post public notices, start the self-evaluation, and transition plans, they should adopt a compliance resolution stating the city has reviewed all its employment policies, conducted a self-evaluation and transition plan, invited public comments, and established a grievance procedure.

11. Document Your Efforts

Documenting efforts demonstrates a city’s good faith effort to comply with the law and your concern for disabled people.

12. Equip Your Police Department to Handle Arrestees with Disabilities


For more information, see the League’s Americans with Disability Act Compliance Guide.

**The Family and Medical Leave Act of 1993**

This section provides a basic overview of the FMLA. For a more thorough review, see the League’s Family Medical Leave Act Guide.

FMLA requires cities to provide up to 12 weeks of unpaid, job-protected leave to “eligible” employees for certain family and medical reasons. The FMLA also allows an employee who is the nearest blood relative of an injured Armed Services member to take the 12 weeks of unpaid leave plus an additional 14 weeks, for a total of 26 weeks. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months and if there are at least 50 employees within 75 miles.

Cities with fewer than 50 employees are technically “covered employers” under the Act. As odd as it sounds, however, their employees are not eligible for family medical leave. The only practical is that even cities with fewer than 50 employees must post an FMLA notice explaining eligibility under the Act. There is a potential $110 fine for failing to post the notice.

**REASONS FOR TAKING LEAVE:** Unpaid leave must be granted for any of the following reasons:

- To care for the employee’s child after birth, or placement for adoption or foster care;
- To care for the employee’s spouse, son or daughter, or parent, who has a serious health condition;
- For a serious health condition that makes the employee unable to perform the employee’s job;
- For nearest blood relative to care for an injured service member that is seriously injured or ill in the line of active duty, up to 26 weeks; or
- For any qualifying exigency when the employee’s spouse, child or parent is on active duty or is notified of a call to active duty.
At the employee’s or employer’s option, certain kinds of paid leave may be substituted for unpaid leave.

ADVANCE NOTICE AND MEDICAL CERTIFICATION: The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.
- The employee ordinarily must provide 30 days’ advance notice when the leave is “foreseeable.”
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer’s expense) and a fitness for duty report to return to work.

JOB BENEFITS AND PROTECTION:
- For the duration of FMLA leave, the employer must maintain the employee’s health coverage under any “group health plan.”
- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee’s leave.

UNLAWFUL ACTS BY EMPLOYERS: FMLA makes it unlawful for any employer to:
- Interfere with, restrain, or deny the exercise of any right provided under FMLA; or
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

ENFORCEMENT:
- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any federal or state law prohibiting discrimination, or supersede any state or local law or collective bargaining agreement which provides greater family or medical leave rights.

On January 16, 2009, the Department of Labor amended the FMLA for the first time. Highlights of this amendment include:
- Changes to the military family leave, allowing for military caregiver leave and qualifying exigency leave;
- Clarification that an employee being placed on a “light duty” assignment does not mean the employee is on FMLA leave;
- Clarification on how to determine when something qualifies as a “serious health condition”;
- Changes to notice requirements, holding that employees needing FMLA leave must now follow the employer’s usual and customary call-in procedures for reporting an absence, absent unusual circumstances;
- Changes to the medical certification process, stating that an employee’s direct supervisor may never be the individual to call the health care representative for information on the employee’s serious health condition;
- Changes to the medical certification process allowing employers to require a new medical certification for each year, if an employee’s medical condition lasts longer than one year; and
- Changes to the fitness-for-duty certification process, allowing employers to require that a fitness-for-duty certification expressly address the employee’s ability to perform the essential functions of the job. Additionally, employers may now also require fitness-for-duty certification prior to an employee returning to work, in cases where reasonable safety concerns exist.
The Fair Labor Standards Act
“21 Things You Should Know”

All Employees

1. The minimum wage in Arkansas is $8.50 per hour for the year 2018. “Beginning January 1, 2019, every employer shall pay each of his or her employees wages at the rate of not less than nine dollars and twenty-five cents ($9.25) per hour, beginning January 1, 2020 the rate of not less than ten dollars ($10.00) per hour and beginning January 1, 2021 the rate of not less than eleven dollars ($11.00) per hour except as otherwise provided in this subchapter.” (A.C.A. § 11-4-210(a) (2)).

   Note: The federal minimum wage for covered, non-exempt employees is $7.25 per hour. However, states are entitled to set a higher minimum wage. Accordingly, the higher Arkansas wage rates are applicable.

2. Overtime or compensatory time must be paid at time and one-half of the employee’s regularly hourly rate (29 U.S.C. § 207(a)(1)). Even if the employee receives a salary, overtime or compensatory time must be granted unless the employee is exempt as explained below.

   Employers cannot avoid paying overtime or compensatory time by averaging hours over several workweeks. The FLSA requires that each workweek stand alone (29 C.F.R. § 778.104). (But see chart below for information on uniformed employee shifts).

3. If an employee volunteers to substitute shifts with another employee after first obtaining the employer’s approval and works more than the maximum hours for a given work period as a result of the switch, his employer is not responsible for paying the additional overtime (29 C.F.R. § 533.31(a)). The regulations state that this may occur “only if employees’ decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or ‘trade time’ with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.” (29 C.F.R. § 533.31(b)).

   Employers are not required to maintain a record of time traded and there is no specific period of time in which the shift must be paid back (see 29 C.F.R. § 533.31). Therefore, the employee’s paycheck for that period would not reflect the switch in additional hours or overtime pay (29 C.F.R. § 553.31).

4. Employees do not have to be paid for “on-call” time unless their activities are overly restricted (29 C.F.R. § 785.17). On-call time should not be counted as compensable unless the employee is required to remain at or near the employer’s premises or otherwise cannot use his or her time freely (29 C.F.R. § 785.17). Providing electronic pagers or cell phones to employees can solve many on-call time problems.

Exempt Employees

5. Elected municipal officials, their personal staffs, persons appointed by elected officials to serve on a policy making level, and legal advisors are considered exempt employees and are excluded from coverage under the Fair Labor Standards Act (29 C.F.R. § 553.11).

6. Trainees and students are not employees within the meaning of the Fair Labor Standards Act if they meet all six criteria below:
(1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;
(2) The training is for the benefit of the individual;
(3) The trainee does not displace regular employees, but is supervised by them;
(4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;
(5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and
(6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training (5 C.F.R. § 551.104).

7. Volunteers are not employees and an employee cannot volunteer to do the same work for the same public agency which he is being paid (29 C.F.R. §§ 553.100, 553.102).


9. Executive, administrative, and professional white-collar employees are exempt from both minimum wage and overtime provisions if they meet all the requirements specified for their job category. These are not the only exemptions, but are the most typical in Arkansas cities and towns.

Note: The salary rate was scheduled to increase from $455 per week to $913 per week, effective December 1, 2016. However, due to a court challenge and the change in administrations, as of this writing the existing salary rate of $455 is still in effect. The US Department of Labor is considering changes, which will likely occur in 2019. Please consult with your city attorney or League legal staff for updates.

a. Executive employees
(1) The employee must be compensated on a salary basis at a rate not less than $455 per week;
(2) The employee’s primary duty must be managing the enterprise in which the employee is employed or managing a customarily recognized department or subdivision of the enterprise;
(3) The employee must customarily and regularly direct the work of two or more other full-time employees or their equivalent; and
(4) The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight (29 C.F.R. § 541.100).

b. Administrative employee
(1) Compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging or other facilities;
(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance (29 C.F.R. § 541.200).

c. Professional employee
(a) The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act shall mean any employee:
(1) Compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging, or other facilities; and

(2) Whose primary duty is the performance of work:
   (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
   (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (29 C.F.R. § 541.300).

d. Computer Employee Exemption
   (a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.
   (b) The (a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging or other facilities, and the (a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:
      (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
      (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
      (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
      (4) A combination of the aforementioned duties, the performance of which requires the same level of skills (29 C.F.R. § 541.400).

10. Employees of amusement or recreational establishments are exempt from minimum wage and overtime if one of the following requirements is satisfied:
   (a) The establishment must not operate for more than seven months in any calendar year.
   (b) During the preceding calendar year, the establishment’s average receipts for any six months of that year must have been equal to or less than one-third of its average receipts for the other six months of that year (29 C.F.R. § 779.385).

Uniformed Employees-Police and Fire

11. Law enforcement officers in cities and towns with fewer than five (5) law enforcement officers, including the chief or marshal, are exempt from the overtime provisions (29 U.S.C. § 213(b) (20); 29 C.F.R. §§ 553.200, 553.211). To count as a law enforcement officer, the officer must be someone: (1) who is a uniformed or plain clothed member of a body of officers and subordinates
who are legally authorized to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics (29 C.F.R. § 553.211).

Volunteers are not considered “employees” for this purpose however. No distinction is made between part-time and full-time employees.

This means that if you have four (4) or fewer than four (4) law enforcement officers (not including radio operators), the city does not have to pay overtime. You must be sure your officers receive minimum wage for all hours worked in a work period.

12. Cities and towns with fewer than five (5) paid firefighters, including the chief (if paid), are exempt from paying overtime to those employees who meet the following definition: “Employee in fire protection activities” means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk (29 U.S.C. § 203(y); see also 29 C.F.R. § 553.210(a)).

You must be sure your paid firefighters (four or fewer) receive minimum wage for all hours on duty during the work period (see 29 U.S.C. § 213(b)(20); A.C.A. § 11-4-210(a)(2)).

13. Volunteer firefighters and auxiliary police officers are “volunteers” and are not treated as employees under the 1985 Amendments to the Fair Labor Standards Act (29 C.F.R. § 553.104(b)).

14. The FLSA provides a partial overtime exemption for law enforcement officers and firefighters who work a “work period” established by the city of no fewer than seven days and no more than twenty-eight days. The city can establish separate work periods for the police department and the fire department. If the city fails to establish a work period, 207(k) does not apply and a fire or police employee working over forty hours will accrue overtime compensation (29 C.F.R. § 553.230).

The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel, determining that law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171 and that fire department employees working in excess of 212 hours within
a 28-day period must also be compensated (29 C.F.R. § 553.230). These 28-day standards can be used as ratios to determine maximum hours for other approved work periods. See the following chart.

<table>
<thead>
<tr>
<th>Work period (days)</th>
<th>Maximum hours standards</th>
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<td>Fire protection</td>
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</table>

When determining compensatory time for either law enforcement personnel or firefighters who miss a shift due to illness, vacation, personal leave, or any other reason, hours missed will not count as hours worked and are not compensable for overtime purposes (29 C.F.R. §§ 553.201, 553.230).

15. Civilian radio operators, clerks, secretaries, and janitors of police and fire departments are on a 40-hour workweek with time and one-half for all hours over 40 hours per week. They do not qualify for the law enforcement officers or firefighters’ “work period” hours exemption (see 29 C.F.R. §§ 553.210(b), 553.211(e)).

16. The city as employer has the option of paying overtime or of giving comp time off. The employee must understand that the city has a policy of compensatory time off. Compensatory time is accrued at 1 ½ hours for each hour worked. Public safety employees—police and fire—and emergency response employees can accrue a maximum of 480 hours of comp time or 320 hours
worked. After an employee has accrued maximum compensatory time, the employee must be paid in cash for overtime worked.

An employee shall be permitted to use accrued comp time within a reasonable period after requesting it if to do so would not disrupt the operations of the employer. Payment of accrued comp time upon termination of employment shall be calculated at the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher (29 C.F.R. § 553.21(o)(3)(B)).

If the employer pays cash wages for overtime hours rather than in compensatory time, the wages must be paid at one and one-half times the employee's regular rate of pay (29 C.F.R. § 553.232).

The United States Supreme Court has held that a public employer may require its employees to use their accumulated compensatory time. Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655 (2000). If employees do not use accumulated compensatory time, the employer must pay cash compensation in some circumstances. In order to avoid paying for accrued compensatory time, Harris County, Texas, enacted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time.

The Court described Harris County's policy as follows: “The employees’ supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee's stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times.” The Court held that, although 29 U.S.C. § 207(o)(5) limits an employer’s ability to prohibit the use of compensatory time when requested, that does not restrict the employer’s ability to require employees to use compensatory time.

Non-Uniformed Employees

17. All non-uniformed employees are entitled to overtime or compensatory time off after 40 hours per week worked unless they are otherwise exempt (see, for example the categories discussed in No. 8 above) (29 C.F.R. § 778.101).

18. There is no FLSA limit on the number of hours per day worked (other than child labor) (29 C.F.R. § 778.102).

19. A work week under the FLSA is defined as seven consecutive 24-hour periods (although this may be altered for police and firefighters as discussed above). Note that this may not be the same as the city’s “pay period.” The city can determine the day and the time of day that the work week begins. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act (29 C.F.R. § 778.105). We recommend that the city work week for water, sewer, street, sanitation, etc., employees begin at 5 p.m. on Fridays.
The city can schedule the hours worked within the work week to limit or prevent overtime. If an emergency occurs over the weekend and some employees must work 16 hours Saturday and 16 hours Sunday, then the city can (if their services are not absolutely needed) tell those employees to take off the rest of the week after working one eight hour shift each. This way each employee is limited to 40 hours per week for the week beginning 5 p.m. on Friday.

20. Only hours worked count in calculating overtime. Pay for holidays, vacations, sick time, jury duty, etc., do not count as hours worked (see 29 C.F.R. § 778.102).

21. If an employee works more than 40 hours per week, the city could give him compensatory time off at the rate of 1 ½ hours for each hour worked over 40 hours per week. The compensatory time belongs to the employee and can accrue to a maximum of 240 hours (160 hours actual work).

The employee must be allowed to use his comp time when he desires unless it would unduly disrupt the city’s operations to do so at that particular time. For a discussion of requiring the employee to take accumulated compensatory time, see point 16 above.

In case of termination of employment, an employee shall be paid for all accrued comp time at his then salary or the average rate of pay for the final three years of employment, whichever is greater (29 C.F.R. §§ 553.21, 553.25).

**The Uniformed Services Employment and Reemployment Rights Act**

Certain rights to re-employment after service in the uniformed services, as well as provisions relating to the pension and health benefits are established in the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 et seq. and in A.C.A. § 21-4-102.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), prohibits discrimination against persons because of their service in the military. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual’s membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

As an employer, the city shall provide to persons entitled to rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under USERRA. A summary of rights afforded by the USERRA is contained in a poster developed by the U.S. Department of Labor and is available at www.esgr.org or in Appendix A of the Arkansas Municipal League’s Sample Personnel Handbook for Arkansas City and Towns.

In addition, under A.C.A. § 21-4-102, employees who are members of a military service organization or National Guard unit shall be entitled to military leave of fifteen (15) days with pay plus necessary travel time.
The Genetic Information Nondiscrimination Act of 2008

The Genetic Information Nondiscrimination Act (GINA) was signed by President George W. Bush on May 21, 2008. GINA applies to employers with fifteen or more employees for each working day in each of twenty or more calendar weeks. GINA was instituted to prevent the misuse of genetic information to discriminate in employment, among other things, and prohibits employers from using genetic information in making employment decisions. It also prohibits employers from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

For the purposes of GINA, “Genetic Information” means an individual’s (i) genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual, but it does not include any information about the sex or age of an individual.

The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. It is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee’s genetic information, or about the genetic information of a relative of the applicant or employee. Furthermore, it is illegal to fire, demote, harass, or otherwise “retaliate” against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination.

In addition, an employer shall not request or require genetic information from an individual or family member, except as specifically allowed by the Act. In making any request for medical information, the employer is strongly advised to include the following language in the requesting form:

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information,” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

For more information on GINA and its exceptions, please go to www.eeoc.gov/laws/types/genetic.cfm.

Summary

Personnel management and law operate in an unstable and constantly changing environment. Not every personnel law that might affect municipal officials can possibly be anticipated and addressed in this booklet. The primary purpose of this booklet is to help you as a municipal official better understand and effectively deal with some major municipal personnel issues. This guideline is an educational tool, and you will need legal counsel when you begin to implement these suggested changes or for any other employment matter. Municipal officials should seek the counsel of their city attorney and should not rely solely on the recommendations in this booklet.

For more information, see the League’s Family Medical Leave Act Guide and the Sample Personnel Handbook for Arkansas Cities and Towns.
APPENDIX A

A. Summary of Personnel Laws

1. Fair Labor Standards Act

2. Title VII of the Civil Rights Act; 42 USC §2000e et. seq.

3. Equal Pay Act of 1963

4. The Immigration Reform and Control Act

5. Age Discrimination in Employment Act (ADEA)

6. Pregnancy Discrimination Act

7. The Drug-free Workplace Act

8. The 1991 Civil Rights Act


10. 42 USC §1983, Ku Klux Klan Act of 1871

The Fair Labor Standards Act
(Federal Law)

The Fair Labor Standards Act (FLSA) is a federal law that governs wages, hours, and working conditions. Important points about this law follow.

Enforcement Agency
U.S. Department of Labor; Wage & Hour & Public Contracts Division

Summary
The employer must pay minimum wage.* Overtime must be paid after 40 hour/week at the rate of time-and-one-half the employee’s basic rate. Executive, administrative, professional, computer, and outside sales employees are exempt from overtime provisions. Child labor protection is also provided by the law. Special rules exist for police and fire departments. The FLSA provides the minimum protection that must exist, but state law or employer action may provide greater overtime compensation or more favorable benefits or protection for employees.

Coverage
The FLSA affects employers who are engaged in interstate commerce, which includes most employers. Public employers are also covered with regard to overtime pay requirements. The following individuals are NOT covered by the FLSA: elected officials and their personal staffs; political appointees; legal advisors; bona fide volunteers; independent contractors; and certain trainees.

Exceptions
There are many specific exemptions from one or more provisions of this Act. Contact your local office of the Department of Labor, Wage & Hour Division with questions.

Posting Requirement
The poster titled “Your Rights Under the Fair Labor Standards Act” is required in work locations. The poster can be found online at www.dol.gov/whd/regs/compliance/posters/flsa.html.

Record Retention Requirement
Employers must maintain employee data, including name, address, zip code, payroll records (including hours worked), pay rates, total wages and deductions, and collective bargaining contracts for at least three years.

Records that must be retained for at least two years include time cards, wage rate tables, work-time schedules, and records explaining basis for wage differentials paid to employees of opposite sex in the same establishment.

Statute of Limitations
Claims must be filed no later than two years after cause of action; three years for willful violation.
Penalties

Employer must pay an amount equal to underpayments to employees, plus an equal amount in liquidated damages, plus reasonable attorney’s fees and costs. For willful violation, a fine of up to $10,000, imprisonment up to six months, or both, may be imposed.

The distinction between exempt and non-exempt can be very difficult to discern in certain cases. If you have any doubt, consult the U.S. Department of Labor or your attorney.
**Title VII of the Civil Rights Act**

(Federal Law; 42 U.S.C. § 2000(e) et seq.)

**Enforcement Agency**

Equal Employment Opportunity Commission (EEOC)

**Summary**

Prohibits discrimination in employment by employers with 15 or more employees in hiring, firing, compensation and terms, conditions or privilege of employment on the basis of race, color, religion, sex, pregnancy, or national origin.

**Exemptions**

- Religious organizations (for religious discrimination only)
- Bona fide, tax-exempt private clubs
- Aliens working for American companies outside the United States
- Indian tribes

**Exceptions**

Bona Fide Occupational Qualifications (BFOQ) permits employers to discriminate on the basis of sex, religion or national origin where such a factor is “reasonably necessary to the normal operation” of the employer’s business. Race cannot be a BFOQ (See definition on page 5).

**Posting Requirement**

The poster titled “Equal Employment Opportunity is the Law” is required in work locations. The poster can be found online at [www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm](http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm).

**Statute of Limitations**

- A charge must be filed within 180 days of the alleged discrimination.
- A lawsuit must be filed within 90 days after receipt of the notice of right-to-sue letter.

**Penalties:**

- Back pay
- Fringe benefits
- Reinstatement
- Reasonable attorney’s fees
- Compensatory damages
- Punitive damages
**Equal Pay Act of 1963**

*(Federal Law)*

**Enforcement Agency**

Equal Employment Opportunity Commission (EEOC)

**Summary**

This act prohibits pay differentials on the basis of sex. It requires that there be equal pay for equal work regardless of sex. “Equal work” means equal use of skill and effort, equal responsibility and equal working conditions.

**Coverage**

Employers engaged in interstate commerce are covered and subject to the Equal Pay Act.

** Exceptions**

Pay differences are permitted under some seniority and merit pay systems that measure earnings on the basis of quantity or quality of production. Differences are also permitted if based on reasonable factors other than sex.
The Immigration Reform and Control Act
(Federal Law)

The Immigration Reform and Control Act of 1986 (IRCA) affects all employers ranging from the individual hiring domestic help to large corporations. The law prohibits the hiring of illegal aliens after November 6, 1986, and imposes sanctions on employers who fail to comply.

Employers Must Follow These Procedures:

- Hire only citizens and aliens lawfully authorized to work in the United States.
- Advise all job applicants of the employer’s policy to such effect.
- Within three (3) business days of first work day, require new employees to complete and sign Form I-9 (Employment Eligibility Verification) to certify that they are eligible for employment.
- Examine documentation presented by new employees, record information about the documents on Form I-9, and sign the form.
- Retain the form for at least three (3) years or for at least one (1) year past the end of employment of the individual, whichever is longer.
- If requested, present Form I-9 for inspection by the Immigration Naturalization Service (INS) or Department of Labor officers. No reporting is required.

