CHAPTER 1
OVERVIEW

I. INTRODUCTION

The Family and Medical Leave Act of 1993 (FMLA or the Act) was enacted on February 5, 1993, and became effective for most federal employers on August 5, 1993. As originally enacted, the FMLA entitled eligible federal employees to take up to 12 weeks of unpaid, job-protected leave during a 12-month leave year for the birth, foster care placement, or adoption of a son or daughter, or to care for the newborn or newly placed child; to care for a spouse, son, daughter, or parent with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition. The FMLA has since been amended to extend unpaid, job protected leave to eligible federal employees to care for injured military service family members (up to 26 weeks), and for qualifying exigencies arising from a family member's military service.

Four different variants of the Family and Medical Leave Act of 1993 (FMLA or the Act) apply to the federal sectors: (1) civil service; (2) non-civil service; (3) congressional employees; and (4) the Executive Office of the President. Several variants of the FMLA may concurrently apply to the same federal employer. Only one variant of the FMLA will apply to a federal employee at any particular time. While the core entitlements of the four FMLA variants are substantially similar, there are many significant differences. As a result, compliance with one variant of the FMLA will not ensure compliance with others. Following the letter of the law of one variant may guarantee a violation of the Act when applied to employees covered by one of the other FMLA variants. To avoid that fate, federal employers must initially determine what variant of the FMLA applies in any given situation.

An added incentive to avoid violation of the FMLA is the possibility of personal liability. That means that an aggrieved federal employee may attempt to personally sue a manager or supervisor who incorrectly applies the requirements of this variant of the FMLA. The suit against the individual supervisor is in addition to the employee's ability to sue the federal employer for the same violation. Add the availability of double damages for willful violations (interpreted to include ignorance of the requirements of the FMLA), plus attorney fees and costs, and FMLA litigation could quickly become an operational and financial drain on individual supervisors and federal employers.

This book focuses on the FMLA as it applies to federal sector employment. It is intended to shed light and clarity on this often confusing and misunderstood entitlement. This book is not intended to champion the cause of either employees or employers. If it champions anything, it is for more guidance from the various regulatory bodies enforcing the requirements of the FMLA. Clarity is needed so that employees and federal employers are on notice of what is required of them in order to secure and abide by the protections and requirements of the Act.

This chapter has two purposes: first, it is designed to introduce the reader to federal sector FMLA leave. Second, it teaches the reader to ask the right questions in order to efficiently and accurately analyze fundamental FMLA issues. By knowing what questions to ask and in what order to ask them, the reader can quickly and methodically work their way through most FMLA problems.

A. FMLA BASICS

The foundation for understanding FMLA law begins with an introduction to the four FMLA variants applicable to the federal sector. This is followed by a short review of core entitlements common to all federal sector variants. The introduction concludes with a review of the purpose behind the FMLA.

1. The Four FMLA Variants

The four variants of the FMLA applicable to the federal sector are:

- *Title I of the FMLA*, 29 USC 2601 et. seq. This variant applies to every executive branch federal agency, but not every federal employee within the federal government. It applies to all non-civil service federal employees. Title I also applies to private sector employers.
- *Title II of the FMLA*, 5 USC 6301 et. seq., applies to all civil service employees.
- *Title V of the FMLA and the Congressional Accountability Act of 1995 (CAA)*, 2 USC 1301 et. seq. Before its repeal, Title V of the FMLA covered certain employees of the U.S. House of Representatives and the U.S. Senate. In 1996, Title V was replaced and the FMLA applied to certain employees of the House and Senate through the CAA, 2 USC 1312. The CAA regulations implementing the CAA most closely resemble those implementing Title I. There are, however, many significant differences.
- *Presidential and Executive Office Accountability Act of 1996 (PEOAA)*, 3 USC 401 et. seq. The PEOAA applies the FMLA to employees of the Executive Office of the President. 3 USC 412. It closely resembles the CAA, and follows Title I of the FMLA, with some differences.

The FMLA has been amended by the 2008 National Defense Authorization Act (2008 NDAA), the 2010 National Defense Authorization Act (2010 NDAA), and in 2009, the Airline Flight Crew Technical Corrections Act (AFCTCA). These FMLA amendments, however, did not apply to all four variants of the FMLA applicable to the federal sector. Generally, these FMLA amendments apply to Titles I and II of the FMLA.