Under IRCA, there are certain documents which can be used to establish both proof of identity and work authorization. The most common combination of documents is a driver’s license plus a social security card.

Failure to ask a new employee for verification of work status will subject employers to civil penalties which range from $100-$1,000 per violation, even if the person hired is a United States citizen. Employers are required to sign Form I-9 verifying that they asked for and were shown the necessary work authorization documents. In addition, each person hired must sign the same form verifying his or her eligibility to work in the United States.

It is an unfair immigration-related employment practice for an employer to intimidate or retaliate against an individual exercising his or her rights under IRCA.

Penalties:

IRCA applies only to illegal aliens hired after November 6, 1986. An employer found by the INS to have violated the Act is subject to an injunction against the illegal activity and to civil or criminal penalties. A first violation on or after June 1, 1989, will subject the violator to civil fines ranging from $250 to $2,000 for each unauthorized alien involved in the violation. Penalties for second violations can run up to $5,000 per unauthorized alien, while subsequent violations can bring penalties up to $10,000 for each illegal worker involved.

In addition, the INS regulations specify that “pattern and practice” violations are punishable by criminal fines of up to $3,000 for each violation, imprisonment of up to six (6) months, or both.
AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)
(Federal Law)

Enforcement Agency
Equal Employment Opportunity Commission (EEOC)

Summary
• It is unlawful for an employer to fail to or refuse to hire, to discharge, or otherwise discriminate against individuals 40 years of age or older with respect to compensation, terms, conditions, or privileges of employment because of age.
• It is unlawful to forcibly retire an employee.
• It is unlawful to give preference because of age to one person over another within the protected age group. (Example: It is unlawful to give preference to a 42-year-old job applicant over a 61-year-old applicant solely because of age.)

Coverage
Employers engaged in interstate commerce with 20 employees or more.

Exceptions
• Bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business.
• Differentiation’s based on reasonable factors other than age. (Example: Use of physical examinations where stringent physical requirements are necessary to perform the work.)
• Differentiation’s based on the terms of a bona fide seniority system (except for retirement).

Penalties
• Back pay (double back pay if the violation is found to be willful)
• Reinstatement
• Fringe benefits
• Reasonable attorney’s fees

Statute of Limitations
• A charge must be filed within 180 days of the alleged discriminatory act.
• A lawsuit must be filed within 90 days after the receipt of the right-to-sue letter.

Older Workers Benefit Protection Act of 1990
The Older Workers Act took effect October 16, 1990, and amends the Age Discrimination in Employment Act. The Act is not retroactive.

Principal features of the Act include:
• Prohibiting all waivers of ADEA rights unless the waiver is knowing and voluntary (specific conditions must be met for the waiver to be legal).
• Extending coverage of ADEA to all employee benefits.
• Codifying the “equal benefit or equal cost principle” which holds that the only justification for age discrimination in employee benefits is the increased cost to the employer in providing the benefits.

• Permitting the following programs (with restrictions):
  • Early retirement incentive plans
  • Subsidized early retirement
  • Social Security bridge payments

• Generally prohibiting an employer from using an employee’s vested pension benefits as a basis to offset or deny any other benefits, such as severance or disability.

• Existing plans must be brought into compliance by mid-April 1991, and new benefits or plans must immediately comply.

**Pregnancy Discrimination Act**
(Federal Law)

**Summary**

The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964 that prohibits, among other things, discrimination in employment on the basis of sex. The Pregnancy Discrimination Act prohibits discrimination “because of or on the basis of pregnancy, childbirth or related-medical conditions.” Therefore, Title VII prohibits discrimination in employment against women affected by pregnancy or related conditions.

The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is, therefore, protected against such practices as being fired, or being refused a job or promotion, merely because she is pregnant or has had an abortion. She usually cannot be forced to go on leave as long as she can still work. If other employees who take disability leave are entitled to get their jobs back when they are able to return to work, so are women who have been unable to work because of pregnancy. If non-pregnant workers have been offered accommodations, then an employee who is pregnant should also be eligible for such accommodations.

In the area of fringe benefits, such as disability benefits, sick leave and health insurance, the same principle applies. A woman unable to work for pregnancy-related reasons is entitled to the same disability benefits or sick leave as employees unable to work for other medical reasons. Also, health insurance must cover expenses for pregnancy-related conditions on the same basis as expenses for other coverage. Coverage for conditions arising from abortion is not required except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion.
The Drug-Free Workplace Act
(Federal Law)

On October 21, 1988, the Drug-Free Workplace Act was passed as Title V of the Omnibus Drug Bill. The Act’s effective date was March 18, 1989.

The Act requires every federal contractor, with an individual procurement contract for at least $25,000, to certify that it is providing a drug-free place of work. Only procurement contracts, including purchase orders, awarded pursuant to provisions of the Federal Acquisition Regulation are subject to the Act. The Act also covers recipients of federal agency grants and individuals who enter into a contract with a federal agency.

Where a procurement contract is to be performed both inside and outside the United States, the Act applies only to that portion performed inside the United States. The Act also applies where an existing contract is modified on or after March 18, 1989, in such a manner that the contract must be considered a new commitment.

The Employer’s Responsibilities

For covered contracts, the contractor must certify it will provide a drug-free workplace by:

- Publishing a “statement” notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of controlled substances is prohibited in the workplace.
- Establishing a “drug-free awareness program” to inform employees about (a) the dangers of drug abuse; (b) the contractor’s drug-free policy; (c) “available” drug counseling, rehabilitation, and assistance programs, and (d) penalties for drug abuse violations. Contractors need only inform employees about available counseling, rehabilitation, etc.—contractors do not have to establish such programs.
- Requiring that each employee “engaged in performance of the contract” be given a copy of the “statement.”
- Notifying employees that as a condition of employment, each must (a) abide by the terms of the statement, and (b) notify the employer of any criminal drug conviction for a violation occurring in the workplace no later than five (5) days after such conviction. A conviction is defined as a finding of guilt (including a plea of nolo contendere) or imposition of sentence.
- Notifying the contracting agency within ten (10) days after receiving notice of an employee’s workplace-related criminal drug conviction.
- Within thirty (30) days after receiving notice of conviction, imposing an “appropriate personnel action” on, or requiring the “satisfactory participation” in an employee-assistance program by the convicted employee.
- Making a “good faith effort” to maintain a drug-free workplace by implementing the previous six (6) requirements.

If an employer violates the Act, its contract may be suspended or terminated, or the contractor may be barred for a period of up to five (5) years. Discretion to impose a penalty lies with the contracting officer. A penalty may be waived by the agency head if such waiver is in the public interest. Because both the imposition and waiver of penalties is undertaken on an agency-to-agency basis, inconsistent treatment of violators across agency lines is likely to occur.

Employers who contract with the Department of Defense should also be aware of the Department’s “drug-free workplace” requirements. These requirements are separate from those contained in the Drug-Free Workplace Act.

Whether your organization tests or not, you should have a written drug and alcohol abuse policy.
Civil Rights Act of 1991
(Federal Law)

Enforcement Agency
Equal Employment Opportunity Agency (EEOC)

Summary
The Civil Rights Act of 1991 (CRA ’91) amends Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866, by reversing several 1989 and 1991 U.S. Supreme Court decisions that narrowed the scope of Title VII and Section 1981. CRA ’91 also amends Title I of the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). A brief discussion of CRA ’91 follows.

The Civil Rights Act of 1991 (CRA ’91) was enacted for two major reasons: First, to overrule recent Supreme Court decisions viewed by the Act’s sponsors as unduly restricting employees’ causes of action under Title VII and ADEA; and second, to expand the range of damages available to victims of job discrimination. CRA ’91 expressly overruled Wards Cove Packaging Co. v. Antonio [490 US 642 (1989)], a Supreme Court decision that had made it almost impossible for plaintiffs to prove job discrimination based on statistical evidence. Further, CRA ’91 permits Title VII plaintiffs to demand jury trials and permits juries to award compensatory and punitive damages in addition to back wages.

The Act also expands the rights of federal employees under federal anti-discrimination acts, and extends their jurisdiction to employees of Congress under a special set of procedures.

CRA ’91 requires plaintiffs to demonstrate that each challenged employment practice causes a disparate impact, unless the plaintiff shows that the decision-making process in question cannot be separated for analysis. For example, when an employer relies on a test, an interview, and an applicant’s grade point average in making an employment decision, but reviews these three factors without assigning a particular weight to each, the process may be treated as a single employment practice under CRA ’91.

Damages for Intentional Discrimination
Historically, under Title VII, courts have been limited to “make-whole” or other types of job-specific relief (e.g., hiring, promotion, reinstatement). Compensatory and punitive damages were available only to victims of intentional discrimination based on race or ethnicity under Section 1981.

CRA ’91 adds new remedies of compensatory and punitive damages for victims of intentional discrimination under Title VII and the ADA based on sex, religion and disability, as well as race and national origin. It sets the following caps on the recovery of such damages.

- $50,000 in the case of an employer with 15 to 100 employees;
- $100,000 in the case of an employer with 101 to 200 employees;
- $200,000 in the case of an employer with more than 500 employees.

In addition, CRA ’91 provides that punitive damages are recoverable in actions under Title VII and the ADA when the plaintiff demonstrates that the employer acted “with malice or with reckless indifference to the [plaintiff’s] federally protected rights.”

In cases where the discriminatory practice involves providing (or ultimately not providing) a “reasonable accommodation” under the ADA or Section 501 of the Rehabilitation Act of 1973 (which applies to recipients of federal financial assistance and government contractors), the employer can avoid liability for compensatory or punitive damages if it demonstrates “good faith efforts” to accommodate
the individual’s disability. Good faith must include consultation with the disabled individual seeking the accommodation.

**Demand for a Jury Trial**

CRA '91 permits parties to seek a jury trial in cases where the plaintiff alleges intentional discrimination and seeks compensatory or punitive damages. This represents considerable increased risk for employers, because they face the prospect of having a jury decide whether these damages are warranted and, if so, in what amounts. Employers also risk having jurors determine that CRA ’91’s caps on damages constitute a congressionally established benchmark to use to set the appropriate level of damage for intentional discrimination (42 U.S.C. § 1981, 1983, and 1988).

42 U.S.C. § 1981 and 1983 are two of the most significant federal civil rights statutes affecting municipal personnel decisions. Equally, they are two of the most complex areas of the public civil rights law. Because of their complexity they will be given limited attention in the guidebook. As a city official, it is incumbent upon you to gain legal advice as to the applicability of these statutes regarding any employment action you take.

**42 U.S.C. § 1981**

§ 1981, as amended, was originally enacted as the Civil Rights Act of 1866. It guarantees all persons the same right to make and enforce contracts (i.e., employment). There are no statutory requirements as to the number of employees a city must have for § 1981 to be applicable. In short it applies to all cities that are employers. The statute covers intentional racial discrimination only. Section 1981 was amended by Civil Rights Act of 1991, and now covers all terms and conditions of public employment. Discriminatory intent is required for a successful § 1981 cause of action. There are no governmental agency (i.e., EEOC) filing requirements, and thus § 1981 cases may be immediately filed without any “pre-filing” with an enforcement agency.

**42 U.S.C. § 1983**

§ 1983, as amended, was originally enacted by the 2nd Congress in 1871 pursuant to Section 5 of the Fourteenth Amendment for the protection of certain rights guaranteed by the “Constitution and Laws.” It was part and parcel of the Ku Klux Klan Act of April 20, 1871. Additionally, protection under the Act was extended to cover federal laws beyond the immediate purview of the Constitution. In the municipal employment context § 1983 causes of action center around an act by the employer alleged to have violated a specific constitutional right(s) of an employee. A goodly portion of these cases focus on an employee’s First Amendment rights to free speech and association, Fourth Amendment rights to be free from warrantless search and seizure, and Fourteenth Amendment rights to procedural and substantive due process regarding a particular employment action. In short, § 1983 is a mechanism to bring cities, their employees and officials into court to be held accountable for their employment actions pursuant to the civil rights guarantees of the Constitution. Like § 1981, there are no administrative filing requirements or number of employee prerequisites for a suit to commence.

**42 U.S.C. § 1988**

§ 1988 provides that if a plaintiff (employee, ex-employee) is the prevailing party in civil rights litigation, that the defendant (city, city employee, and/or city official) must then pay the plaintiff’s attorney’s fees and costs. Section 1988 is applicable to virtually every federal civil rights law. It is the proverbial “carrot at the end of the stick” encouraging attorneys to file civil rights employment causes of action.
APPENDIX B

SAMPLE FORMS

1. Job Opportunity Notice
2. Application
3. Unlawful Harassment Policy
4. Drug-free Workplace Policy
5. Ten Steps to Compliance with the Omnibus Transportation Act of 1991

SAMPLE GUIDELINES

1. Mayor’s/Manager’s Termination Checklist
2. Interview Guidelines
Job Opportunity Notice
(This form may be used to advertise vacancies.)

Date Posted ________________________

Job Title ____________________________ Salary Level ________________________

Job Location and/or City Dept. __________________________________________

Description/Requirements ________________________________________________

________________________________________________________________________

________________________________________________________________________

Applicant must meet the following minimum requirements ______________________

________________________________________________________________________

________________________________________________________________________

If you wish to apply for the position you may pick up an application at ________________

________________________________________________________________________

The City of ________________________ is an Equal Opportunity Employer.

The City of ________________________ does not discriminate on the basis of race, color, religion, sex, national origin, marital or veteran status, political status, disability status or other legally protected status.
**SAMPLE**

**APPLICATION FOR EMPLOYMENT**

The City of ______________________ does not discriminate on the basis of race, color, religion, sex, national origin, marital or veteran status, disability unrelated to job requirements, genetic information, political status, or other legally protected status of exercise of constitutional rights.

Name ___________________________________________ Date__________________

Address ____________________________________________

Telephone number where you can be reached or a message left for you________________________

Are you 18 years old or older?  _____ Yes  _____ No

Have you ever been convicted of a felony?  _____ Yes  _____ No
(Conviction will not necessarily disqualify an applicant for employment.) If yes, describe conditions: ___

_________________________________________________________

Do you have the legal right to work and remain in the United States?  _____ Yes  _____ No

Can you perform the duties of the job which you are applying with or without reasonable accommodations?  _____ Yes  _____ No

If Yes, can you produce evidence of U.S. citizenship or legal work status within three (3) days?

_____ Yes  _____ No

<table>
<thead>
<tr>
<th>Education</th>
<th>Name &amp; Location of School</th>
<th>Year Graduated</th>
<th>Major</th>
<th>Diploma/Degree</th>
</tr>
</thead>
<tbody>
<tr>
<td>High School</td>
<td></td>
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<td></td>
<td></td>
<td>NA</td>
</tr>
<tr>
<td>College / University</td>
<td></td>
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</tr>
<tr>
<td>College / University</td>
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<td></td>
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</tr>
<tr>
<td>Other Training</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>
Position applied for:

1. ___________________________ 2. ___________________________

Wage or salary desired? ___________________________  When can you start? ___________________________

**Work History**

<table>
<thead>
<tr>
<th>Most recent employer:</th>
<th>Address:</th>
<th>Telephone:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Date Stated:</strong></td>
<td><strong>Starting Salary: $</strong></td>
<td><strong>Starting Position:</strong></td>
</tr>
<tr>
<td><strong>Date Ended:</strong></td>
<td><strong>Ending Salary: $</strong></td>
<td><strong>Ending Position:</strong></td>
</tr>
<tr>
<td><strong>Name of Supervisor:</strong></td>
<td><strong>Title of Supervisor:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Description of Duties:</strong></td>
<td><strong>Reason for Leaving:</strong></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Most recent employer:</th>
<th>Address:</th>
<th>Telephone:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Date Stated:</strong></td>
<td><strong>Starting Salary: $</strong></td>
<td><strong>Starting Position:</strong></td>
</tr>
<tr>
<td><strong>Date Ended:</strong></td>
<td><strong>Ending Salary: $</strong></td>
<td><strong>Ending Position:</strong></td>
</tr>
<tr>
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<td><strong>Title of Supervisor:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Description of Duties:</strong></td>
<td><strong>Reason for Leaving:</strong></td>
<td></td>
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</table>

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<thead>
<tr>
<th>Most recent employer:</th>
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</tr>
</thead>
<tbody>
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<td></td>
</tr>
<tr>
<td><strong>Description of Duties:</strong></td>
<td><strong>Reason for Leaving:</strong></td>
<td></td>
</tr>
</tbody>
</table>
In addition to your work history, what other experiences, skills or qualifications would especially qualify you for work with the City of______________________________? Specify office equipment, machines, computers you can operate: ____________________________________________________________

Give the names and addresses of three (3) persons, other than relatives, who have knowledge of your character, experience or ability:

<table>
<thead>
<tr>
<th>Name</th>
<th>Address/Phone No.</th>
<th>Occupation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
</tr>
</tbody>
</table>
Applicant Information for Record Keeping Requirements

(Answer All Questions and Please Print)

The City of ___________________________ is an Equal Opportunity Employer. We request that you voluntarily provide the following information which will be used to study recruitment and employment patterns and to provide, as requested, statistical data to certain federal compliance agencies. This information WILL NOT be used in the employment process; and failure to provide the information WILL NOT jeopardize your opportunity for employment with the City of ___________________________.

NAME ___________________________ TODAY’S DATE ______________

Sex and race/ethnic identification

SEX: ☐Male  ☐Female  (Check One)

RACE/ETHNIC: For the purpose of Equal Opportunity, race/ethnic categories are identified as follows: Please check the category which identifies your race/ethnic background.

☐ WHITE: (Not of Hispanic origin) All persons having origin in any of the original peoples of Europe, North America or the Middle East.

☐ BLACK: (Not of Hispanic origin) All persons having origin in any of the black racial groups of Africa.

☐ HISPANIC: All persons of Mexican, Puerto Rican, Cuban, Central or South America or other Spanish culture or origin, regardless of race.

☐ ASIAN OR PACIFIC ISLANDERS: All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Subcontinent or the Pacific Islands (Ex: China, Japan, Korea, the Philippine Islands and Samoa).

☐ OTHER:

I understand that I am protected by various laws prohibiting discrimination on the basis of race, color, national origin, sex, religion, age and, in some circumstances, disability or veteran status. I further understand that the information contained in this form is to be used solely in equal employment record keeping, reporting and other legal requirements. I also understand that this information will be kept in the strictest of confidence and will not be disclosed to others except for the above stated purpose and then only if necessary.

Signed: ___________________________ Date: ___________________________

NOTE: THE information provided on this form will be kept separate from the employment application form such as in Section III of this file.
SAMPLE

EMPLOYEE STATEMENT

I understand that this application is not intended to create any contractual or other legal rights. It does not alter the at-will employment status nor does it create an employment contract.

I certify that I have made no willful misrepresentations in this application nor have I withheld information in my statements and answers to questions. I am aware that the information given by me in my application will be investigated, with my full permission, and that any misrepresentations may cause my application to be rejected or my employment to be terminated.

I authorize former employers to release to the City of ________________________________ or its authorized representative any and all employment records and other information it may have about my employment. I understand that the information will be used for the purpose of evaluating my application for employment with the city. A photocopy of this authorization shall be as valid as the original.

I understand that my appointment will be at the discretion of the department head, subject, to the approval of the [chief administrative officer] and that this application is the property of the city and will become a part of my file if I am accepted for employment.

Signature of Applicant: __________________________________________________________
Date of Signature: ______________________________________________________________

(Also see Sample Personnel Handbook for Arkansas Cities and Towns)
Unlawful Harassment Policy

The City of _______________ expressly prohibits its officials or employees from engaging in any form of unlawful harassment or discrimination, whether due to race, color, religion, sex, national origin, age, genetic information, political status, marital status, or status as a veteran or special disabled veteran or the presence of any physical, mental, or sensory handicap. Harassment or discrimination of any employee is a serious violation of city policy and will not be tolerated. Neither will workplace retaliation against someone for having complained of harassment.

For the purposes of this policy, “harassment” refers to an annoying, persistent act or actions that singles out an employee to that employee's objection or detriment, because of the employee's membership in any legally protected class or for some other trait the employee was born with (i.e., race, color, religion, sex, national origin, age, genetic Information, political status, marital status, or status as a veteran or special disabled veteran or the presence of any physical, mental, or sensory handicap). Harassment may be considered a violation of federal and/or state law.

Discrimination or harassment can take many forms and can include slurs, comments, jokes, innuendoes, unwelcome compliments, pictures, cartoons, pranks, or other verbal or physical conduct, including but not limited to the following actions:

- Verbal abuse or ridicule. This includes epithets, derogatory comments, slurs or unwanted sexual advances, unwanted sexual invitations, or negative comments because of the employee's protected class membership;
- Interference with an employee's work. This includes physical contact such as assault, blocking normal movement, or interferences with the work directed at an individual because of his/her protected status;
- Displaying or distributing offensive materials based upon protected status of some other reason. This includes derogatory or sexual posters, cartoons, e-mails, calendars, magazines, drawings, or gestures;
- Discriminating against any employee in work assignments or job-related training because of one of the above-referenced bases;
- Unwanted, intentional physical contact, whether it be of a sexual or other nature;
- Making protected status innuendos;
- Requesting favors (sexual or otherwise), explicitly or implicitly, as a condition of employment, promotion, transfer, or any other term or condition of employment;
- Gender based harassment, including sexual harassment and harassment based on pregnancy, childbirth, or related medical conditions; and/or
- Retaliation for having reported harassment.

Discrimination or harassment based upon a person's protected status, is prohibited by federal and state anti-discrimination laws and violates city policy where it:

- Has the purpose of effect of creating an intimidating, hostile, or offensive working environment
- Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- Otherwise unreasonably affects an individual employment opportunity.
It is every employee’s and official’s responsibility to ensure that his or her conduct does not include or imply harassment in any form. If, however, harassment or suspected harassment has or is taking place, the following will apply:

A. An employee should report harassment or suspected harassment to one of the employees designated to take these types of complaints. This complaint should, where practical, be made in writing.

B. Each complaint shall be fully investigated and a determination of the facts and an appropriate response will be made on a case-by-case basis.

The City of _________________ will not tolerate harassment or any form of retaliation against an employee who has either instigated or cooperated in the Investigation of alleged harassment. Disciplinary action will be taken against offenders.
**Drug-Free Workplace Policy**

It is the policy of the City of _________________ to create a drug-free workplace in keeping with the spirit and intent of the Drug-Free Workplace Act of 1988 and its amendments. The use of controlled substances is inconsistent with the behavior expected of employees, subjects all employees and visitors to city facilities to unacceptable safety risks and undermines the city’s ability to operate effectively and efficiently. Therefore, the unlawful manufacture, distribution, dispensation, possession, sale, or use of a controlled substance in the workplace or while engaged in city business for the City of _________________ or on the city’s premises is strictly prohibited. Such conduct is also prohibited during non-working hours to the extent that, in the opinion of the city, it impairs an employee’s ability to perform on the job or threatens the reputation or integrity of the city.

To educate employees on the danger of drug abuse, the city has established a drug-free awareness program. Periodically, employees will be required to attend training sessions at which the dangers of drug abuse, the city’s policy regarding drugs, the availability of counseling, and the city’s employee-assistance program will be discussed. Employees convicted of controlled substances-related violations in the workplace must inform the city within five (5) days of such conviction or plea. Employees who violate any aspect of these rules are subject to penalty up to and including termination. At its discretion, the city may require employees who violate this policy to successfully complete a drug abuse-assistance or rehabilitation program as a condition of continued employment.
Ten Steps to Compliance with the Omnibus Transportation Act of 1991

(Drug and Alcohol Testing)

By Ken Wasson, League Staff

According to the Federal Highway Administration (FHWA) rules, all municipalities that have employees with a Commercial Driver’s License (CDL) must comply with the Omnibus Transportation Employee Testing Act of 1991. The Act mandates that beginning January 1, 1996, municipalities test their CDL employees for alcohol and controlled substances. Additionally, the League suggests the following steps for municipalities to comply with this act.

Step 1

Participate in the Arkansas Municipal League Defense Program. Member cities that participate in the Legal Defense Program are automatically eligible to participate in the Arkansas Municipal League Drug/Alcohol Compliance Testing Program. The League will act as the administrator of a statewide municipal consortium. The League will assist you with complying with the new act. There will be no direct costs or fees for cities that participate in the Municipal Legal Defense Program.

Step 2

Adopt a set of policies and procedures that clearly set out the requirements of the Department of Transportation (DOT) drug and alcohol testing programs. This policy should be part of and in addition to existing personnel policies. These policies and procedures should clearly explain the city’s requirements and the requirements and responsibilities of each city employee who holds a CDL. The city should require that each CDL employee sign a receipt indicating that he or she has been provided a copy of the city’s policies on drug and alcohol testing. (A sample policy and sample acknowledgment receipt form is available through the League.)

Step 3

Adopt a resolution stating the city’s intent to fully comply with the requirements for drug and alcohol testing as mandated by the U.S. Department of Transportation (DOT) and other federal laws and regulations. This resolution should clearly state the penalty for a positive drug and alcohol test and the penalty for refusing to take a mandated test. (A sample resolution is available through the League.)

Step 4

Designate one city employee as the “contact person” who will answer employees’ questions concerning drug and alcohol testing. The contact person will be responsible for receiving and handling all correspondence concerning the city’s drug and alcohol policies and procedures, test results and testing times in a confidential manner. The contact person would also serve as the city’s representative to receive information from the League drug/alcohol testing program administrator.
Step 5

Take steps to ensure that a CDL supervisor with authority to determine reasonable suspicion receives at least 60 minutes of training on alcohol misuse and at least an additional 60 minutes of training on controlled substance abuse (for information on training programs contact the League).

Step 6

The city contact person should send to the League a list of city employees with CDLs. The list should include the name, social security number, and city department of each CDL employee. This list will be added to lists from other cities and will comprise the League consortium list for random drug/alcohol testing.

Step 7

Set up a separate filing system in which all records and information concerning employee drug and alcohol testing are kept. All records should be kept secure to prevent disclosure of information to unauthorized individuals. Remember, employee drug/alcohol testing records are confidential!

Step 8

Compile a resource list of information and assistance about drug and alcohol abuse. Each city government is required to advise CDL employees who engage in conduct prohibited under the rules of the available resources for evaluation and treatment of alcohol and drug problems. (A listing of resources and information on alcohol and drug abuse treatment centers are available through the League.)

Step 9

Arkansas municipalities should be prepared to submit annual reports summarizing the results of their alcohol and controlled substance testing programs. Arkansas municipalities are responsible for ensuring the accuracy and timeliness of each report. (The League will be available to provide assistance in submitting this report.)

Step 10

Document, document, document! Placing your actions and efforts in written form demonstrates your city’s good faith effort to be fair and reasonable with all your employees.
The Family Medical Leave Act (FMLA) of 1993 requires cities with fifty (50) or more employees to offer up to twelve (12) weeks of unpaid, job-protected leave to eligible employees for certain family and medical reasons. Eligible city employees may take up to twelve (12) weeks of unpaid leave for the following reasons:

- The birth and care of the employee's child;
- The placement of a child into an employee's family by adoption or by foster-care arrangement;
- The care of an immediate family member (spouse, child, or parent) who has a serious health condition; and
- The inability of a city employee to work because of a serious health condition which renders the employee unable to perform the essential functions of his or her job.

Cities with fewer than 50 employees are technically “covered employers” under the Act. However, their employees are not eligible for family medical leave. The only practical result is that even cities with fewer than 50 employees must post an FMLA notice explaining eligibility under the Act. There is a potential $100 fine for failing to post the notice. This makes little sense, but it is that way Congress wrote—and the Department of Labor interprets—the law.

The Act requires that the city maintain the employee's health coverage under any group plan during the time the employee is on FMLA leave. To be eligible for the FMLA benefits employees must:

- Be employed by the city for at least one year;
- Have worked 1,250 hours over the previous twelve (12) months preceding the leave request.

An employee on a sick leave or family care leave of absence (must/or may choose to) use all accrued personal, vacation and sick days while on leave. An employee on a parental leave of absence (must/or may choose to) use all accrued personal and vacation days while on leave. (The city should decide whether it will require the use of accrued leave as indicated. If it does not so require, the employee has the option of doing so.)

City employees must use vacation or accrued leave before FMLA leave will be granted. City employees are required to provide advance leave notice in writing, to the employee's supervisor (at least 30 days) when leave is foreseeable (such as childbirth, adoption or planned medical treatment, or as early as possible if the leave taken is not foreseeable 30 days’ in advance). Depending on each individual situation, the city may require a medical certification to support a request for FMLA leave because of a serious health condition and require a fitness for duty report to return to work.

The city understands that upon return from FMLA leave, most employees must be restored to their original or equivalent position with equivalent pay, benefits and other employment terms. Furthermore, the use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Additional information and forms may be obtained from the city clerk.

See also other League publications, Sample Personnel Handbook for Arkansas Cities and Towns, and the Family Medical Leave Act Guide for more information.
Sample

**Mayor’s/Manager’s Termination Checklist**

<table>
<thead>
<tr>
<th>Employee</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department</td>
<td>Manager</td>
</tr>
</tbody>
</table>

1. Do I have ALL the facts recorded accurately? | Yes | No |
2. Have I documented all facts and action? | Yes | No |
3. Have I assembled all the records?  
   - Performance (production) records (Keep examples of unsatisfactory work production that have been discussed with the employee).  
   - Attendance records  
   - Performance review records, reflecting candid appraisals.  
   - Discipline and warning records  
   - Special Action records. | Yes | No |
4. Is my decision based on facts, not inference, suspicion, or emotion? | Yes | No |
5. Has the employee fully understood the job requirements and behavior standards? | Yes | No |
6. Does the employee know exactly where he/she has fallen short in job performance or behavior standards? | Yes | No |
7. Has the employee received at least one warning of possible dismissal? (Unless the conduct is serious enough to warrant dismissal). | Yes | No |
8. Has the employee has sufficient time and opportunity to correct the condition that led me to take this action? | Yes | No |
9. Have I considered the employee’s point of view? | Yes | No |
10. Have personal difficulties or special mitigating circumstances been taken into account? | Yes | No |
11. Am I sure that discharge will come as no surprise to the employee? | Yes | No |
12. Is dismissal in this case consistent with best practices? | Yes | No |
13. Would the city be able to justify treatment of this employee if he/she claims discrimination, harassment, or retaliation? | Yes | No |
14. Would a jury conclude that our treatment of this employee was unquestionably fair? | Yes | No |
15. Has this decision been discussed with and approved by appropriate levels of higher management (i.e., contacting the city attorney)? | Yes | No |
16. Am I prepared to handle this dismissal tactfully and objectively? | Yes | No |
17. Have I scheduled the dismissal interview at a time that will eliminate or minimize the employee’s personal contact with other employees before he/she leaves the premises? | Yes | No |
18. Have I made arrangements to notify the employee in private? | Yes | No |
19. Have I arranged for the final pay check and am I prepared to explain the amount? | Yes | No |
20. Do I know what group insurance the employee has and am I able to explain what will happen to it after dismissal? | Yes | No |
21. Have I decided what restricted statements will be made to other employees concerning this person’s discharge? | Yes | No |
22. Have I ensured there will be no impermissible search of the employee’s desk or private work area? | Yes | No |
<table>
<thead>
<tr>
<th>Subject</th>
<th>You may</th>
<th>You may NOT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name and Address</td>
<td>Ask a job application his/her name.</td>
<td>Ask an application whose name has been changed what his/her original name was.</td>
</tr>
<tr>
<td></td>
<td>Ask a job application whose name has been changed what his/her original name was only if you legally need to know.</td>
<td></td>
</tr>
<tr>
<td>Birth Place</td>
<td></td>
<td>Inquire into the birthplace of an applicant’s spouse, parents, or other close relatives if outside the United States.</td>
</tr>
<tr>
<td>Age</td>
<td>Ask an applicant his/her age only if the information is a bona fide occupational qualification. Or if the applicant’s date of birth is needed to comply with a state or federal law.</td>
<td>Ask an applicant his/her age where it is not relevant to the job.</td>
</tr>
<tr>
<td>Sex</td>
<td>“Sex” may not be a question on the application unless it constitutes a bona fide qualification for the job (i.e., washroom attendant, jail guard).</td>
<td></td>
</tr>
<tr>
<td>Marital Status</td>
<td>Ask if the application is married, single, divorced or engaged, or whether the applicant has children at home, what their ages are or whether the applicant has future plans for children.</td>
<td>Ask about an applicant’s color or race or require an applicant to submit a photograph with the application.</td>
</tr>
<tr>
<td>Religion</td>
<td>Ask an applicant if he/she can work after hours or on Saturday or Sunday if such work and inquire regarding reasonable accommodations.</td>
<td>Ask an applicant his/her religion, the name of his/her church, or religious holidays observed.</td>
</tr>
<tr>
<td>Race or Color</td>
<td></td>
<td>Ask about an applicant’s color or race or require an applicant to submit a photograph with the application.</td>
</tr>
<tr>
<td>Citizenship</td>
<td>Ask an applicant, if hired, if he/she could produce evidence of U.S. citizenship or legal work status within three (3) days.</td>
<td>Inquire whether an applicant, spouse, or parents were naturalized or native-born citizens—or ask for the dates when they became citizens.</td>
</tr>
<tr>
<td>Job-Related Education</td>
<td>Ask an applicant about schooling.</td>
<td></td>
</tr>
<tr>
<td>Work Experience</td>
<td>Inquire into an applicant’s work experience.</td>
<td></td>
</tr>
<tr>
<td>Physical Characteristics</td>
<td>Explain manual labor, lifting, or other requirements of the job or show how it is performed. You may require a physical exam of a person to whom you have made an offer of employment.</td>
<td>Ask height and weight if it is not related to the performance of the job.</td>
</tr>
<tr>
<td>Residence</td>
<td>Ask how applicant can be reached is he/she has no phone.</td>
<td></td>
</tr>
<tr>
<td>Disability</td>
<td>Describe job tasks and ask applicant to demonstrate and/or describe how he/she would perform tasks with reasonable accommodations.</td>
<td>Ask about medical conditions or disability including Workers’ Compensation claims.</td>
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Understanding Municipal Personnel Law and Suggestions for Avoiding Lawsuits
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Disclaimer

This publication is intended as general information only and does not carry the force of legal opinion. The Arkansas Municipal League is providing this information as a service. You should be aware that while we try to keep the information timely and accurate, there will often be a delay between changes to the FMLA and the official publications of the materials contained within these pages. Therefore, we make no express or implied guarantees. The Federal Register and the Code of Federal Regulations remain the official sources for regulatory information published by the Department of Labor. We will make every effort to keep this information current and to correct errors brought to our attention. To ensure that you have the latest regulations, check the U.S. Department of Labor’s web page, www.dol.gov/whd/fmla/applicable_laws.htm.
Does the Family and Medical Leave Act Apply to My City?

This booklet contains general information, regulations, and forms needed to comply with the federal Family and Medical Leave Act (FMLA), including the most recent amendments to the military family leave entitlements.

However, the first thing a city needs to know is whether it is required to comply with the FMLA at all. The regulations can be confusing, so a brief explanation is in order.

Technically, all cities are “covered employers” under the FMLA. See 29 U.S.C. § 2611(4)(A)(iii); 29 C.F.R. § 825.108(d). However, in order for city employees to be eligible for leave under the FMLA, the city must have at least 50 employees according to U.S.C. § 2611(2)(B)(ii).

For a city with under 50 employees, the only practical effect of the FMLA is that the notice of rights under the FMLA must still be prominently posted by the city subject to a $166 fine for failing to do so. See 29 C.F.R. § 825.300; see also the Your Rights and Responsibilities Poster in the back of this booklet.

What follows is a short compliance guide published by the U.S. Department of Labor, which gives a good overview of the FMLA. Immediately following that is the complete set of the applicable federal regulations. Finally, we have included some useful forms provided by the U.S. Department of Labor.

In keeping with our goal to keep the information contained in this publication current, please be aware that the 2008 Regulations and 2013 Regulations: Side by Side Comparison of Current/Final Regulations, which is contained in this publication, should be reviewed.

Employers should be aware that the FMLA poster required to be posted by employers has changed and employers may no longer use the old FMLA poster (rev. 01/09), but instead should use the current FMLA poster (rev. 04/16), which is contained in this publication and available online at the following web address:

The Family and Medical Leave Act Compliance Guide

Adapted from information from the U.S. Department of Labor Wage & Hour Division website located at www.dol.gov/whd/fmla/index.htm.

The FMLA provides certain employees with up to 12 workweeks of unpaid, job-protected leave a year, and requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave. This Compliance Guide summarizes the FMLA provisions and regulations. More detail on the FMLA may be found in the applicable regulations at 29 C.F.R. Part 825, or at the Department of Labor’s website at www.dol.gov.

Summary

For most employers and employees, the FMLA became effective August 5, 1993. The FMLA covers only certain employers; affects only those employees eligible for the protections of the law; regulates entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; sets requirements for notice and certification of the need for FMLA leave; specifies employer recordkeeping requirements; and protects employees who request or take leave under the FMLA.

Purposes of the FMLA

The FMLA allows employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. The FMLA seeks to accomplish these purposes in a manner that accommodates the legitimate interests of employers and minimizes the potential for employment discrimination on the basis of gender, while promoting equal employment opportunity for men and women.

Employer Coverage

FMLA applies to all:
- public agencies, including state, local and federal employers, and schools; and
- private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year—including joint employers and successors of covered employers.

For FMLA purposes, most Federal and Congressional employees are under the jurisdiction of the U.S. Office of Personnel Management (OPM) or the Congress.

Employee Eligibility

To be eligible for FMLA leave, an employee must work for a covered employer and:
- have worked for that employer for at least 12 months; and
- have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and
- works at a location where the employer has at least 50 employees within 75 miles.

Leave Entitlement

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave in a 12 month period for one or more of the following reasons:
- for the birth of a son or daughter and to care for the newborn child;
- for the placement with the employee of a child for adoption or foster care and to care for the newly placed child;
- to care for an immediate family member (spouse, child, or parent — but not a parent “in-law”) with a serious health condition; and
- when the employee is unable to work because of a serious health condition.
Leave to care for a newborn child or for a newly placed child must conclude within 12 months after the birth or placement. Spouses employed by the same employer may be limited to a combined total of 12 workweeks of family leave for the following reasons:

- birth and care of a child;
- for the placement of a child for adoption or foster care, and to care for the newly placed child; and
- to care for an employee's parent who has a serious health condition.

**Service members**

A covered employer must also grant an eligible employee up to a total of 12 workweeks of unpaid leave in a 12 month period for any qualifying exigency arising out of the fact that a spouse, child or parent is military member on covered active duty or call to covered active duty status. An eligible employee may also take up to 26 workweeks of leave during a “single 12-month period” to care for a covered service member with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the service member. The “single 12-month period” for military caregiver leave is different from the 12-month period used for other FMLA leave reasons. See Fact Sheets 28F: Qualifying Reasons under the FMLA and 28M: The Military Family Leave Provisions under the FMLA, links to which are found at www.dol.gov/whd/fmla/index.htm.

**Intermittent/Reduced Schedule Leave**

Under some circumstances, such as when medically necessary to care for a seriously ill parent or child; because of the employee’s serious health condition; a serious injury or illness of a covered service member requires treatment by a health care provider periodically; or to care for a newborn or newly placed adopted or foster care child only with the employer’s approval, employees may take FMLA leave on an intermittent or reduced schedule basis. See generally 29 C.F.R. § 825.205.

That means an employee may take leave in separate blocks of time or by reducing the time he or she works each day or week for a single qualifying reason. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer’s operations. In such cases, the employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodates recurring periods of leave better than the employee’s regular job. If FMLA leave is for the birth, adoption, or foster placement of a child, use of intermittent or reduced schedule leave requires the employer’s approval.

Under certain conditions, employees may choose, or employers may require employees, to “substitute” (run concurrently) accrued paid leave, such as sick or vacation leave, to cover some or all of the FMLA leave period. An employee’s ability to substitute accrued paid leave is determined by the terms and conditions of the employer’s normal leave policy.

Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA leave. Employees may not be required 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.

**Substitution of Paid Leave**

Employees may choose to use, or employers may require the employee to use, accrued paid leave to cover some or all of the FMLA leave taken. Employees may choose, or employers may require, the substitution of accrued paid vacation or personal leave for any of the situations covered by FMLA. The substitution of accrued sick or family leave is limited by the employer’s policies governing the use of such leave.
Serious Health Condition

“Serious health condition” means an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care in a hospital, hospice, or residential medical care facility; or
- a period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
- any period of incapacity due to pregnancy, or for prenatal care; or
- any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
- a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or
- any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

Medical Certification

When an employee requests FMLA leave due to his or her own serious health condition or a covered family member’s serious health condition, the employer may require certification in support of the leave from a health care provider. Generally, the employer must allow the employee at least 15 calendar days to obtain the medical certification. An employer may, at its own expense, require the employee to obtain a second medical certification from a health care provider. 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, again at the employer’s expense. This third opinion shall be final and binding. The third health care provider must be approved jointly by the employer and the employee. The “Certification of Health Care Provider” (optional form WH-380) may be used to obtain the certifications.

Health Care Provider

Health care providers who may provide certification of a serious health condition include:

- doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
- podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice under State law;
- nurse practitioners, nurse-midwives, and clinical social workers authorized to practice under State law and performing within the scope of their practice as defined under State law;
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
- any health care provider recognized by the employer or the employer’s group health plan’s benefits manager; and
- a health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country.
Maintenance of Health Benefits
A covered employer is required to maintain group health insurance coverage, including family coverage, for an employee on FMLA leave on the same terms as if the employee continued to work.

Where appropriate, arrangements will need to be made for employees taking unpaid FMLA leave to pay their share of health insurance premiums. For example, if the group health plan involves co-payments by the employer and the employee, an employee on unpaid FMLA leave must make arrangements to pay his or her normal portion of the insurance premiums to maintain insurance coverage, as must the employer. Such payments may be made under any arrangement voluntarily agreed to by the employer and employee.

An employer's obligation to maintain health benefits under FMLA stops if and when an employee informs the employer of an intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is exhausted. The employer's obligation also stops if the employee's premium payment is more than 30 days late and the employer has given the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received.

In some circumstances, the employer may recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave.

Other Benefits
Other benefits, including cash payments chosen by the employee instead of group health insurance coverage, need not be maintained during periods of unpaid FMLA leave.

Certain types of earned benefits, such as seniority or paid leave, need not continue to accrue during periods of unpaid FMLA leave provided that such benefits do not accrue for employees on other types of unpaid leave. For other benefits, such as elected life insurance coverage, the employer and the employee may make arrangements to continue benefits during periods of unpaid FMLA leave. An employer may elect to continue such benefits to ensure that the employee will be eligible to be restored to the same benefits upon returning to work. At the conclusion of the leave, the employer may recover only the employee's share of premiums it paid to maintain other “non-health” benefits during unpaid FMLA leave.