There are regulations implementing the FMLA for three of the four federal sector variants. The Department of Labor (DOL) initially issued final regulations implementing Title I effective April 6, 1995. *See* 29 CFR Part 825. The Office of Personnel Management (OPM) initially issued final regulations implementing Title II of the Act effective June 6, 1997. *See* 5 CFR Part 630. Regulations implementing the FMLA for purposes of the CAA were adopted on April 23, 1996. *See* S. Res. 242, Cong. Rec. S3959–S3997 (April 23, 1996). There are no regulations implementing the FMLA for purposes of the PEOAA. However, the PEOAA provides that §§ 101–105, and 107 of Title I of the FMLA apply to the PEOAA. The DOL and OPM have periodically issued proposed or final revised FMLA regulations. Since the publication of the *2009 Supplement* to the *FMLA Guide* the OPM has

issued revised Title II FMLA regulations in 2010 and 2011. *See* 76 FR 60701-60706 (Sept. 30, 2011); 75 FR 75363-75375 (Dec. 3, 2010). The DOL issued proposed changes to the Title I FMLA regulations in 2012. *See* 77 FR 8960-9020 (Feb. 15, 2012). The congressional FMLA regulations have not been revised since their enactment, and FMLA regulations have not been issued to implement the PEOAA.

2. Core Entitlements

All federal sector FMLA variants permit an eligible employee to take up to 12 weeks of job-protected, unpaid leave during a 12-month leave year for:

- The birth of a son or daughter, and to care for the newborn;
- The placement of a child with the employee for adoption or foster care, and to care for the newly placed child;
- To care for a spouse, son, daughter, or parent with a serious health condition; or
- Because the employee is unable to work due to his or her own serious health condition.

Additionally, the expansion of the FMLA by the 2008 and 2010 NDAA amendments created two new categories of core entitlements. Now, eligible civil service (Title II) and non-civil service (Title I) employees covered by the NDAA amendments are entitled to take FMLA leave for two additional circumstances:

- Qualifying exigency leave.
- Military caregiver leave.

Qualifying exigency leave and military caregiver leave are forms of family leave. That is, the employee requesting qualifying exigency leave or military caregiver leave is a family member of someone in the military whose military service gives rise for the employee's need for leave. The employee requesting leave is not due to his or her own military service needs.

Qualifying exigency leave. An eligible civil service (Title II) or non-civil service (Title I) employee may take up to 12 weeks of FMLA leave during a 12-month leave year because of a qualifying exigency where the spouse, son, daughter, or parent of the employee is on or has been called to active duty in the Armed Forces in support of a contingency operation. This is not a new 12 weeks of leave. Rather, think of this as simply another reason, like birth of a son or daughter, permitting an eligible employee to take FMLA leave. Qualifying exigency leave was not initially available to Title II-covered civil service employees. The 2008 NDAA amendments extended qualifying exigency leave to Title I non-civil service employees only. The 2010 NDAA amendments extended qualifying exigency leave to civil service (Title II) federal employees.

Military caregiver leave. Military caregiver leave permits an eligible civil service (Title II) and non-civil service (Title I) employee, who is the spouse, son, daughter, parent, or next of kin of a covered service member of the Armed Forces, including Guard and Reserves, to take up to 26 weeks of unpaid FMLA leave during a single 12-month period to care for the service member with a serious illness or injury incurred in the line of duty while on active military duty. This is a new 26 weeks of unpaid FMLA leave. However, eligible employees are generally capped at 26 weeks of unpaid FMLA leave during any given 12-month leave year for all covered reasons for leave. Eligible employees do not have 38 weeks (e.g., 12 weeks for a serious health condition and 26 weeks for military caregiver leave) in any one 12-month leave year.

Documentation supporting FMLA leave. Where the need for leave is due to a serious health condition, all variants of the FMLA allow federal employers to require an employee to submit medical certification substantiating his or her need for leave due to a serious health condition. The medical certification requirements are not, however, identical. This is an area where the DOL has made substantial revisions, including the creation of several new medical certification forms. Additionally, all FMLA variants include a second and third health care opinion provider process that allows a federal employer to challenge the validity of a medical certification provided by the employee in support of serious health condition leave. As amended by the NDAA of 2008 and 2010, federal employers with civil service and non-civil service employees may require medical and non-medical documentation to substantiate their request for military caregiver and qualifying exigency leave.

Maintenance of benefits during FMLA leave. During an employee's absence for FMLA leave, the law requires federal employers to maintain an employee's health benefits as if the employee remained at work. Under certain circumstances, an employee is also allowed to substitute accrued and available paid leave for unpaid FMLA leave.

Return to same or equivalent position on conclusion of FMLA leave. The FMLA entitles employees to return to their same or equivalent position when FMLA leave is no longer needed or when the employees have exhausted their 12 weeks of FMLA leave. A federal employer may, under certain conditions, require an employee to submit a fitness for duty medical certification before accepting an employee's return to work from FMLA leave.