Job Restoration
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.

“Key” Employee Exception
Under limited circumstances where restoration to employment will cause “substantial and grievous economic injury” to its operations, an employer may refuse to reinstate certain highly-paid, salaried “key” employees. In order to do so, the employer must notify the employee in writing of his/her status as a “key” employee (as defined by FMLA), the reasons for denying job restoration, and provide the employee a reasonable opportunity to return to work after so notifying the employee.

Notices
Employer Notices 29 C.F.R. § 825.300
To meet the general notice requirements of the FMLA, covered employers must display a poster in plain view for all workers and applicants to see, notifying them of the FMLA provisions and providing information concerning how to file a complaint with the Wage and Hour Division.

A covered employer must display this poster even if it has no eligible employees. An employer who willfully violates this posting requirement may be assessed a civil money penalty of $166 for each separate offense. Employers may post the Wage and Hour Division's FMLA Poster, which is available at no cost from the WHD website at www.dol.gov/whd/fmla, to satisfy this requirement, or may use another format so long as the information provided includes, at a minimum, all the information contained in the FMLA Poster.
In addition to displaying a poster, a covered employer who has any eligible employees also must provide a general notice containing the same information that is in the poster in its employee handbook (or other written material about leave and benefits). If no handbook or written leave materials exist, the employer must distribute this general notice to new employees upon hire. Employers may meet this general notice requirement by either duplicating the general notice language found on the FMLA Poster or by using another format so long as the information provided includes, at a minimum, all the information contained in the FMLA Poster.

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. For what information must be contained in the notice, see 29 C.F.R. § 825.300(b). The employer must also provide the employee with a written “rights and responsibilities notice,” the requirements for which may be found at 29 C.F.R. § 825.300(c), and a written “designation notice,” the requirements for which may be found at 29 C.F.R. § 825.300(d) and 29 C.F.R. § 825.301.

Employee Notice 29 C.F.R. § 825.302

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 “as soon as practicable” when the need to take FMLA leave is not foreseeable;
- sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons (the employee need not mention FMLA when requesting leave to meet this requirement, but may only explain why the leave is needed); and

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 (generally within two business days of returning to work) that leave was taken for an FMLA-qualifying reason must be given.

Unlawful Acts

The FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by this law. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; nor can FMLA leave be counted under “no fault” attendance policies.

Enforcement

FMLA is enforced by the Wage and Hour Division of the U.S. Department of Labor’s Employment Standards Administration. This agency investigates complaints of violations. If violations cannot be satisfactorily resolved, the Department may bring action in court to compel compliance. An eligible employee may bring a private civil action against an employer for violations. An employee is not required to file a complaint with the Wage and Hour Division prior to bringing such action.

Other Provisions

Some special rules apply to employees of local education agencies. Generally, these rules provide for FMLA leave to be taken in blocks of time when the leave is needed intermittently or when leave is required near the end of a school term (semester). Several States and other jurisdictions also have family or medical leave laws. If both the Federal law and a State law apply to an employer's operations, an employee is entitled to the most generous benefit provided under either law. Employers may also provide family and medical leave that is more generous than the FMLA leave requirements. The FMLA does not modify or affect any Federal or State law which prohibits discrimination.
FAQs

General

(Q) What does the Family and Medical leave act provide?
The Family and Medical Leave Act (FMLA) provides eligible employees up to 12 workweeks of unpaid leave a year, and requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave. Employees are also entitled to return to their same or an equivalent job at the end of their FMLA leave.
The FMLA also provides certain military family leave entitlements. Eligible employees may take FMLA leave for specified reasons related to certain military deployments of their family members. Additionally, they may take up to 26 weeks of FMLA leave in a single 12-month period to care for a covered service member with a serious injury or illness.

Coverage

(Q) What types of businesses/employers does the FMLA apply to?
The FMLA applies to all:
- public agencies, including local, State, and Federal employers, and local education agencies (schools); and
- private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year – including joint employers and successors of covered employers.

Eligibility

(Q) Who can take FMLA leave?
In order to be eligible to take leave under the FMLA, an employee must:
- work for a covered employer;
- have worked 1,250 hours during the 12 months prior to the start of leave; (special hours of service rules apply to airline flight crew members)
- work at a location where the employer has 50 or more employees within 75 miles; and
- have worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. In general, only employment within seven years is counted unless the break in service is (1) due to an employee's fulfillment of military obligations, or (2) governed by a collective bargaining agreement or other written agreement.

Hours of Service Requirement

(Q) Does the time I take off for vacation, sick leave or PTO count toward the 1,250 hours?
The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included. (Special hours of service rules apply to airline flight crew members.)

Unpaid leave

(Q) Is my employer required to pay me when I take FMLA leave?
The FMLA only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid vacation leave, paid sick or family leave for some or all of the FMLA leave period. An employee must follow the employer's normal leave rules in order to substitute paid leave. When paid leave is used for an FMLA-covered reason, the leave is FMLA-protected.

Qualifying conditions

(Q) When can an eligible employee use FMLA leave?
A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12 month period for one or more of the following reasons:
- for the birth of a son or daughter, and to bond with the newborn child;
- for the placement with the employee of a child for adoption or foster care, and to bond with that child;
• to care for an immediate family member (spouse, child, or parent – but not a parent “in-law”) with a serious health condition;
• to take medical leave when the employee is unable to work because of a serious health condition; or
• for qualifying exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces.

The FMLA also allows eligible employees to take up to 26 workweeks of unpaid, job-protected leave in a “single 12-month period” to care for a covered service member with a serious injury or illness.

Birth and bonding

(Q) Are there any restrictions on when an employee can take leave for the birth or adoption of a child?
Leave to bond with a newborn child or for a newly placed adopted or foster child must conclude within 12 months after the birth or placement. The use of intermittent FMLA leave for these purposes is subject to the employer’s approval. If the newly born or newly placed child has a serious health condition, the employee has the right to take FMLA leave to care for the child intermittently, if medically necessary and such leave is not subject to the 12-month limitation.

(Q) When can a parent take leave for a newborn?
Mothers and fathers have the same right to take FMLA leave to bond with a newborn child. A mother can also take FMLA leave for prenatal care, incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can also use FMLA leave to care for his spouse who is incapacitated due to pregnancy or child birth.

Intermittent/reduced leave schedule

(Q) Does an employee have to take leave all at once or can it be taken periodically or to reduce the employee’s schedule?
When it is medically necessary, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee’s usual weekly or daily work schedule. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer’s operation.

Leave to care for or bond with a newborn child or for a newly placed adopted or foster child may only be taken intermittently with the employer’s approval and must conclude within 12 months after the birth or placement.

(Q) Can an employer change an employee’s job when the employee takes intermittent or reduced schedule leave?
Employees needing intermittent/reduced schedule leave for foreseeable medical treatments must work with their employers to schedule the leave so as not disrupt the employer’s operations, subject to the approval of the employee’s health care provider. In such cases, the employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodate recurring periods of leave better than the employee’s regular job.

Serious health condition

(Q) What is a serious health condition?
The most common serious health conditions that qualify for FMLA leave are:

• conditions requiring an overnight stay in a hospital or other medical care facility;
• conditions that incapacitate you or your family member (for example, unable to work or attend school) for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);
• chronic conditions that cause occasional periods when you or your family member are incapacitated and require treatment by a health care provider at least twice a year; and
• pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).
(Q) **Can I continue to use FMLA for leave due to my chronic serious health condition?**

Under the regulations, employees continue to be able to use FMLA leave for any period of incapacity or treatment due to a chronic serious health condition. The regulations continue to define a chronic serious health condition as one that (1) requires "periodic visits" for treatment by a health care provider or nurse under the supervision of the health care provider, (2) continues over an extended period of time, and (3) may cause episodic rather than continuing periods of incapacity. The regulations clarify this definition by defining "periodic visits" as at least twice a year.

(Q) **Can I take FMLA leave for reasons related to domestic violence issues?**

FMLA leave may be available to address certain health-related issues resulting from domestic violence. An eligible employee may take FMLA leave because of his or her own serious health condition or to care for a qualifying family member with a serious health condition that resulted from domestic violence. For example, an eligible employee may be able to take FMLA leave if he or she is hospitalized overnight or is receiving certain treatment for post-traumatic stress disorder that resulted from domestic violence.

**Certification**

(Q) **Am I required to prove that I have a serious health condition?**

An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must allow the employee at least 15 calendar days to obtain the medical certification.

(Q) **What happens if my employer says my medical certification is incomplete?**

An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The employer must state in writing what additional information is necessary to make the certification complete and sufficient and must allow the employee at least seven calendar days to cure the deficiency, unless seven days is not practicable under particular circumstances despite the employee's diligent good faith efforts.

(Q) **Can my employer make me get a second opinion?**

An employer may require a second or third medical opinion (at the employer’s expense) if he or she has reason to doubt the validity of the medical certification.

(Q) **Do I have to give my employer my medical records for leave due to a serious health condition?**

No. An employee is not required to give the employer his or her medical records. The employer, however, does have a statutory right to request that an employee provide medical certification containing sufficient medical facts to establish that a serious health condition exists.

(Q) **How soon after I request leave does my employer have to request a medical certification of a serious health condition?**

Under the regulations, an employer should request medical certification, in most cases, at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave begins.

An employer may request certification at a later date if he or she has reason to question the appropriateness or duration of the leave.

(Q) **May my employer contact my health care provider about my serious health condition?**

The regulations clarify that contact between an employer and an employee’s health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. Under the regulations, employers may contact an employee's health care provider for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official. In order to address employee privacy concerns, the regulations makes clear that in no case may the employee's direct supervisor contact the employee's health care provider. In order for an employee's HIPAA-covered health care provider to provide an employer with individually-identifiable health information, the employee will need to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the employer. Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.
(Q) Must I sign a medical release as part of a medical certification?

No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide a complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.

(Q) How often may my employer ask for medical certifications for an on-going serious health condition?

The regulations allow recertification no more often than every 30 days in connection with an absence by the employee unless the condition will last for more than 30 days. For conditions that are certified as having a minimum duration of more than 30 days, the employer must wait to request a recertification until the specified period has passed, except that in all cases the employer may request recertification every six months in connection with an absence by the employee. The regulations also allow an employer to request recertification in less than 30 days if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly, or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

Additionally, employers may request a new medical certification each leave year for medical conditions that last longer than one year. Such new medical certifications are subject to second and third opinions.

Examples:

Janie takes six weeks of FMLA leave for a cancer operation and treatment and gives her employer a medical certification that states that she will be absent for six weeks. Because her certification covers a six-week absence, her employer cannot ask for a recertification during that time. At the end of the six-week period, Janie asks to take two more weeks of FMLA leave; her employer may properly ask Janie for a recertification for the additional two weeks.

Joe takes eight weeks of FMLA leave for a back operation and intensive therapy, and gives his employer a medical certification that states that he will be absent for eight weeks. At the end of the eight-week period, Joe tells his employer that he will need to take three days of FMLA leave per month for an indefinite period for additional therapy; his employer may properly request a recertification at that time. Six months later, and in connection with an absence for therapy, the employer may properly ask Joe for another recertification for his need for FMLA leave.

(Q) Can employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?

Yes. As a condition of restoring an employee who was absent on 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 who take leave for such conditions to submit a certification from the employee's own health care provider that the employee is able to resume work. Under the regulations, an employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the employer has appropriately notified the employee that this information will be required and has provided a list of essential functions. Additionally, an employer may require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the condition for which leave was taken.

(Q) What happens if I do not submit a requested medical or fitness-for-duty certification?

If an employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the employee never provides a medical certification, then the leave is not FMLA leave.

If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.
Job restoration

(Q) Can my employer move me to a different job when I return from FMLA leave?

On return from FMLA leave (whether after a block of leave or an instance of intermittent leave), the FMLA requires that the employer return the employee to the same job, or one that is nearly identical (equivalent).

If not returned to the same job, a nearly identical job must:

- offer the same shift or general work schedule, and be at a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance);
- involve the same or substantially similar duties, responsibilities, and status;
- include the same general level of skill, effort, responsibility and authority;
- offer identical pay, including equivalent premium pay, overtime and bonus opportunities, profit-sharing, or other payments, and any unconditional pay increases that occurred during FMLA leave; and
- offer identical benefits (such as life insurance, health insurance, disability insurance, sick leave, vacation, educational benefits, pensions, etc.).

Employee notice

(Q) What and when do I need to tell my employer if I plan to take FMLA leave?

Employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. If leave is foreseeable less than 30 days in advance, the employee must provide notice as soon as practicable – generally, either the same or next business day. When the need for leave is not foreseeable, the employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Absent unusual circumstances, employees must comply with the employer's usual and customary notice and procedural requirements for requesting leave.

Employees must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that the employee is incapacitated due to pregnancy, has been hospitalized overnight, is unable to perform the functions of the job, and/or that the employee or employee's qualifying family member is under the continuing care of a health care provider.

When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. When an employee seeks leave, however, due to a FMLA-qualifying reason for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for the leave or the need for FMLA leave.

(Q) Is an employee required to follow an employer's normal call-in procedures when taking FMLA leave?

Yes. Under the regulations, an employee must comply with an employer's call-in procedures unless unusual circumstances prevent the employee from doing so (in which case the employee must provide notice as soon as he or she can practicably do so). The regulations make clear that, if the employee fails to provide timely notice, he or she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer's rules provide.

Example:

Sam has a medical certification on file with his employer for his chronic serious health condition, migraine headaches. He is unable to report to work at the start of his shift due to a migraine and needs to take unforeseeable FMLA leave. He follows his employer's absence call-in procedure to timely notify his employer about his need for leave. Sam has provided his employer with appropriate notice.

Employer notice

(Q) Are employers required to tell their employers of the existence of FMLA and the employee's right to take FMLA leave?

Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints of violations of the FMLA with the Wage and Hour Division. An employer that willfully violates this
posting requirement may be subject to a civil money penalty for each separate offense. For current penalty amounts, see www.dol.gov/whd/fmla/applicable_laws.htm. Additionally, employers must include this general notice in employee handbooks or other written guidance to employees concerning benefits, or, if no such materials exist, must distribute a copy of the notice to each new employee upon hiring.

When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA purpose, the employer must notify the employee of his or her eligibility to take leave, and inform the employee of his or her rights and responsibilities under the FMLA. When the employer has enough information to determine that leave is being taken for a FMLA-qualifying reason, the employer must notify the employee that the leave is designated and will be counted as FMLA leave.

(Q) How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?

Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

(Q) Does an employer have to provide employees with information regarding their specific rights and responsibilities under the FMLA?

At the same time an employer provides an employee notice of the employee's eligibility to take FMLA leave, the employer must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, the employer must inform the employee whether the employee will be required to provide certification of the FMLA-qualifying reason for leave and the employee's right to substitute paid leave (including any conditions related to such substitution, and the employee's entitlement to unpaid FMLA leave if those conditions are not met). If the information included in the notice of rights and responsibilities changes, the employer must inform the employee of such changes within five business days of receipt of the employee's first notice of the need for FMLA leave subsequent to any change. Employers are expected to responsively answer questions from employees concerning their rights and responsibilities.

(Q) How soon after an employee provides notice of the need for leave must an employer notify an employee that the leave will be designated and counted as FMLA leave?

Under the regulations, an employer must notify an employee whether leave will be designated as FMLA leave within five business days of learning that the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances. The designation notice must also state whether paid leave will be substituted for unpaid FMLA leave and whether the employer will require the employee to provide a fitness-for-duty certification to return to work (unless a handbook or other written document clearly provides that such certification will be required in specific circumstances, in which case the employer may provide oral notice of this requirement). Additionally, if the amount of leave needed is known, an employer must inform an employee of the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (e.g., where the leave will be unscheduled), an employer must provide this information upon request by the employee, but no more often than every 30 days and only if leave was taken during that period.

Military provisions

(Q) What is covered active duty?

For a member of the Regular Armed Forces, covered active duty or call to covered active duty status means duty during the deployment of the member with the Armed Forces to a foreign country.

For a member of the Reserve components of the Armed Forces (members of the National Guard and Reserves), covered active duty or call to covered active duty status means 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.
**Caregiver leave**

**(Q) What is the definition of deployment of a member with the Armed Forces to a foreign country?**

Deployment to a foreign country means the military member is deployed to an area outside of the United States, the District of Columbia, or any Territory or possession of the United States. Deployment to a foreign country includes deployment to international waters.

**(Q) Are families of service members in the Regular Armed Forces eligible for military caregiver leave?**

Yes. Military caregiver leave extends to those seriously injured or ill members of both the Regular Armed Forces and the National Guard or Reserves.

**(Q) Can I take military caregiver leave if I am the stepson or stepdaughter of the covered service member or if I am the stepparent of a covered service member?**

Yes. Under the FMLA for military caregiver leave, a “son or daughter of a covered service member” means a covered service member's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, and who is of any age. Under the FMLA for military caregiver leave, a “parent of a covered service member” means a covered service member’s biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents “in law.”

**(Q) How much leave may I take to care for a covered service member?**

An eligible employee is entitled to take up to 26 workweeks of leave during a “single 12-month period” to care for a seriously injured or ill covered service member. The “single 12-month period” begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.

**(Q) May I take FMLA leave to both care for a covered service member and for another FMLA qualifying reason during this “single 12-month period?”**

Yes. The regulations provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in this single 12-month period, provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period. For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave, but could not take 16 weeks of leave to care for a newborn child and 10 weeks of military caregiver leave.

**(Q) Can I carry-over unused weeks of military caregiver leave from one 12-month period to another?**

No. If an employee does not use his or her entire 26-workweek leave entitlement during the single 12-month period of leave, the remaining workweeks of leave are forfeited. After the end of the single 12-month period for military caregiver leave, however, an employee may be entitled to take FMLA leave to care for the covered military member if the member is a qualifying family member under non-military FMLA and he or she has a serious health condition.

**(Q) Who is a service member’s next of kin for purposes of military caregiver leave?**

The regulations define a covered service member's "next of kin" as the service member's nearest blood relative, other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA, in which case the designated individual shall be deemed to be the covered service member's next of kin. The regulations provide that all family members sharing the closest level of familial relationship to the covered service member shall be considered the covered service member's next of kin, unless the covered service member has specifically designated an individual as his or her next of kin for military caregiver leave purposes. In the absence of a designation, where a covered service member has three siblings, for example, all three siblings will be considered the covered service member's next of kin.

**(Q) Can I take military caregiver leave for more than one seriously injured or ill service member, or more than once for the same service member if he or she has a subsequent serious injury or illness?**

Yes. By regulation, military caregiver leave is a “per-service member, per-injury” entitlement. Accordingly, an eligible employee may take 26 workweeks of leave to care for one covered service member in a “single 12-month period,” and then
take another 26 workweeks of leave in a different “single 12-month period” to care for another covered service member. An eligible employee may also take 26 workweeks of leave to care for a covered service member in a “single 12-month period,” and then take another 26 workweeks of leave in a different “single 12-month period” to care for the same service member with a subsequent serious injury or illness (e.g., if the service member is returned to active duty and suffers another injury).

(Q) Can I care for two seriously injured or ill service members at the same time?
Yes. However, an eligible employee may not take more than 26 workweeks of leave during each single 12-month period.

(Q) What if my covered service member receives a catastrophic injury and the military issues me travel orders to immediately fly to Landstuhl Regional Medical Center in Germany to be at his bedside. Do I have to provide a completed certification before flying to Germany?
No. Given the seriousness of the injuries or illnesses incurred by a service member whose family receives an invitational travel order (ITO) or invitational travel authorization (ITA), and the immediate need for the family member at the service member's bedside, the regulations require an employer to accept the submission of an ITO or ITA, in lieu of the DOL optional certification form or an employer's own form, as sufficient certification of a request for military caregiver leave during the time period specified in the ITO or ITA.
The regulations also permit an eligible employee who is a spouse, parent, son, daughter or next of kin of a covered service member to submit an ITO or ITA issued to another family member as sufficient certification for the duration of time specified in the ITO or ITA, even if the employee seeking leave is not the named recipient on the ITO or ITA.
If the covered service member’s need for care extends beyond the expiration date specified in the ITO or ITA, the regulations permit an employer to require an employee to provide certification for the remainder of the employee's leave period.

(Q) How is leave designated if it qualifies as both military caregiver leave and leave to care for a family member with a serious health condition?
For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that an employer must designate the leave as military caregiver leave first. The Department believes that applying military caregiver leave first will help to alleviate some of the administrative issues caused by the running of the separate single 12-month period for military caregiver leave.
The regulations also prohibit an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee's entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other FMLA-qualifying reasons.

(Q) What type of notice must I provide to my employer when taking FMLA leave because of a qualifying exigency?
An employee must provide notice of the need for qualifying exigency leave as soon as practicable. For example, if an employee receives notice of a family support program a week in advance of the event, it should be practicable for the employee to provide notice to his or her employer of the need for qualifying exigency leave the same day or the next business day.
When the need for leave is unforeseeable, an employee must comply with an employer's normal call-in procedures absent unusual circumstances.
An employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA, when providing notice. The employee must provide “sufficient information” to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

(Q) Are the certification procedures (timing, authentication, clarification, second and third opinions, recertification) the same for qualifying exigency leave and leave due to a serious health condition?
The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. Thus, an employee must provide the requested certification 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.
If the qualifying exigency involves a meeting with a third party, employers may verify the schedule and purpose of the meeting with the third party. Additionally, an employer may contact the appropriate unit of the Department of Defense to confirm that the military member is on covered active duty or call to covered active duty status.
Employers are not permitted to require second or third opinions on qualifying exigency certifications. Employers are also not permitted to require recertification for such leave.

(Q) How much FMLA leave may I take for qualifying exigencies?

An employee may take up to 12 workweeks of FMLA leave for qualifying exigencies during the twelve-month period established by the employer for FMLA leave. Qualifying exigency leave may also be taken on an intermittent or reduced leave schedule basis.

(Q) How much leave can I take if I need leave for both a serious health condition and a qualifying exigency?

Qualifying exigency leave, like leave for a serious health condition, is a FMLA-qualifying reason for which an eligible employee may use his or her entitlement for up to 12 workweeks of FMLA leave each year. An eligible employee may take all 12 weeks of his or her FMLA leave entitlement as qualifying exigency leave or the employee may take a combination of 12 weeks of leave for both qualifying exigency leave and leave for a serious health condition.

(Q) Can I take qualifying exigency leave when my military member returns from deployment?

Yes. An eligible employee is entitled to take qualifying exigency leave for certain qualifying post-deployment exigencies, including reintegration activities, for a period of 90 days following the termination of the military member's covered active duty status.

USERRA-FMLA Questions

(Q) What is the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

USERRA is a federal law that provides reemployment rights for veterans and members of the National Guard and Reserve following qualifying military service. It also prohibits employer discrimination against any person on the basis of that person’s past USERRA-covered service, current military obligations, or intent to join one of the uniformed services.

(Q) What effect does USERRA have on FMLA-eligibility requirements?

USERRA requires that service members who conclude their tours of duty and who are reemployed by their civilian employers receive all benefits of employment that they would have obtained if they had been continuously employed, except those benefits that are considered a form of short-term compensation, such as accrued paid vacation. If a service member had been continuously employed, one such benefit to which he or she might have been entitled is leave under the FMLA. The service member’s eligibility will depend upon whether the service member would have met the employee eligibility requirements outlined above had he or she not performed USERRA-covered service.

(Q) How should the 12-month FMLA requirement be calculated for returning service members?

USERRA requires that a person reemployed under its provisions be given credit for any months of service he or she would have been employed but for the period of absence from work due to or necessitated by USERRA-covered service in determining eligibility for FMLA leave. A person reemployed following USERRA-covered service should be given credit for the period of absence from work due to or necessitated by USERRA-covered service towards the months-of-employment eligibility requirement. Each month served performing USERRA-covered service counts as a month actively employed by the employer. For example, someone who has been employed by an employer for nine months is ordered to active military service for nine months after which he or she is reemployed. Upon reemployment, the person must be considered to have been employed by the employer for more than the required 12 months (nine months actually employed plus nine months of USERRA-covered service) for purposes of FMLA eligibility. It should be noted that the 12 months of employment need not be consecutive to meet this FMLA requirement.

(Q) How should the 1,250 hours-of-service requirement be calculated for returning service members?

An employee returning from USERRA-covered service must be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining FMLA eligibility. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee’s pre-service work schedule can generally be used for calculations. For example, an employee who works 40 hours per week for the employer returns to employment following 20 weeks of USERRA-covered service and requests leave under the FMLA. To determine the person’s eligibility, the hours
he or she would have worked during the period of USERRA-covered service \((20 \times 40 = 800 \text{ hours})\) must be added to the hours actually worked during the 12-month period prior to the start of the leave to determine if the 1,250 hour requirement is met. Special hours of service eligibility requirements apply to airline flight crew employees.

(Q) Where can I get more information about USERRA and the FMLA?
The Department of Labor’s Veterans’ Employment and Training Service (VETS) administers USERRA, provides technical assistance/educational outreach, and investigates complaints. Information about USERRA is available on the VETS website. The address is http://www.dol.gov/vets/. There you will find USERRA information as well as a directory of local VETS offices.

Miscellaneous Questions

(Q) I am a caregiver for my brother who is not able to take care of himself. Can I take FMLA leave for his care?
Maybe. FMLA leave to care for a relative is generally limited to caring for a spouse, son, daughter, or parent. An eligible employee standing in loco parentis to a sibling who is under 18, or who is 18 years of age or older and incapable of self-care because of a mental or physical disability, may take leave to care for the sibling, if the sibling has an FMLA-qualifying serious health condition.

(Q) Can my FMLA leave be counted against me for my bonus?
Under the regulations, an employer may deny a bonus that is based upon achieving a goal, such as hours worked, products sold or perfect attendance, to an employee who takes FMLA leave (and thus does not achieve the goal) as long as it treats employees taking FMLA leave the same as employees taking non-FMLA leave. For example, if an employer does not deny a perfect attendance bonus to employees using vacation leave, the employer may not deny the bonus to an employee who used vacation leave for a FMLA-qualifying reason.

Example:
Sasha uses 10 days of FMLA leave during the quarter for surgery. Sasha substitutes paid vacation leave for her entire FMLA absence. Under Sasha’s employer’s quarterly attendance bonus policy, employees who use vacation leave are not disqualified from the bonus but employees who take unpaid leave are disqualified. Sasha’s employer must treat her the same way it would treat an employee using vacation leave for a non-FMLA reason and give Sasha the attendance bonus.

(Q) My medical condition limits me to a 40 hour workweek but my employer has assigned me to work eight hours of overtime in a week. Can I take FMLA leave for the overtime?
Yes. Employees with proper medical certifications may use FMLA leave in lieu of working required overtime hours. The regulations clarify that the hours that an employee would have been required to work but for the taking of FMLA leave can be counted against the employee’s FMLA entitlement. Employers must select employees for required overtime in a manner that does not discriminate against workers who need to use FMLA leave.

(Q) Can I use my paid leave as FMLA leave?
Under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer’s applicable paid leave policy. The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA. If the employee does not choose to substitute applicable accrued paid leave, the employer may require the employee to do so.

Example:
Neila needs to take two hours of FMLA leave for a treatment appointment for her serious health condition. Neila would like to substitute paid sick leave for her absence, but her employer’s sick policy only permits employees to take sick leave in full days. Neila may either choose to comply with her employer’s sick leave policy by taking a full day of sick leave for her doctor’s appointment (in which case she will use a full day of FMLA leave), or she may ask her employer to waive the requirement that sick leave be used in full day increments and permit her to use two hours of sick leave for her FMLA absence. Neila can also take unpaid FMLA leave for the two hours.
(Q) How do collective bargaining agreements (CBAs) affect the FMLA Regulations?

An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the FMLA may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA.

Prohibited acts

(Q) What happens if I am mistreated for taking FMLA leave or if I am denied FMLA leave?

Your employer is prohibited from interfering with, restraining, or denying the exercise of FMLA rights, retaliating against you for filing a complaint and cooperating with the Wage and Hour Division (WHD), or bringing private action to court. You should contact the WHD immediately if your employer retaliates against you for engaging in any of the legally protected activities. For additional information, call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

Additional Information / Complaints

(Q) Who do I contact if I need additional information or I want to file a complaint?

If you have questions, or you think that your rights under the FMLA may have been violated, you can contact the Wage and Hour Division (WHD) at 1-866-487-9243. You will be directed to the WHD office nearest you for assistance. There are over 200 WHD offices throughout the country staffed with trained professionals to help you. To find the one nearest you, go to www.dol.gov/whd/americ2.htm.
The Family And Medical Leave Act Of 1993

Subpart A—Coverage Under the Family and Medical Leave Act

§ 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993, as amended, (FMLA or Act) allows eligible employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (see § 825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees of a covered employer may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a single 12-month period to care for a covered service member with a serious injury or illness. In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered service member, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer generally has a right to advance notice from the employee. In addition, the employer may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered service member, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (see §§ 825.312 and 825.313). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 Purpose of the Act.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered service member with a serious injury or illness, or because of a 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 call to covered active duty status. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who
must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§ 825.102 Definitions.

For purposes of this part:


Administrator means the Administrator of the Wage and Hour Division, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

Airline flight crew employee means an airline flight crewmember or flight attendant as those terms are defined in regulations of the Federal Aviation Administration. See also § 825.800(a).

Applicable monthly guarantee means:

(1) For an airline flight crew employee who is not on reserve status (line holder), the minimum number of hours for which an employer has agreed to schedule such employee for any given month; and

(2) For an airline flight crew employee who is on reserve status, the number of hours for which an employer has agreed to pay the employee for any given month. See also § 825.801(b)(1).


Commerce and industry or activity affecting commerce mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include “commerce” and any “industry affecting commerce” as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 142(1) and (3).

Contingency operation means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under sections 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. See also § 825.126(a)(2).

Continuing treatment by a health care provider means any one of the following:

(1) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
(iii) The requirement in paragraphs (i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(v) The term “extenuating circumstances” in paragraph (i) means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. See also § 825.115(a)(5).

(2) Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care. See also § 825.120.

(3) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(4) Permanent or long-term conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

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 pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during
a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. § 101(a)(13)(B). See also § 825.126(a).

**Covered service member** 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** 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. See § 825.127(b)(2).

**Eligible employee** means:

1. An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, *unless*:

   i. The break in service is occasioned by the fulfillment of the employee's Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, *et seq.*, covered service obligation (the period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by the employer, but this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

   ii. A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes); and

2. Who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with such employer during the previous 12-month period, or for an airline flight crew employee, in the previous 12 months, having worked or been paid for not less than 60 percent of the applicable total monthly guarantee and having worked or been paid for not less than 504 hours, not counting personal commute time, or vacation, medical or sick leave (*see* § 825.801(b)), *except that*:

   i. An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person reemployed following absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employer (or, for an airline flight crew employee, would have been worked for or paid by the employer) added to any hours actually worked (or, for an airline flight crew employee, actually worked or paid) during the previous 12-month period to meet the hours of service requirement); and

   ii. To determine the hours that would have been worked (or, for an airline flight crew employee, would have been worked or paid) during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations; and

3. Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

4. Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.


6. Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

7. Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

*Employ* means to suffer or permit to work.
Employee has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. § 203(e), as follows:

(1) The term employee means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, employee means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the United States House of Representatives or the United States Senate who is covered by the Congressional Accountability Act of 1995,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(1) Holds a public elective office of that State, political subdivision, or agency,

(2) Is selected by the holder of such an office to be a member of his personal staff,

(3) Is appointed by such an officeholder to serve on a policymaking level,

(4) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(5) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

Employee employed in an instructional capacity. See the definition of Teacher in this section.

Employer means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(2) Any successor in interest of an employer; and

(3) Any public agency.

Employment benefits means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. See also § 825.209(a).


Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer’s employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;
(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The Act defines health care provider as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Secretary to be capable of providing health care services.

(2) Others “capable of providing health care services” include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(iv) Any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase “authorized to practice in the State” as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of Teacher in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Invitational travel authorization (ITA) or Invitational travel order (ITO) are orders issued by the Armed Forces to a family member to join an injured or ill service member at his or her bedside. See also § 825.310(e).

Key employee means a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee’s worksite. See also § 825.217.

Mental disability: See the definition of Physical or mental disability in this section.

Military caregiver leave means leave taken to care for a covered service member with a serious injury or illness under the Family and Medical Leave Act of 1993. See also § 825.127.
Next of kin of a covered service member means the nearest blood relative other than the covered service member’s spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member 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 service member, all such family members shall be considered the covered service member’s next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member’s only next of kin. See also § 825.127(d)(3).

Outpatient status means, with respect to a covered service member who is a current member of the Armed Forces, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. See also § 825.127(b)(1).

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 as defined below. This term does not include parents “in law.”

Parent of a covered service member means a covered service member’s biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents “in law.” See also § 825.127(d)(2).

Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 C.F.R. part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., as amended, define these terms.

Public agency means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a “person” engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Reserve components of the Armed Forces, for purposes of qualifying exigency leave, include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation. See also § 825.126(a)(2)(i).

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in § 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 § 825.113 are met.

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 service member 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 service member 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:
(i) 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 service member unable to perform the duties of the service member’s office, grade, rank, or rating; or

(ii) 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; or

(iii) 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

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. See also § 825.127(c).

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, who is either under age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence.

Son or daughter of a covered service member means a covered service member’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered service member stood in loco parentis, and who is of any age. See also § 825.127(d)(1).

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 covered active duty status, and who is of any age. See also § 825.126(a)(5).

Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

TRICARE is the health care program serving active duty service members, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

§ 825.103 [Reserved]

§ 825.104 Covered employer.

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. See § 825.600.

(b) The terms commerce and industry affecting commerce are defined in accordance with section 501(1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. § 142(1) and (3)), as set forth in the definitions at § 825.102
of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the joint employment test discussed in § 825.106, or the integrated employer test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;
(ii) Interrelation between operations;
(iii) Centralized control of labor relations; and
(iv) Degree of common ownership/financial control.

(d) An employer includes any person who acts directly or indirectly in the interest of an employer to any of the employer’s employees. The definition of employer in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers “acting in the interest of an employer” are individually liable for any violations of the requirements of FMLA.

§ 825.105 Counting employees for determining coverage.

(a) The definition of employ for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g), 29 U.S.C. § 203(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term “employ” as defined in the Act includes “to suffer or permit to work.” The courts have indicated that, while “to permit” requires a more positive action than “to suffer,” both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on isolated factors or upon a single characteristic or technical concepts, but depends “upon the circumstances of the whole activity” including the underlying “economic reality.” In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who “follows the usual path of an employee” and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer’s payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.
(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of September 1, 2008, subsequently dropped below 50 employees before the end of 2008 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2009, the employer would continue to be covered throughout calendar year 2009 because it met the coverage criteria for 20 workweeks of the preceding (i.e., 2008) calendar year.

§ 825.106 Joint employer coverage.

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.

(2) A type of company that is often called a Professional Employer Organization (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintaining health benefits. Factors considered in determining which is the primary employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. See § 825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer. In those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary placement agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its jointly employed employees, whether or not the secondary employer is covered by FMLA. See § 825.220(a). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary
employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

§ 825.107 Successor in interest coverage.

(a) For purposes of FMLA, in determining whether an employer is covered because it is a “successor in interest” to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans’ Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;
(2) Use of the same plant;
(3) Continuity of the work force;
(4) Similarity of jobs and working conditions;
(5) Similarity of supervisory personnel;
(6) Similarity in machinery, equipment, and production methods;
(7) Similarity of products or services; and
(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a successor in interest exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a successor in interest, employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA’s coverage criteria must count periods of employment and hours of service with the predecessor for purposes of determining employee eligibility for FMLA leave.

§ 825.108 Public agency coverage.

(a) An employer under FMLA includes any public agency, as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. § 203(x). Section 3(x) of the FLSA defines public agency as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. State is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a public agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

(2) The Census Bureau takes a census of governments at five-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, U.S. Department of Commerce District
of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 C.F.R. Part 630, Subpart L. Employees of the Government Printing Office are covered by Title II. While employees of the Government Accountability Office and the Library of Congress are covered by Title I of the FMLA, the Comptroller General of the United States and the Librarian of Congress, respectively, have responsibility for the administration of the FMLA with respect to these employees. Other legislative branch employees, such as employees of the Senate and House of Representatives, are covered by the Congressional Accountability Act of 1995, 2 U.S.C. § 1301.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;
(2) Employees of the Postal Regulatory Commission;
(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,
(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. For example, employees of the U.S. Tax Court are covered by these regulations.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

§ 825.110 Eligible employee.

(a) An eligible employee is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and
(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave (see § 825.801 for special hours of service requirements for airline flight crew employees), and
(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. See § 825.105(b) regarding employees who work outside the U.S.

(b) The 12 months an employee must have been employed by the employer need not be consecutive months, provided

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her Uniformed Services Employment and Re-employment Rights Act (USERRA), 38 U.S.C. § 4301, et seq., covered service obligation. The period of absence from work
due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employer chooses to recognize such prior employment, the employer must do so uniformly, with respect to all employees with similar breaks in service.

(c)(1) Except as provided in paragraph (c)(2) of this section and in § 825.801 containing the special hours of service requirement for airline flight crew employees, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. See 29 C.F.R. part 785. The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.

(2) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the hours of service requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations. See § 825.801(c) for special rules applicable to airline flight crew employees.

(3) In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 C.F.R. part 541), the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachers (see § 825.102 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave. See § 825.801(d) for special rules applicable to airline flight crew employees.

(d) The determination of whether an employee meets the hours of service requirement and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave. See § 825.300(b) for rules governing the content of the eligibility notice given to employees.

(e) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.
§ 825.111 Determining whether 50 employees are employed within 75 miles.

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, e.g., construction workers, transportation workers (e.g., truck drivers, seamen, pilots), salespersons, etc., the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their worksite. The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they report for duty, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (see § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g., airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are maintained on the payroll during any portion of the year when school is not in session. See § 825.105(c).

§ 825.112 Qualifying reasons for leave, general rule.

(a) Circumstances qualifying for leave. Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (see § 825.120);

(2) For placement with the employee of a son or daughter for adoption or foster care (see § 825.121);
(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (see §§ 825.113 and 825.122);
(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (see §§ 825.113 and 825.123);
(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 (see §§ 825.122 and 825.126); and
(6) To care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered service member. See §§ 825.122 and 825.127.

(b) Equal application. The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

(c) Active employee. In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

§ 825.113 Serious health condition.

(a) For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

(b) The term incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term treatment includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) 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. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. 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 this section are met.

§ 825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in § 825.113(b), or any subsequent treatment in connection with such inpatient care.

§ 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term extenuating circumstances in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care. See also § 825.120.

(c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(d) Permanent or long-term conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§§ 825.116–825.118 [Reserved]

§ 825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of §§ 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.
§ 825.120 Leave for pregnancy or birth.

(a) General rules. Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

(1) Both parents are entitled to FMLA leave for the birth of their child.

(2) Both parents are entitled to FMLA leave to be with the healthy newborn child (i.e., bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If state law allows, or the employer permits, bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. See § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, both parents are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many state pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the birth mother, and would not be subject to the combined limit.

((4) The expectant 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. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The expectant 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. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

(5) A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition. See § 825.124.

(6) Both parents are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) Intermittent and reduced schedule leave. An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and employee may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the expectant mother or newborn child. See § 825.121 for rules governing leave for adoption or foster care. See § 825.601 for special rules applicable to instructional employees of schools. See § 825.802 for special rules applicable to airline flight crew employees.
§ 825.121 Leave for adoption or foster care.

(a) General rules. Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If state law allows, or the employer permits, leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. See § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newly placed child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) Use of intermittent and reduced schedule leave. An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. See §§ 825.202-825.205 for general rules governing the use of intermittent and reduced schedule leave. See § 825.120 for general rules governing leave for pregnancy and birth of a child. See § 825.601 for special rules applicable to instructional employees of schools. See § 825.802 for special rules applicable to airline flight crew employees.
§ 825.122 Definitions of spouse, parent, son or daughter, next of kin of a covered service member, adoption, foster care, son or daughter on active duty or call to active duty status, son or daughter of a covered service member, and parent of a covered service member.

(a) Covered service member 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 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. See § 825.127(b)(2).

(b) Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

(c) 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 as defined in paragraph (d) of this section. This term does not include parents “in law.”

(d) Son or daughter. For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, 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, who is either under age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence.

(1) Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 C.F.R. § 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., define these terms.

(3) Persons who are “in loco parentis” include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(e) Next of kin of a covered service member means the nearest blood relative other than the covered service member’s spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member 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 service member, all such family members shall be considered the covered service member’s next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member’s only next of kin. See § 825.127(d)(3).

(f) 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. See § 825.121 for rules governing leave for adoption.

(g) 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 agreement between the State and 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. See § 825.121 for rules governing leave for foster care.

(h) 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 covered active duty status, and who is of any age. See § 825.126(a)(5).

(i) Son or daughter of a covered service member means the covered service member's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered service member stood in loco parentis, and who is of any age. See § 825.127(d)(1).

(j) Parent of a covered service member means a covered service member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents “in law.” See § 825.127(d)(2).

(k) Documenting relationships. For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.123 Unable to perform the functions of the position.

(a) Definition. An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. § 12101 et seq., and the regulations at 29 C.F.R. § 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) Statement of functions. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. See § 825.306.

§ 825.124 Needed to care for a family member or covered service member.

(a) The medical certification provision that an employee is needed to care for a family member or covered service member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered service member, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered service member.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered service member includes not only a situation where the condition of the family member or covered service member itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. See §§ 825.202-825.205 for rules governing the use of intermittent or reduced schedule leave.

§ 825.125 Definition of health care provider.

(a) The Act defines health care provider as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others capable of providing health care services include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase authorized to practice in the State as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

§ 825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave for a qualifying exigency 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).

(1) **Covered active duty or call to covered active duty status** in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Regular components of the Armed Forces will generally specify if the member is deployed to a foreign country.

(2) **Covered active duty or call to covered active duty status** in the case of a member of the Reserve components of the Armed Forces means 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 pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. § 101(a)(13)(B).

(i) For purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (a)(2).

(ii) The active duty orders of a member of the Reserve components will generally specify if the military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation and will specify that the deployment is to a foreign country.
(3) Deployment of the member with the Armed Forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters.

(4) A call to covered active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (a)(2) of this section.

(5) 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 covered active duty status, and who is of any age.

(b) An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

(1) Short-notice deployment. (i) To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment;
(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;

(2) Military events and related activities. (i) To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member; and
(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member;

(3) Childcare and school activities. For the purposes of leave for childcare and school activities listed in (i) through (iv) of this paragraph, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.
(i) To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status of the military member necessitates a change in the existing childcare arrangement;
(ii) To provide childcare for a child of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;
(iii) To enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member;
(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member;

(4) Financial and legal arrangements. (i) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and
(ii) To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status;

(5) Counseling. To attend counseling provided by someone other than a health care provider, for oneself, for the military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands 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 at the time that FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call to covered active duty status of the military member;
(6) Rest and Recuperation. (i) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment;
(ii) Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;
(7) Post-deployment activities. (i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and
(ii) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services;
(8) Parental care. For purposes of leave for parental care listed in (i) through (iv) of this paragraph, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.
(i) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent;
(ii) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;
(iii) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and
(iv) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings;
(9) Additional activities. To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

§ 825.127 Leave to care for a covered service member with a serious injury or illness.
(a) Eligible employees are entitled to FMLA leave to care for a covered service member with a serious illness or injury.
(b) Covered service member 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. Outpatient status means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.
(2) A covered veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness. 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. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the single 12-month period described in paragraph (c)(1) of this section may extend beyond the five-year period.
(i) For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the
period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status.

(c) A 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, means an injury or illness that was incurred by the covered service member 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 member medically unfit to perform the duties of the member’s office, grade, rank or rating; and,

(2) In the case of a covered veteran, means 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:

(i) 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 service member unable to perform the duties of the service member’s office, grade, rank, or rating; or

(ii) 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; or

(iii) 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

(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(d) In order to care for a covered service member, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered service member.

(1) Son or daughter of a covered service member means the covered service member’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered service member stood in loco parentis, and who is of any age.

(2) Parent of a covered service member means a covered service member’s biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents “in law.”

(3) Next of kin of a covered service member means the nearest blood relative, other than the covered service member’s spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member 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 service member, all such family members shall be considered the covered service member’s next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member’s only next of kin. For example, if a covered service member has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered service member’s next of kin. Alternatively, where a covered service member has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered service member’s next of kin. An employer is permitted to require an employee to provide confirmation of covered family relationship to the covered service member pursuant to § 825.122(k).

(e) An eligible employee is entitled to 26 workweeks of leave to care for a covered service member with a serious injury or illness during a single 12-month period.

(1) The single 12-month period described in paragraph (e) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered service member and ends 12 months after that date, regardless of the method used by the employer to determine the employee’s 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered service member during this
single 12-month period, the remaining part of his or her 26 workweeks of leave entitlement to care for the covered service member is forfeited.

(2) The leave entitlement described in paragraph (e) of this section is to be applied on a per-covered-service member, 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 service members or to care for the same service member 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 service member 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 service member or for a subsequent serious injury or illness of the same covered service member, 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.

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period described in paragraph (e) of this section, provided that the employee is entitled to no more than 12 workweeks of leave for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the single 12-month period, take 16 workweeks of FMLA leave to care for a covered service member and 10 workweeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the single 12-month period, even if the employee takes fewer than 14 workweeks of FMLA leave to care for a covered service member.

(4) In all circumstances, including for leave taken to care for a covered service member, the employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in §825.300. In the case of leave that qualifies as both leave to care for a covered service member and leave to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section, the employer must designate such leave as leave to care for a covered service member in the first instance. Leave that qualifies as both leave to care for a covered service member and leave taken to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section must not be designated and counted as both leave to care for a covered service member and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employers may retroactively designate leave as leave to care for a covered service member pursuant to §825.301(d).

(f) Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 workweeks of leave during the single 12-month period described in paragraph (e) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered service member with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

§825.200 Amount of leave.

(a) Except in the case of leave to care for a covered service member with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;
(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 one or more of the essential functions of his or her job; and,

(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 status (or has been notified of an impending call or order to covered active duty).

(b) 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 described in paragraph (a) of this section occurs:

(1) The calendar year;

(2) Any fixed 12-month leave year, such as a fiscal year, a year required by State law, 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 under paragraph (a) begins; or,

(4) A “rolling” 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the “rolling” 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employers using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA protected.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act’s leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine any 12 months for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for the leave entitlements described in paragraph (a) for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.
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 service member with a serious injury or illness. An employer shall determine the single 12-month period in which the 26-weeks-of-leave-entitlement described in this paragraph occurs using the 12-month period measured forward from the date an employee's first FMLA leave to care for the covered service member begins. See § 825.127(e)(1).

During the single 12-month period described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. See § 825.127(e)(3).

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 employee'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 two weeks for the Christmas/New Year holiday or the summer vacation 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. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205. See § 825.802 for special calculation of leave rules applicable to airline flight crew employees.

§ 825.201 Leave to care for a parent.

(a) General rule. An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the FMLA. See § 825.122(c) for definition of parent.

(b) Same employer limitation. Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a parent, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. See also § 825.127(d).

§ 825.202 Intermittent leave or reduced leave schedule.

(a) Definition. 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. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) Medical necessity. For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered service member with a serious injury or illness, 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. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employer, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. See §§ 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered service member's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered service member's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered service member with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a spouse, parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered service member which requires treatment by a
health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered service member, even if he or she does not receive treatment by a health care provider. See §§ 825.113 and 825.127.

(c) Birth or placement. 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. Such a schedule reduction might occur, for example, where an employee, with the employer’s agreement, works part-time after the birth of a child, or takes leave in several segments. The employer’s agreement is not required, however, for leave during which the expectant mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. See § 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. See also § 825.120 (pregnancy) and § 825.121 (adoption and foster care).

(d) Qualifying exigency. Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

§ 825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered service member. See § 825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer’s operations.

§ 825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) Transfer or reassignment. If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered service member, including during a period of recovery from one’s own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered service member, or if the employer agrees to permit intermittent or reduced schedule 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, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee’s regular position. See § 825.601 for special rules applicable to instructional employees of schools.

(b) Compliance. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee’s need for intermittent or reduced schedule leave.

(c) Equivalent pay and benefits. The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee’s regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee’s same job on a part-time schedule, paying the same hourly rate as the employee’s previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer’s normal practice is to base such benefits on the number of hours worked.
(d) **Employer limitations.** An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) **Reinstatement of employee.** When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§ 825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) **Minimum increment.** (1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave 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 that it is not greater than one hour and provided further that an employee'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. See also § 825.205(a)(2) for the physical impossibility exception, §§ 825.600 and 825.601 for special rules applicable to employees of schools, and § 825.802 for special rules applicable to airline flight crew employees. If an employer uses different increments to account for different types of leave, the employer must account for FMLA leave in the smallest increment used to account for any other type of leave. For example, if an employer accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, then FMLA leave use must be accounted for using increments no larger than one-half hour. If an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may also account for FMLA leave in varying increments, provided that the increment used for FMLA leave is no greater than the smallest increment used for any other type of leave during the period in which the FMLA leave is taken. If an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances. In all cases, employees may not be charged FMLA leave for periods during which they are working.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed “clean room” during a certain period of time and no equivalent position is available, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period during which the employer is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to the physical impossibility after a period of FMLA leave. See § 825.214.

(b) **Calculation of leave.** (1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth (\(\frac{1}{5}\)) of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work eight hour days works four-hour days under a reduced leave schedule, the employee would use one-half (\(\frac{1}{2}\)) week of FMLA leave. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. If an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (\(\frac{1}{3}\)) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to a total of 12 workweeks of leave, or 26 workweeks in the case of military caregiver leave, and the total number of hours contained in those workweeks is necessarily dependent on the specific hours the employee would have worked but for the
use of leave. *See also §§ 825.601 and 825.602, special rules for schools and § 825.802, special rules for airline flight crew employees.*

(2) If an employer has made a permanent or long-term change in the employee’s schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee’s schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee’s leave entitlement.

(c) Overtime. If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee’s ability to work overtime, the hours which the employee would have been required to work may be counted against the employee’s FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek, or one-sixth (1⁄6) of a week of FMLA leave. Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee’s FMLA leave entitlement.

§ 825.206 Interaction with the FLSA.

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee (under regulations issued by the Secretary, 29 C.F.R. part 541), providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. See 29 C.F.R. § 541.602(b)(7). This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee’s salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 C.F.R. part 541.

(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (see 29 C.F.R. § 778.114), the employer, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee’s regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee’s weekly salary by the employee’s normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee’s compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating workweek basis.

(c) This special exception to the salary basis requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as FMLA leave. Hourly or other deductions which are not in accordance with 29 C.F.R. part 541 or 29 C.F.R. § 778.114 may not be taken, for example, from the salary of an employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee’s eligibility for exemption. Nor may deductions which are not permitted by 29 C.F.R. part 541 or 29 C.F.R. § 778.114 be taken from such an employee’s salary for any leave which does not qualify as FMLA leave, e.g., leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or serious injury or illness; or for leave which is more generous than provided by FMLA. Employers may comply with State law or the employer’s own policy/practice under these circumstances and maintain the employee’s eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee’s
pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an hourly employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 Substitution of paid leave.

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. 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. Accordingly, the employee receives pay pursuant to the employer’s applicable paid leave policy during the period of otherwise 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. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

(b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer’s plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee’s FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee’s FMLA leave entitlement.

(d) 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 FMLA if it meets the criteria set forth above in §§ 825.112 through 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.

(e) The Act provides that 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 in accordance with § 825.300(d), the leave counts against the employee’s FMLA leave entitlement. Because the workers’ compensation absence is not unpaid, the provision for substitution of the employee’s accrued paid leave is not applicable, 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 workers’ compensation benefits, such as in the case where workers’ compensation only provides replacement income for two-thirds of an employee’s salary. If the health care provider treating the employee for the workers’ compensation injury certifies the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employer 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. See also §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702(d)(1) and (2) regarding the relationship between workers’ compensation absences and FMLA leave.

(f) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. This section of the FLSA limits the number of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). In addition, under the FLSA, an employer always has the right to cash out an employee’s compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA
reason, or if the employer requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

§ 825.208 [Reserved]

§ 825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. § 5000(b)(1) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of group health plan is set forth in § 825.102. For purposes of FMLA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

1. No contributions are made by the employer;
2. Participation in the program is completely voluntary for employees;
3. The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;
4. The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,
5. The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employee's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) 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. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) 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.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc. See § 825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for key employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.
(g) If a key employee (see § 825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee’s entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee does not desire restoration to employment at the end of the leave period, or the FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) 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).

§ 825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employer’s group health plan, as described in § 825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee’s share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee’s premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

1. Payment would be due at the same time as it would be made if by payroll deduction;
2. Payment would be due on the same schedule as payments are made under COBRA;
3. Payment would be prepaid pursuant to a cafeteria plan at the employee’s option;
4. The employer’s existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,
5. Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. See § 825.300(c).

(e) An employer may not require more of an employee using unpaid FMLA leave than the employer requires of other employees on leave without pay.

(f) An employee who is receiving payments as a result of a workers’ compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking FMLA leave. See § 825.207(e).

§ 825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee’s FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use banked hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.
(e) As provided in § 825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employer can show that the employee would have been laid off and the employment relationship terminated; or,

(3) The employee provides unequivocal notice of intent not to return to work.

§ 825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employer policy providing a longer grace period, an employer's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, 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, where the required 15–day notice has been provided.

(2) An employer has no obligation regarding the maintenance of a health insurance policy which is not a group health plan. See § 825.209(a).

(3) All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave.

(b) The employer may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employer maintains health coverage by paying the employee's share after the premium payment is missed.

(c) 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, including family or dependent coverage. See § 825.215(d)(1)-(5). In such case, an 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. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

§ 825.213 Employer recovery of benefit costs.

(a) In addition to the circumstances discussed in § 825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered service member, which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of other circumstances beyond the employee's control are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a key employee who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.
(3) When an employee fails to return to work because of the continuation, recurrence, or onset of either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered service member, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition or the covered service member's serious injury or illness. Such certification is not required unless requested by the employer. 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. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL forms developed for these purposes. See §§ 825.306(b), 825.310(c)-(d). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100 percent of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employer may elect to maintain other benefits, e.g., life insurance, disability insurance, etc., by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer's share of allowable premiums as would be calculated under COBRA, excluding the two percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

§ 825.214 Employee right to reinstatement.

General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. See also § 825.106(e) for the obligations of joint employers.

§ 825.215 Equivalent position.

(a) Equivalent position. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) Conditions to qualify. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent pay.
An employee is entitled to any unconditional pay increases which 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. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. 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.

Equivalent benefits. Benefits include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

At the end of an employee’s FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See § 825.213(b).

An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

Equivalent terms and conditions of employment. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee’s original position.
(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) De minimis exception. The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

§ 825.216 Limitations on an employee’s right to reinstatement.

(a) 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. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. See § 825.107.

(b) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees (key employees, as defined in § 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in § 825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers’ compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. See § 825.702, state leave laws, or workers' compensation laws.

(d) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA’s job restoration or maintenance of health benefits provisions.

(e) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.
§ 825.217 Key employee, general rule.

(a) A key employee is a salaried FMLA–eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee’s worksite.

(b) The term salaried means paid on a salary basis, as defined in 29 C.F.R. § 541.602. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, professional, and computer employees.

(c) A key employee must be among the highest paid 10 percent of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employer within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, e.g., stock options, or benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer’s employees within 75 miles of the worksite may be key employees.

§ 825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause substantial and grievous economic injury to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

(d) FMLA’s substantial and grievous economic injury standard is different from and more stringent than the undue hardship test under the ADA. See also § 825.702.

§ 825.219 Rights of a key employee.

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer’s operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer’s finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.
(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has:
   (i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;
   (ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;
   (iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See § 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50–employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. See § 825.215.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. See § 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employ-
ee held at the time the employee’s FMLA leave commenced or to an equivalent position. The employee’s right to restoration, however, ceases at the end of the applicable 12–month FMLA leave year.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

Subpart C—Employee and Employer Rights and Obligations Under the Act

§ 825.300 Employer notice requirements.

(a) General notice. (1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act’s provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $173 for each separate offense.

(2) Covered employers must post this general notice even if no employees are eligible for FMLA leave.

(3) If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

(4) To meet the requirements of paragraph (a)(3) of this section, employers may duplicate the text of the Department’s 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. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at www.dol.gov/whd. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law.

(b) Eligibility notice. (1) 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. See § 825.110 for definition of an eligible employee and § 825.801 for special hours of service eligibility requirements for airline flight crews. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. See §§ 825.127(c) and 825.200(b). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in § 825.110. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employer, the hours of service with the employer during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. Notification of eligibility may be oral or in writing; employers may use optional Form WH-381 (Notice of Eligibility and Rights and Responsibility) to provide such notification to employees. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at www.dol.gov/whd. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4).

(3) 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 (e.g., if the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.
(c) Rights and responsibilities notice. (1) 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 employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4). This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (see §§ 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (see §§ 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the consequences of failing to do so (see §§ 825.305, 825.309, 825.310, 825.313);

(iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (see § 825.207);

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) The employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

(vi) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (see §§ 825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

(2) The notice of rights and responsibilities may include other information—e.g., whether the employer will require periodic reports of the employee's status and intent to return to work—but is not required to do so.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

(4) 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. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, 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 (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

(5) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(6) A prototype notice of rights and responsibilities may be obtained from local offices of the Wage and Hour Division or from the Internet at www.dol.gov/whd. Employers may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) Designation notice. (1) The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), 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 (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time.
(3) If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee’s ability to perform the essential functions of the employee’s position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee’s position. See § 825.312. If the employer handbook or other written documents (if any) describing the employer’s leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (e.g., by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at www.dol.gov/whd. 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.

(5) 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.

(6) The employer must notify the employee of the amount of leave counted against the employee’s FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee’s FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee’s FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee’s FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee’s FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee’s pay stub.

(e) Consequences of failing to provide notice. Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee’s FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered See § 825.400(c).

§ 825.301 Designation of FMLA leave.

(a) Employer responsibilities. The employer’s decision to designate leave as FMLA–qualifying must be based only on information received from the employee or the employee’s spokesperson (e.g., if the employee is incapacitated, the employee’s spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee’s use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA–qualifying. Once the employer has acquired knowledge that the leave is being taken for a FMLA–qualifying reason, the employer must notify the employee as provided in § 825.300(d).

(b) Employee responsibilities. 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 notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if
an employee requesting to use paid leave for a FMLA–qualifying reason does not explain the reason for the leave and the employer denies the employee's request, the employee will need to provide sufficient information to establish a FMLA–qualifying reason for the needed leave so that the employer is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA–qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA–qualifying reason against the employee's FMLA leave entitlement.

(c) Disputes. If there is a dispute between an employer and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(d) Retroactive designation. If an employer does not designate leave as required by § 825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) Remedies. If an employer’s failure to timely designate leave in accordance with § 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See § 825.400(c). For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from working during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously ill son or daughter if the leave had been designated timely.

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

(a) Timing of notice. An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered service member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. For foreseeable leave due to a qualifying exigency notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.

(b) As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) Content of notice. An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA–qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that
the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military 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), and that the requested leave is for one of the reasons listed in § 825.126(b); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered service member with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. See § 825.305. An employer may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave. See §§ 825.309, 825.310). When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employee is unable to determine whether the leave is FMLA-qualifying.

(d) **Complying with employer policy.** 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. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. 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-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) **Scheduling planned medical treatment.** 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. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. See §§ 825.203 and 825.205.

(f) **Intermittent leave or leave on a reduced leave schedule.** Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. See § 825.304.

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) **Timing of notice.** When the approximate timing of the need for 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. See § 825.303(c). Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the
employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b) **Content of notice.** An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military 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), that the requested leave is for one of the reasons listed in § 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered service member with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA–qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA–protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in “sick” without providing more information will not be considered sufficient notice to trigger an employer’s obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA–qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA–qualifying.

(c) **Complying with employer policy.** When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA–qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer’s usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA–protected leave may be delayed or denied.

### § 825.304 Employee failure to provide notice.

(a) **Proper notice required.** In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's provision of the required notice in either an employee handbook or employee distribution, as required by § 825.300.

(b) **Foreseeable leave--30 days.** When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) **Foreseeable leave--less than 30 days.** When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer two weeks notice but instead only provided one week notice, then the employer may delay FMLA–protected leave for one week (thus, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (i.e., a week before the two week notice period has been met) the leave will not be FMLA–protected).

(d) **Unforeseeable leave.** When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave
very soon after the need arises consistent with the employer's policy, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

(e) Waiver of notice. An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

§ 825.305 Certification, general rule.

(a) General. An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered service member with a serious injury or illness be supported by a certification, as described in §§ 825.309 and 825.310, respectively. An employer must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by § 825.300(c). An employer's oral request to an employee to furnish any subsequent certification is sufficient.

(b) 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 some 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 calendar days to return the requested certification.

(c) Complete and sufficient certification. The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. 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 deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) Consequences. At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request. This provision will apply in any case where an employer requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. See §§ 825.306, 825.307, 825.308, and 825.312.

(e) 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 (as defined in § 825.200), 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 § 825.307, including second and third opinions.
§ 825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) Required information. 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 an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (see § 825.123(b) and (c));

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) DOL has developed two optional forms (Form WH–380E and Form WH–380F, as revised) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. Optional form WH–380E is for use when the employee's need for leave is due to the employee's own serious health condition. Optional form WH–380F is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Form WH–380–E and WH–380–F, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§ 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. Prototype forms WH–380–E and WH–380–F may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.dol.gov/whd](http://www.dol.gov/whd).

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA–protected leave. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA–protected leave. If the employee fails to provide the information required
for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. See § 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA–protected leave.

(e) 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 of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. See § 825.305(d).

§ 825.307 Authentication and clarification of medical certification for leave taken because of an employee’s own serious health condition or the serious health condition of a family member; second and third opinions.

(a) Clarification and authentication. If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). 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, however, may the employee's direct supervisor contact the employee's health care provider. For purposes of these regulations, authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification 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 medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (see 45 C.F.R. parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA–covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA–covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. See § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

(b) Second opinion.

(1) 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. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employee's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) Third opinion. 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. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement.
on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) Copies of opinions. The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) Travel expenses. If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable “out of pocket” travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) Medical certification abroad. In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

§ 825.308 Recertifications for leave taken because of an employee’s own serious health condition or the serious health condition of a family member.

(a) 30–day rule. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) More than 30 days. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) Less than 30 days. An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.
(d) **Timing.** 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.

(e) **Content.** The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. See § 825.305(d). 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.

(f) 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.

§ 825.309 Certification for leave taken because of a qualifying exigency.

(a) **Active Duty Orders.** 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 (see § 825.126(a)), 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 which 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. This information need only be provided to the employer once. A copy of new active duty orders or other documentation issued by the military may be required by the employer if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of the same or a different military member;

(b) **Required information.** An employer may require that leave for any qualifying exigency specified in § 825.126 be supported by a certification from the employee that sets forth the following information:

1. A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

2. The approximate date on which the qualifying exigency commenced or will commence;

3. If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;

4. If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency;

5. If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and email address) and a brief description of the purpose of the meeting; and

6. If the qualifying exigency involves Rest and Recuperation leave, a copy of the military member’s Rest and Recuperation orders, or other documentation issued by the military which indicates that the military member has been granted Rest and Recuperation leave, and the dates of the military member’s Rest and Recuperation leave.

(c) DOL has developed an optional form (Form WH–384) for employees’ use in obtaining a certification that meets FMLA’s certification requirements. Form WH–384 may be obtained from local offices of the Wage and Hour Division or from the Internet at www.dol.gov/whd. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. 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 this section.

(d) **Verification.** If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the
employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between
the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings
or appointments with third parties, but no additional information may be requested by the employer. An employer also
may contact an appropriate unit of the Department of Defense to request verification that a military 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);
no additional information may be requested and the employee's permission is not required.

§ 825.310 Certification for leave taken to care for a covered service member (military caregiver
leave).

(a) Required information from health care provider. When leave is taken to care for a covered service member with a serious
injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care
provider of the covered service member. For purposes of leave taken to care for a covered service member, any one of the
following health care providers may complete such a certification:

(1) A United States Department of Defense ("DOD") health care provider;
(2) A United States Department of Veterans Affairs ("VA") health care provider;
(3) A DOD TRICARE network authorized private health care provider;
(4) A DOD non-network TRICARE authorized private health care provider; or
(5) Any health care provider as defined in § 825.125.

(b) If the authorized health care provider is unable to make certain military-related determinations outlined below, the au-
thorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD Recov-
ery Care Coordinator) or an authorized VA representative. An employer may request that the health care provider provide
the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the
health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the
following:
   (i) A DOD health care provider;
   (ii) A VA health care provider;
   (iii) A DOD TRICARE network authorized private health care provider;
   (iv) A DOD non-network TRICARE authorized private health care provider; or
   (v) A health care provider as defined in § 825.125.

(2) Whether the covered service member's injury or illness was incurred in the line of duty on active duty or, if not, whether
the covered service member's injury or illness existed before the beginning of the service member's active duty and was
aggravated by service in the line of duty on active duty;

(3) The approximate date on which the serious injury or illness commenced, or was aggravated, and its probable duration;

(4) A statement or description of appropriate medical facts regarding the covered service member's health condition for
which FMLA leave is requested. The medical facts must be sufficient to support the need for leave.
   (i) In the case of a current member of the Armed Forces, such medical facts must include information on whether the in-
jury or illness may render the covered service member medically unfit to perform the duties of the service member's office,
grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy.
   (ii) In the case of a covered veteran, such medical facts must include:

      (A) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness
that is the continuation of an injury or illness that was incurred or aggravated when the covered veteran was a member of
the Armed Forces and rendered the service member medically unfit to perform the duties of the service member's office,
grade, rank, or rating; or

      (B) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that
is 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 that such VASRD rating is based, in whole or in part, on
the condition precipitating the need for military caregiver leave; or

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(C) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is 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) Documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(5) Information sufficient to establish that the covered service member is in need of care, as described in § 825.124, and whether the covered service member will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered service member, whether there is a medical necessity for the covered service member to have such periodic care and an estimate of the treatment schedule of such appointments;

(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered service member other than for planned medical treatment (e.g., episodic flare-ups of a medical condition), whether there is a medical necessity for the covered service member to have such periodic care, which can include assisting in the covered service member's recovery, and an estimate of the frequency and duration of the periodic care.

(c) Required information from employee and/or covered service member. In addition to the information that may be requested under § 825.310(b), an employer may also request that such certification set forth the following information provided by an employee and/or covered service member:

(1) The name and address of the employer of the employee requesting leave to care for a covered service member, the name of the employee requesting such leave, and the name of the covered service member for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered service member for whom the employee is requesting leave to care;

(3) Whether the covered service member is a current member of the Armed Forces, the National Guard or Reserves, and the covered service member's military branch, rank, and current unit assignment;

(4) Whether the covered service member is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

(5) Whether the covered service member is on the temporary disability retired list;

(6) Whether the covered service member is a veteran, the date of separation from military service, and whether the separation was other than dishonorable. The employer may require the employee to provide documentation issued by the military which indicates that the covered service member is a veteran, the date of separation, and that the separation is other than dishonorable. Where an employer requires such documentation, an employee may provide a copy of the veteran's Certificate of Release or Discharge from Active Duty issued by the U.S. Department of Defense (DD Form 214) or other proof of veteran status. See § 825.127(c)(2).

(7) A description of the care to be provided to the covered service member and an estimate of the leave needed to provide the care.

(d) DOL has developed optional forms (WH–385, WH–385–V) for employees' use in obtaining certification that meets FMLA's certification requirements, which may be obtained from local offices of the Wage and Hour Division or on the Internet at www.dol.gov/whd. These optional forms reflect certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered service member with a serious injury or illness. WH–385, WH–385–V, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An employer may seek authentication and/or clarification of the certification under § 825.307. Second and third opinions under § 825.307 are not permitted for leave to care for a covered service member when the certification has been completed by one of the types of health care providers identified in § 825.310(a)(1)-(4). However, second and third opinions under § 825.307 are permitted when the certification has been completed by a health care provider as defined in § 825.125 that is not one of the types identified in § 825.310(a)(1)-(4). Additionally, recertifications under § 825.308 are not permitted for leave to care for a
covered service member. An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill service member pursuant to § 825.122(k) of the FMLA.

(e) An employer requiring an employee to submit a certification for leave to care for a covered service member must accept as sufficient certification, in lieu of the Department’s optional certification forms (WH–385) or an employer’s own certification form, invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill service member at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered service member in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered service member regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered service member beyond the expiration date specified in an ITO or ITA, an employer may request that the employee have one of the authorized health care providers listed under § 825.310(a) complete the DOL optional certification form (WH–385) or an employer's own form, as requisite certification for the remainder of the employee’s necessary leave period.

(2) An employer may seek authentication and clarification of the ITO or ITA under § 825.307. An employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill service member pursuant to § 825.122(k) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) An employer requiring an employee to submit a certification for leave to care for a covered service member must accept as sufficient certification of the service member’s serious injury or illness documentation indicating the service member's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Such documentation is sufficient certification of the service member’s serious injury or illness to support the employee's request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation.

(1) An employer may seek authentication and clarification of the documentation indicating the service member's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers under § 825.307. An employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 when the service member’s serious injury or illness is shown by documentation of enrollment in this program.

(2) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill service member pursuant to § 825.122(k) when an employee supports his or her request for FMLA leave with a copy of such enrollment documentation. An employer may also require an employee to provide documentation, such as a veteran's Form DD–214, showing that the discharge was other than dishonorable and the date of the veteran's discharge.

(g) 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. See § 825.305(b). In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. See § 825.305(d).

§ 825.311 Intent to return to work.

(a) 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.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer’s obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that pre-
cipated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

§ 825.312 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, 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. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. See § 825.305(d).

(b) 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. The certification from the employee's health care provider must certify that the employee is able to resume work. 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 § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

(c) 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.

(d) The designation notice required in § 825.300(d) shall advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in paragraph (d) of this section. If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. See § 825.313(d).

(f) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.
(g) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.

(h) Requirements under the Americans with Disabilities Act (ADA), as amended, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

§ 825.313 Failure to provide certification.

(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave.* In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) *Recertification.* An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered service member.

(d) *Fitness-for-duty certification.* When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see § 825.312(a)) if the employer has provided the required notice (see § 825.300(e)); the employer may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also § 825.213(a)(3).

Subpart D—Enforcement Mechanisms

§ 825.400 Enforcement, general rules.

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered
service member or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney’s fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

§ 825.401 Filing a complaint with the Federal Government.

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories or on the Department’s Web site.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

§ 825.402 Violations of the posting requirement.

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act’s provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

§ 825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

§ 825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. § 3711 et seq., and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

Subpart E—Recordkeeping Requirements

§ 825.500 Recordkeeping requirements.

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund, or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of FMLA exists or the Department is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.
(b) No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) Covered employers who have eligible employees must maintain records that must disclose the following:

1. Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

2. Dates FMLA leave is taken by FMLA eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

3. If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

4. Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees as required under FMLA and these regulations See § 825.300(b)-(c). Copies may be maintained in employee personnel files.

5. Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

6. Premium payments of employee benefits.

7. Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) of this section.

(e) Covered employers in a joint employment situation (see § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA’s recordkeeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 C.F.R. 516.2(a)(7)), provided that:

1. Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

2. With respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) 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 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 FMLA. If the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 C.F.R. § 1630.14(c)(1)), except that:

1. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

2. First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

(h) Special rules regarding recordkeeping apply to employers of airline flight crew employees. See § 825.803.

Subpart F—Special Rules Applicable to Employees of Schools

§ 825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of local educational agencies, including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA (and these special rules) and the Act's 50–employee coverage test does not apply. The usual requirements for employees to be eligible do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. Instructional employees are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§ 825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered service member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. Periods of a particular duration means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (see § 825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.
§ 825.602 Special rules for school employees, limitations on leave near the end of an academic term.

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if:

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered service member. The employer may require the employee to continue taking leave until the end of the term if:

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered service member. The employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(b) For purposes of these provisions, academic term means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

§ 825.603 Special rules for school employees, duration of FMLA leave.

(a) If an employee chooses to take leave for periods of a particular duration in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§ 825.604 Special rules for school employees, restoration to “an equivalent position.”

The determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of “established school board policies and practices, private school policies and practices, and collective bargaining agreements.” The “established policies” and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to an equivalent position must provide substantially the same protections as provided in the Act for reinstated employees. See § 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

§ 825.700 Interaction with employer’s policies.

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

§ 825.701 Interaction with State laws.

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee needing leave due to his or her own serious health condition would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a “spouse equivalent,” and leave was used for that purpose, the employee is still entitled to his or her full FMLA leave entitlement, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or “spouse equivalent.”

(4) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. See Subpart F of this part.

(b) [Reserved]

§ 825.702 Interaction with Federal and State anti-discrimination laws.

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA’s legislative history explains that FMLA is “not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 [as amended] or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.” S. Rep. No. 103–3, at 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer
violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 445 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

(b) If an employee is a qualified individual with a disability within the meaning of the ADA, the employer must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employer must afford the employee his or her FMLA rights. ADA’s “disability” and FMLA’s “serious health condition” are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees’ group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee’s present position and an accommodation is not possible in the employee’s present position, or an accommodation in the employee’s present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an eligible employee entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee’s FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA’s provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer’s FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. See § 825.220(b).
(2) An employee may be on a workers’ compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers’ compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers’ compensation injury may certify the employee is able to return to work in a light duty position. If the employer offers such a position, the employee is permitted but not required to accept the position. See § 825.220(d). As a result, the employee may no longer qualify for payments from the workers’ compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12–week FMLA leave entitlement is exhausted. See § 825.207(e). If the employee returning from the workers’ compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employer requires certifications of an employee’s fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employer (and, therefore, not an eligible employee under FMLA) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, et seq., veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning service member would be eligible for FMLA leave if the months and hours that he or she would have worked (or, for airline flight crew employees, would have worked or been paid) for the civilian employer during the period of absence due to or necessitated by USERRA–covered service, combined with the months employed and the hours actually worked (or, for airline flight crew employees, actually worked or paid), meet the FMLA eligibility threshold of 12 months of employment and the hours of service requirement. See §§ 825.110(b)(2)(i) and (c)(2) and 825802(c).

(h) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

Subpart H—Special Rules for Airline Flight Crew Employees

Omitted
U.S. Department of Labor Forms

Forms can be found at: https://www.dol.gov/whd/fmla/forms.htm
Certification of Health Care Provider for Employee’s Serious Health Condition

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee’s health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact:

Employee’s job title: ____________________________  Regular work schedule: ____________________________

Employee’s essential job functions: ________________________________________________________________

Check if job description is attached: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name:

First  ____________________________  Middle  ____________________________  Last  ____________________________

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee’s family members, 29 C.F.R. § 1635.3(b). Please be sure to sign the form on the last page.

Provider’s name and business address: ________________________________________________________________

Type of practice / Medical specialty: ________________________________________________________________

Telephone: (_______)  ____________________________  Fax: (_______)  ____________________________
PART A: MEDICAL FACTS

1. Approximate date condition commenced: ________________________________________

Probable duration of condition: ________________________________________________

Mark below as applicable:
Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?  
______No   ____Yes. If so, dates of admission:
__________________________________________________________________________

Date(s) you treated the patient for condition:
_________________________________________________________________________

Will the patient need to have treatment visits at least twice per year due to the condition?  ____No  ____Yes.
Was medication, other than over-the-counter medication, prescribed?  ____No  ____Yes.
Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?  
______No   ____Yes. If so, state the nature of such treatments and expected duration of treatment:
________________________________________________________________________

2. Is the medical condition pregnancy?  ____No   ____Yes. If so, expected delivery date: ________________

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to  
provide a list of the employee’s essential functions or a job description, answer these questions based upon  
the employee’s own description of his/her job functions.
Is the employee unable to perform any of his/her job functions due to the condition:   ____No  ____Yes.
If so, identify the job functions the employee is unable to perform:
________________________________________________________________________

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave  
(such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use  
of specialized equipment):
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of incapacity: ____________________________

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee’s medical condition? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary?
   ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   __________________________________________________________

   Estimate the part-time or reduced work schedule the employee needs, if any:

   __________ hour(s) per day; __________ days per week from __________ through __________

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ___No ___Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups?
   ___ No ___Yes. If so, explain:

   __________________________________________________________

   __________________________________________________________

   Based upon the patient’s medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency : ______ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
Signature of Health Care Provider ____________________________________________ Date ____________

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.
SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees’ family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: ____________________________

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: ____________________________
First        Middle         Last

Name of family member for whom you will provide care: ____________________________

Relationship of family member to you: ____________________________
First        Middle         Last

If family member is your son or daughter, date of birth: ____________________________

Describe care you will provide to your family member and estimate leave needed to provide care:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Employee Signature ____________________________ Date ____________________________
SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), or genetic services, as defined in 29 C.F.R. § 1635.3(e). Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider’s name and business address: ____________________________________________________________

Type of practice / Medical specialty: ____________________________________________________________

Telephone: (_______) ___________________________ Fax:(_______) _________________________________

PART A: MEDICAL FACTS

1. Approximate date condition commenced: ______________________________________________________

   Probable duration of condition: ______________________________________________________________

   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___ No ___ Yes. If so, dates of admission: ______________________________________________________

   Date(s) you treated the patient for condition: __________________________________________________

   Was medication, other than over-the-counter medication, prescribed? ___ No ___ Yes.

   Will the patient need to have treatment visits at least twice per year due to the condition? ___ No ___ Yes

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g.,
   physical therapist)? ___ No ___ Yes. If so, state the nature of such treatments and expected
   duration of treatment: ______________________________________________________________________

2. Is the medical condition pregnancy? ___ No ___ Yes. If so, expected delivery date: __________________

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such
   medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of
   specialized equipment):

   _______________________________________________________________________________________
   _______________________________________________________________________________________
PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient’s need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care;

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery?  ____No  ____Yes.

   Estimate the beginning and ending dates for the period of incapacity: ________________________________

   During this time, will the patient need care?  ____No  ____Yes.

   Explain the care needed by the patient and why such care is medically necessary:

   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________

5. Will the patient require follow-up treatments, including any time for recovery?  ____No  ____Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________

   Explain the care needed by the patient, and why such care is medically necessary: ________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery?  ____No  ____Yes.

   Estimate the hours the patient needs care on an intermittent basis, if any:

   ______ hour(s) per day; _______ days per week  from __________________ through __________________

   Explain the care needed by the patient, and why such care is medically necessary:

   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____ No ____ Yes.

   Based upon the patient’s medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

   Does the patient need care during these flare-ups? ____ No ____ Yes.

   Explain the care needed by the patient, and why such care is medically necessary: _________________________________

   ____________________________________________

   ____________________________________________

   ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

   ____________________________________________

   ____________________________________________

   ____________________________________________

   ____________________________________________

   ____________________________________________

   ____________________________________________

   ____________________________________________

   ________________________________

   Signature of Health Care Provider   Date

   PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

   If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.
Notice to the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a current servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees’ family members created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 CFR 1635.9, if the Genetic Information Nondiscrimination Act applies.

SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave

INSTRUCTIONS to the EMPLOYEE or CURRENT SERVICEMEMBER: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a servicemember. If requested by the employer, your response is required to obtain or retain the benefits of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee’s FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE (“DOD”) HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs (“VA”) health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a current member of the Regular Armed Forces, the National Guard, or the 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. For purposes of FMLA leave, a serious injury or illness is one that was incurred 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 that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a current servicemember’s serious injury or illness includes written documentation confirming that the servicemember’s injury or illness was incurred in the line of duty on active duty or if not, that the current servicemember’s injury or illness existed before the beginning of the servicemember’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that the current servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage. Limit your responses to the servicemember’s condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 CFR 1635.3(f), or genetic services, as defined in 29 CFR 1635.3(e).
SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave:

(This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION
Name and Address of Employer (this is the employer of the employee requesting leave to care for the current servicemember):

Name of Employee Requesting Leave to Care for the Current Servicemember:

<table>
<thead>
<tr>
<th>First</th>
<th>Middle</th>
<th>Last</th>
</tr>
</thead>
</table>

Name of the Current Servicemember (for whom employee is requesting leave to care):

<table>
<thead>
<tr>
<th>First</th>
<th>Middle</th>
<th>Last</th>
</tr>
</thead>
</table>

Relationship of Employee to the Current Servicemember:

Spouse [ ] Parent [ ] Son [ ] Daughter [ ] Next of Kin [ ]

Part B: SERVICEMEMBER INFORMATION

(1) Is the Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves?  
Yes [ ] No [ ]

If yes, please provide the servicemember’s military branch, rank and unit currently assigned to:

Is the servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)?

Yes [ ] No [ ]

If yes, please provide the name of the medical treatment facility or unit:

(2) Is the Servicemember on the Temporary Disability Retired List (TDRL)?

Yes [ ] No [ ]

Part C: CARE TO BE PROVIDED TO THE SERVICEMEMBER

Describe the Care to Be Provided to the Current Servicemember and an Estimate of the Leave Needed to Provide the Care:


Page 2 CONTINUED ON NEXT PAGE Form WH-385 Revised May 2015
SECTION II: For Completion by a United States Department of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator).

(Please ensure that Section I above has been completed before completing this section. Please be sure to sign the form on the last page.)

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider’s Name and Business Address:

________________________________________________________________________________________

Type of Practice/Medical Specialty: _____________________________________________________________

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care provider, or (5) a health care provider as defined in 29 CFR 825.125:

________________________________________________________________________________________

Telephone: ( ) __________________ Fax: ( ) __________________ Email: __________________________

PART B: MEDICAL STATUS

(1) The current Servicemember’s medical condition is classified as (Check One of the Appropriate Boxes):

☐ (VSI) Very Seriously Ill/Injured – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ (SI) Seriously Ill/Injured – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ OTHER Ill/Injured – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member’s office, grade, rank, or rating.

☐ NONE OF THE ABOVE (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a “serious health condition” under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380-F or an employer-provided form seeking the same information.)

(2) Is the current Servicemember being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces? Yes☐ No☐

(3) Approximate date condition commenced: ____________________________________________

(4) Probable duration of condition and/or need for care: ________________________________

Page 3 CONTINUED ON NEXT PAGE Form WH-385 Revised May 2015
(5) Is the servicemember undergoing medical treatment, recuperation, or therapy for this condition? Yes ☐ No ☐
If yes, please describe medical treatment, recuperation or therapy:

PART C: SERVICEMEMBER’S NEED FOR CARE BY FAMILY MEMBER

(1) Will the servicemember need care for a single continuous period of time, including any time for treatment and recovery? Yes ☐ No ☐
If yes, estimate the beginning and ending dates for this period of time: ______________________

(2) Will the servicemember require periodic follow-up treatment appointments? Yes ☐ No ☐
If yes, estimate the treatment schedule: __________________________

(3) Is there a medical necessity for the servicemember to have periodic care for these follow-up treatment appointments? Yes ☐ No ☐

(4) Is there a medical necessity for the servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? Yes ☐ No ☐
If yes, please estimate the frequency and duration of the periodic care:

________________________________________

Signature of Health Care Provider: ________________________________ Date: ______________________

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT
If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. 2616; 29 CFR 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.
SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and while you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.309.

Employer name: ____________________________________________________________________________________

Contact Information: _________________________________________________________________________________

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 CFR 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _______________________________________________________________________________________

First    Middle    Last

Name of military member on covered active duty or call to covered active duty status:

First    Middle    Last

Relationship of military member to you: _____________________________________________________________

Period of military member’s covered active duty: _______________________________________________________

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a military member’s covered active duty or call to covered active duty status. Please check one of the following and attach the indicated document to support that the military member is on covered active duty or call to covered active duty status.

 A copy of the military member’s covered active duty orders is attached.

 Other documentation from the military certifying that the military member is on covered active duty (or has been notified of an impending call to covered active duty) is attached.

 I have previously provided my employer with sufficient written documentation confirming the military member’s covered active duty or call to covered active duty status.
PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

___________________________________________________________________________________________
___________________________________________________________________________________________
___________________________________________________________________________________________
___________________________________________________________________________________________

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military; a document confirming the military member’s Rest and Recuperation leave; a document confirming an appointment with a third party, such as a counselor or school official, or staff at a care facility; or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached.

Yes ☐ No ☐ None Available ☐

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: ______________________________________________________

Probable duration of exigency: ________________________________________________________________

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? Yes ☐ No ☐

If so, estimate the beginning and ending dates for the period of absence:

___________________________________________________________________________________________

3. Will you need to be absent from work periodically to address this qualifying exigency? Yes ☐ No ☐

Estimate schedule of leave, including the dates of any scheduled meetings or appointments:

___________________________________________________________________________________________
___________________________________________________________________________________________

Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

Frequency: _____ times per _____ week(s) _____ month(s)

Duration: _____ hours ___ day(s) per event.
PART C:

If leave is requested to meet with a third party (such as to arrange for childcare or parental care, to attend counseling, to attend meetings with school, childcare or parental care providers, to make financial or legal arrangements, to act as the military member’s representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: ____________________________________________ Title: ____________________________________________

Organization: __________________________________________________

Address: _______________________________________________________

Telephone: (______) __________________________ Fax: (______) __________________________

Email: ______________________________________________________________________________

Describe nature of meeting: _______________________________________________________________

_____________________________________________________________________________________

_____________________________________________________________________________________

_____________________________________________________________________________________

_____________________________________________________________________________________

_____________________________________________________________________________________

PART D:

I certify that the information I provided above is true and correct.

Signature of Employee ____________________________________________ Date ____________________________

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

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Notice to the EMPLOYER

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees’ family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 CFR 1635.9, if the Genetic Information Nondiscrimination Act applies.

SECTION I: For completion by the EMPLOYEE and/or the VETERAN for whom the employee is requesting leave

INSTRUCTIONS to the EMPLOYEE and/or VETERAN: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee’s FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

(This section must be completed before Section II can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and address of employer (this is the employer of the employee requesting leave to care for a veteran):

Name of employee requesting leave to care for a veteran:

First                               Middle                               Last

Name of veteran (for whom employee is requesting leave):

First                               Middle                               Last

Relationship of employee to veteran:

Spouse☐  Parent☐  Son☐  Daughter☐  Next of Kin ☐ (please specify relationship):
Part B: VETERAN INFORMATION

(1) Date of the veteran’s discharge:

______________________________

(2) Was the veteran dishonorably discharged or released from the Armed Forces (including the National Guard or Reserves)? Yes □ No □

(3) Please provide the veteran’s military branch, rank and unit at the time of discharge:

______________________________

(4) Is the veteran receiving medical treatment, recuperation, or therapy for an injury or illness? Yes □ No □

Part C: CARE TO BE PROVIDED TO THE VETERAN

Describe the care to be provided to the veteran and an estimate of the leave needed to provide the care:

______________________________
SECTION II: For completion by: (1) a United States Department of Defense (“DOD”) health care provider; (2) a
United States Department of Veterans Affairs (“VA”) health care provider; (3) a DOD TRICARE network
authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care
provider; or (5) a health care provider as defined in 29 CFR 825.125.

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee named in Section I has requested leave under the
military caregiver leave provision of the FMLA to care for a family member who is a veteran. For purposes of FMLA military
caregiver leave, a serious injury or illness means an injury or illness incurred by the servicemember in the line of duty on active duty
in the Armed Forces (or that existed before the beginning of the servicemember’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 servicemember became a veteran, and is:

(i) 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; or
(ii) 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; or
(iii) 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
(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the
Department of Veterans’ Affairs Program of Comprehensive Assistance for Family Caregivers.

A complete and sufficient certification to support a request for FMLA military caregiver leave due to a covered veteran’s serious
injury or illness includes written documentation confirming that the veteran’s injury or illness was incurred in the line of duty on
active duty or existed before the beginning of the veteran’s active duty and was aggravated by service in the line of duty on active
duty, and that the veteran is undergoing treatment, recuperation, or therapy for such injury or illness by a health care provider listed
above. Answer fully and completely all applicable parts. Several questions seek a response as to the frequency or duration of a
condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and
examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient
to determine FMLA military caregiver leave coverage. Limit your responses to the veteran’s condition for which the employee is
seeking leave. Do not provide information about genetic tests, as defined in 29 CFR 1635.3(f), or genetic services, as defined in 29
CFR 1635.3(e).

(Please ensure that Section I has been completed before completing this section. Please be sure to sign the form on the
last page and return this form to the employee requesting leave (See Section I, Part A above). DO NOT SEND THE
COMPLETED FORM TO THE WAGE AND HOUR DIVISION.)

Part A: HEALTH CARE PROVIDER INFORMATION

Health care provider’s name and business address:

__________________________________________________________
Telephone: ( ) __________________ Fax: ( ) ______________ Email: __________________________

Type of Practice/Medical Specialty: ____________________________________________________________

Please indicate if you are:

☐ a DOD health care provider

☐ a VA health care provider

☐ a DOD TRICARE network authorized private health care provider

☐ a DOD non-network TRICARE authorized private health care provider

☐ other health care provider

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PART B: MEDICAL STATUS

Note: If you are unable to make certain of the military-related determinations contained in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as, DOD Recovery Care Coordinator) or an authorized VA representative.

(1) The Veteran’s medical condition is:

☐ 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.

☐ 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% or higher, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave.

☐ 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.

☐ An injury, including a psychological injury, on the basis of which the covered veteran is enrolled in the Department of Veterans’ Affairs Program of Comprehensive Assistance for Family Caregivers.

☐ None of the above.

(2) Is the veteran being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces?  Yes ☐ No ☐

(3) Approximate date condition commenced:__________________________________________

(4) Probable duration of condition and/or need for care:________________________________

(5) Is the veteran undergoing medical treatment, recuperation, or therapy for this condition? Yes ☐ No ☐

If yes, please describe medical treatment, recuperation or therapy:

__________________________________________

PART C: VETERAN’S NEED FOR CARE BY FAMILY MEMBER

“Need for care” encompasses both physical and psychological care. It includes situations where, for example, due to his or her serious injury or illness, the veteran is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport him or herself to the doctor. It also includes providing psychological comfort and reassurance which would be beneficial to the veteran who is receiving inpatient or home care.

(1) Will the veteran need care for a single continuous period of time, including any time for treatment and recovery? Yes ☐ No ☐

If yes, estimate the beginning and ending dates for this period of time:________________________________

(2) Will the veteran require periodic follow-up treatment appointments? Yes ☐ No ☐

If yes, estimate the treatment schedule:________________________________
(3) Is there a medical necessity for the veteran to have periodic care for these follow-up treatment appointments?  
Yes ☐ No ☐

(4) Is there a medical necessity for the veteran to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)?  
Yes ☐ No ☐
If yes, please estimate the frequency and duration of the periodic care:

__________________________________________  
__________________________________________

Signature of Health Care Provider: ________________________________ Date: _______________________

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In general, to be eligible an employee must have worked for an employer for at least 12 months, meet the hours of service requirement in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

[Part A – NOTICE OF ELIGIBILITY]

TO: __________________________________________
Employee

FROM: __________________________________________
Employer Representative

DATE: __________________________________________

On _____________________, you informed us that you needed leave beginning on ______________________ for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition;

_____ Because you are needed to care for your _____ spouse; _____ child; _____ parent due to his/her serious health condition.

_____ Because of a qualifying exigency arising out of the fact that your _____ spouse; _____ son or daughter; _____ parent is on covered active duty or call to covered active duty status with the Armed Forces.

_____ Because you are the _____ spouse; _____ son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

_____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

_____ Are not eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

_____ You have not met the FMLA’s 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately ___ months towards this requirement.

_____ You have not met the FMLA’s hours of service requirement.

_____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact ___________________________________________________ or view the FMLA poster located in ________________________________________________________________________.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by __________________________________________________________________.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

_____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request ______ is/ is not enclosed.

_____ Sufficient documentation to establish the required relationship between you and your family member.

_____ Other information needed (such as documentation for military family leave): ____________________________________________________________

______________________________________________________________

No additional information requested

Page 1 CONTINUED ON NEXT PAGE
If your leave does qualify as FMLA leave you will have the following responsibilities while on FMLA leave (only checked blanks apply):

Contact ______________________ at ______________________ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

You will be required to use your available paid _____ sick, _____ vacation, and/or _____ other leave during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

Due to your status within the company, you are considered a “key employee” as defined in the FMLA. As a “key employee,” restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us.

We have/ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every ______________________. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following rights while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
  - the calendar year (January – December).
  - a fixed leave year based on ______________________.
  - the 12-month period measured forward from the date of your first FMLA leave usage.
  - a “rolling” 12-month period measured backward from the date of any FMLA leave usage.

- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on ______________________.

- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.

- You must be reinstituted to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)

- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember’s serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have _____ sick, _____ vacation, and/or _____ other leave run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

  For a copy of conditions applicable to sick/vacation/other leave usage please refer to ______________________ available at ______________________.

  Applicable conditions for use of paid leave:

  ____________________________________________ ...

  ____________________________________________ ...

  ____________________________________________ ...

  ____________________________________________ ...

  ____________________________________________ ...

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

Contact ______________________ at ______________________.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**
Designation Notice

Designation Notice (Family and Medical Leave Act)  
U.S. Department of Labor  
Wage and Hour Division

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee’s FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may require that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: _____________________________________________

Date: ____________________________________________

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on ___________________________ and decided:

_____ Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

_____ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____________________________________________

_____ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

_____ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

_____ We are requiring you to substitute or use paid leave during your FMLA leave.

_____ You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ___ is ___ is not attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

_____ Additional information is needed to determine if your FMLA leave request can be approved:

_____ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than ____________________, unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

(Provide at least seven calendar days)  
(Specify information needed to make the certification complete and sufficient)

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

_____ Your FMLA Leave request is Not Approved.

_____ The FMLA does not apply to your leave request.

_____ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 – 30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.

Form WH-382 January 2009
EMPLOYEE RIGHTS
UNDER THE FAMILY AND MEDICAL LEAVE ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

LEAVE ENTITLEMENTS

Eligible employees who work for a covered employer can take up to 12 weeks of unpaid, job-protected leave in a 12-month period for the following reasons:

- The birth of a child or placement of a child for adoption or foster care;
- To bond with a child (leave must be taken within 1 year of the child’s birth or placement);
- To care for the employee’s spouse, child, or parent who has a qualifying serious health condition;
- For the employee’s own qualifying serious health condition that makes the employee unable to perform the employee’s job;
- For qualifying exigencies related to the foreign deployment of a military member who is the employee’s spouse, child, or parent.

An eligible employee who is a covered servicemember’s spouse, child, parent, or next of kin may also take up to 26 weeks of FMLA leave in a single 12-month period to care for the servicemember with a serious injury or illness.

An employee does not need to use leave in one block. When it is medically necessary or otherwise permitted, employees may take leave intermittently or on a reduced schedule.

Employees may choose, or an employer may require, use of accrued paid leave while taking FMLA leave. If an employee substitutes accrued paid leave for FMLA leave, the employee must comply with the employer’s normal paid leave policies.

While employees are on FMLA leave, employers must continue health insurance coverage as if the employees were not on leave.

BENEFITS & PROTECTIONS

Upon return from FMLA leave, most employees must be restored to the same job or one nearly identical to it with equivalent pay, benefits, and other employment terms and conditions.

An employer may not interfere with an individual’s FMLA rights or retaliate against someone for using or trying to use FMLA leave, opposing any practice made unlawful by the FMLA, or being involved in any proceeding under or related to the FMLA.

ELIGIBILITY REQUIREMENTS

An employee who works for a covered employer must meet three criteria in order to be eligible for FMLA leave. The employee must:

- Have worked for the employer for at least 12 months;
- Have at least 1,250 hours of service in the 12 months before taking leave;* and
- Work at a location where the employer has at least 50 employees within 75 miles of the employee’s worksite.

*Special “hours of service” requirements apply to airline flight crew employees.

REQUESTING LEAVE

Generally, employers must give 30 days’ advance notice of the need for FMLA leave. If it is not possible to give 30 days’ notice, an employer must notify the employer as soon as possible and, generally, follow the employer’s usual procedures.

Employees do not have to share a medical diagnosis, but must provide enough information to the employer so it can determine if the leave qualifies for FMLA protection. Sufficient information could include informing an employer that the employee is or will be unable to perform his or her job functions, that a family member cannot perform daily activities, or that hospitalization or continuing medical treatment is necessary. Employees must inform the employer if the need for leave is for a reason for which FMLA leave was previously taken or certified.

Employers can require a certification or periodic recertification supporting the need for leave. If the employer determines that the Certification is incomplete, it must provide a written notice indicating what additional information is required.

EMPLOYER RESPONSIBILITIES

Once an employer becomes aware that an employee’s need for leave is for a reason that may qualify under the FMLA, the employer must notify the employee if he or she is eligible for FMLA leave and, if eligible, must also provide a notice of rights and responsibilities under the FMLA. If the employee is not eligible, the employer must provide a reason for ineligibility.

Employers must notify its employees if leave will be designated as FMLA leave, and if so, how much leave will be designated as FMLA leave.

ENFORCEMENT

Employees may file a complaint with the U.S. Department of Labor, Wage and Hour Division, or may bring a private lawsuit against an employer.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

For additional information or to file a complaint:

1-866-4-USWAGE
(1-866-468-7924) TTY: 1-877-889-5627
www.dol.gov/hrd

U.S. Department of Labor | Wage and Hour Division
DE DERECHOS DEL EMPLEADO SEGÚN LA LEY DE AUSENCIA FAMILIAR Y MÉDICA

DIVISIÓN DE HORAS Y SALARIOS DEL DEPARTAMENTO DE EE. UU.

DE LOS DERECHOS DE LA LICENCIA
Los empleados elegibles que trabajan para un empleador sujeto a esta ley pueden tomar hasta 12 semanas de licencia sin sueldo sin perder su empleo por las siguientes razones:

- El nacimiento de un hijo o la colocación de un hijo en adopción o en hogar de crianza;
- Para establecer lazos afectivos con un niño (la licencia debe ser tomada dentro del primer año del nacimiento o la colocación del niño);
- Para cuidar al cónyuge del empleado, al hijo, o al padre que tenga un problema de salud serio que califique;
- Debido a un problema de salud serio del mismo empleado que califique y que resulte en que el empleado no pueda realizar su trabajo;
- Por exigencias que califiquen relacionadas con el despliegue de un miembro de las fuerzas armadas que sea cónyuge del empleado, hijo o padre.

Un empleado elegible que es cónyuge, hijo, padre o familiar más cercano del miembro de las fuerzas armadas que está cubierto, puede tomarse hasta 26 semanas de licencia bajo la Ley de Ausecencia Familiar y Médica (FMLA, por sus siglas en inglés) en un periodo de 12 meses para cuidar al miembro de las fuerzas armadas que tenga una lesión o enfermedad seria.

Un empleado no tiene que tomarse la licencia de una sola vez. Cuando es medicamente necesario o de otra manera permitido, los empleados pueden tomarse la licencia de forma intermitente o en una jornada reducida.

Los empleados pueden elegir, o un empleador puede exigir, el uso de licencias pagadas acumuladas mientras se toman la licencia bajo la FMLA. Si un empleado sustituye la licencia pagada acumulada por la licencia bajo la FMLA, el empleado tiene que respetar las políticas de pago de licencias normales del empleador.

Mientras los empleados estén de licencia bajo la FMLA, los empleadores pueden obligar a que continúe el pago de salud como si los empleados no estuvieran de licencia.

BENEFICIOS Y PROTECCIONES

Después de regresar de la licencia bajo la FMLA, a mayoría de los empleados se les tiene que restablecer el mismo trabajo o uno casi idéntico, con el pago, los beneficios y otros términos y otras condiciones de empleo equivalentes.

Un empleador no puede interferir con los derechos de la FMLA de un individuo o tomar represas contra alguien por usar o tratar de usar la licencia bajo la FMLA, oponerse a cualquier práctica ilegal hecha por la FMLA, o estar involucrado en un procedimiento según una relación con la FMLA.

REQUISITOS DE ELEGIBILIDAD
Un empleado que trabaja para un empleador cubierto tiene que cumplir con tres criterios para poder ser elegible para una licencia bajo la FMLA. El empleado tiene que:

- Haber trabajado para el empleador por lo menos 12 meses;
- Tener por lo menos 1,250 horas de servicio en los 12 meses previos a tomar la licencia*; y
- Trabajar en el lugar donde el empleado tiene al menos 50 empleados dentro de 75 millas del lugar de trabajo del empleado.

(*Requisitos especiales de "horas de servicio" se aplican a empleados de una tripulación de una aeronave.

PEDIDO DE LA LICENCIA
En general, los empleados tienen que pedir la licencia necesaria bajo la FMLA con 30 días de anticipación. Si no es posible avisar con 30 días de anticipación, un empleado tiene que notificar al empleador lo más pronto posible y, generalmente, seguir los procedimientos usuales del empleador.

Los empleados no tienen que informar un diagnóstico médico, pero tienen que proporcionar información suficiente para que el empleador pueda determinar si la ausencia califica bajo la protección de la FMLA. La información suficiente podría incluir informar al empleador que el empleado está o estará incapacitado para realizar sus funciones laborales, que el miembro de la familia con el que no puede realizar las actividades diarias, o que una hospitalización o un tratamiento médico es necesario. Los empleados tienen que informar al empleador si la necesidad de la ausencia es por una razón por la cual la licencia bajo la FMLA fue previamente tomada o certificada.

Los empleadores no pueden exigir un certificado o una recertiificación periódica que respalde la necesidad de la licencia. Si el empleador determina que la certificación está incompleta, tiene que proporcionar un aviso por escrito indicando qué información adicional se requiere.

RESPONSABILIDADES DEL EMPLEADOR
Una vez que el empleador tiene conocimiento que la necesidad de la ausencia del empleado es por una razón que puede calificar bajo la FMLA, el empleador tiene que notificar al empleado si él o ella es elegible para una licencia bajo FMLA y, si es elegible, también tiene que proporcionar un aviso de los derechos y las responsabilidades según la FMLA. Si el empleado no es elegible, el empleador tiene que brindar una razón por la cual no es elegible.

Los empleadores que tienen que notificar a sus empleados si la ausencia será designada como licencia bajo la FMLA, y de ser así, cuánta ausencia será designada como licencia bajo la FMLA.

CUMPLIMIENTO
Los empleados pueden presentar un reclamo ante el Departamento de Los empleados Les Los empleados pueden presentar un reclamo ante el Departamento de Trabajo de EE.UU., la División de Horas y Salaris, o pueden presentar una demanda privada contra un empleador.

La FMLA no afecta a ninguna ley federal o estatal que prohíba la discriminación ni sustituye a ninguna ley estatal o local o convenio colectivo de negociación que proporcione mayores derechos de ausencias familiares o médicas.

Para información adicional o para presentar un reclamo:

1-866-4-USWAGE
(1-866-487-9243)  TTY: 1-877-889-5627

www.dol.gov/whd

Departamento de Trabajo de los EEUU. | División de Horas y Salaris
ausencia reducido cuando sea médicamente necesario. El empleado ha de esforzarse razonablemente cuando hace citas para tratamientos médicos planificados para no interrumpir indebidamente las operaciones del empresario. Ausencias causadas por exigencias calificadoras también pueden tomarse intermitentemente.

**Responsabilidades del Empleado**
El empleado ha de proveer un aviso con 30 días de anticipación cuando necesita ausentarse bajo FMLA cuando la necesidad es previsible. Cuando no sea posible proveer un aviso con 30 días de anticipación, el empleado ha de proveer aviso en cuanto sea factible y, en general, ha de cumplir con los procedimientos normales del empresario en cuanto a llamar para reportar su ausencia.

El empleado ha de proporcionar suficiente información para que el empresario determine si la ausencia califica para la protección de FMLA, con la fecha y la duración anticipadas de la ausencia. Suficiente información puede incluir que el empleado no puede desempeñar las funciones del puesto, que el miembro de la familia no puede desempeñar las actividades diarias, la necesidad de ser hospitalizado o de seguir un régimen continuo bajo un servidor de atención médica, o circunstancias que exijan una necesidad de ausencia familiar militar. Además, el empleado ha de informar al empresario si la ausencia solicitada es por una razón por la cual se había previamente tomado o certificado FMLA. También se le puede exigir al empleado que provea certificación y recertificación periódicamente constatando la necesidad para la ausencia.

**Responsabilidades del Empresario**
Los empresarios bajo el alcance de FMLA han de informar a los empleados solicitando ausencia si son o no elegibles bajo FMLA. Si lo son, el aviso ha de especificar cualquier otra información exigida tanto como los derechos y las responsabilidades del empleado. Si no son elegibles, el empresario ha de proveer una razón por la inelegibilidad.

Los empresarios bajo el alcance de la Ley han de informar a los empleados si la ausencia se va a designar protegida por FMLA y la cantidad de tiempo de la ausencia que se va a contar contra el derecho del empleado para ausentarse. Si el empresario determina que la ausencia no es protegida por FMLA, el empresario ha de notificar al empleado de esto.

**Actos Ilegales Por Parte del Empresario**
La ley FMLA le prohíbe a todo empresario:
- que interfiera con, limite, o niegue el ejercicio de cualquier derecho estipulado por FMLA;
- que se despida a, o se discrimine en contra de, alguien que se oponga a una práctica prohibida por FMLA o porque se involucre en cualquier procedimiento bajo o relacionado a FMLA.

**Cumplimiento**
El empleado puede presentar una denuncia con el Departamento de Trabajo de EEUU o puede presentar un pleito particular contra el empresario.

FMLA no afecta ninguna otra ley federal o estatal que prohíbe la discriminación, o invalida ninguna ley estatal o local o ninguna negociación colectiva que provea derechos superiores familiares o médicos.

La Sección 109 de FMLA (29 U.S.C. § 2619) exige que todo empresario bajo el alcance de FMLA exhiba el texto de este aviso. Los Reglamentos 29 C.F.R. § 825.300(a) pueden exigir divulgaciones adicionales.

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Si precisa información adicional:
WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

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Family & Medical Leave Act Guide