Discrimination and reprisal prohibited. All federal sector variants of the FMLA protect an employee from adverse consequences for exercising rights under the Act. A federal employer may not discipline an employee for taking leave protected by the FMLA. Nor may an employer use the fact that an employee has taken FMLA leave to deny a promotion, bonus, transfer, job selection, or for any other negative reason impacting terms and conditions of employment. On the other hand, the FMLA will not protect an employee from discipline or other adverse actions for conduct or performance issues that are independent of the employee's use of FMLA leave.

The core entitlements identified above (discussed in more detail throughout this book), are common to all four federal sector variants of the FMLA. How these core entitlements are interpreted and applied may vary greatly among the four versions.

3. The Purpose of the FMLA

The FMLA is the product of more than eight years of legislative wrangling before being signed into law on February 5, 1993, the first piece of legislation of the newly elected Democratic President William Jefferson Clinton.

The FMLA was intended to balance the demands of the workplace with the needs of working families. Congress felt that re-balancing was needed in order to address the confluence of developing demographic trends with the competitive demands of the market economy, both of which were competing for limited employee time.

These demographic trends included the dramatic increase in the number of single parent and dual-income families, coupled with the new parental care demands of a growing aging population. The competitive demands imposed on American employers by the global market economy, as well as, the desire of employees to achieve a high standard of living, has resulted in American employees working the most hours and taking the least amount of vacation time, than employees in any other industrialized nation. Congress found that the time pressures placed on employees by the collision of the demographic trends and the increased time expected at work often placed employees in the position of having to choose between their job and family care responsibilities. These pressures, Congress found, were destabilizing the American family.

The FMLA was intended to promote the stability and economic security of families, and to promote national interests in preserving family integrity. The Act accomplished this by allowing employees to take up to 12 workweeks of job protected unpaid leave each year for their own illness or the illness of a covered family member. Employees are also entitled to this job protected leave to bond with a healthy newborn child, or a child placed with the employee through adoption or foster care. During leave, covered employers must maintain employee health benefits as if the employee remained at work. On the conclusion of leave, an employee must be returned to the same or an equivalent position. Finally, FMLA leave may not be used against an employee for any employment purpose, including discipline or as an impediment to advancement.

The addition of qualifying exigency leave and military caregiver leave by the 2008 and 2010 NDAA amendments was intended as a concrete measure to support the nation's servicemen and women and their families struggling to balance work and family demands as a result of military service.

II. DETERMINING WHETHER LEAVE QUALIFIES FOR THE PROTECTIONS OF THE FMLA

The following is a series of questions that I generally ask to determine whether a request for leave falls within the protections of the FMLA. Determining whether leave is covered by the FMLA forms the foundation of any analysis.

I have ordered the questions in a way that efficiently raises and disposes of the most salient issues to determine whether leave qualifies for protection under the FMLA. Of course, I make no claim that this is the best or most logical ordering of issues, only that it has worked for me. Moreover, the questions should be used as an issue spotting guide only. The details of the FMLA, and there are many, must be considered and addressed with each request for FMLA leave.

A. WHAT VARIANT OF THE FMLA APPLIES?

The federal government is covered by the FMLA. This does not mean, however, that the same form of the FMLA applies throughout the federal sector. There are four variants of the FMLA that apply to different parts of the federal government. Titles I and II of the FMLA apply throughout the federal sector. Knowing which employees each variant covers is usually the more salient question. The two remaining forms of the FMLA, the CAA and the PEOAA, apply to a very limited number of federal employees who work for specific federal employers: Congress and the Executive Office of the President.

The four variants of the FMLA that apply to the federal sector, while similar, contain many significant differences. Because of these significant differences, it is crucial for an employer to determine which version of the FMLA applies in any given situation. This determination is complicated by the fact that, in many instances, more than one variant of the FMLA may apply to the same federal employer. Moreover, compliance with one variant of the FMLA does not ensure compliance with others. It is crucial to determine which variant(s) of the FMLA applies to the particular federal employer in question. [Federal employer coverage by the FMLA is addressed in more detail in Chapter 3, "FMLA Coverage of the Federal Government."]

B. IS THE INDIVIDUAL REQUESTING LEAVE AN "EMPLOYEE" WITHIN THE MEANING OF THE FMLA?

Having identified which FMLA variant applies to the leave request at issue, the next question is whether the individual requesting leave is an "employee" within the meaning of the FMLA. If not, you no longer have an FMLA issue. You may have an issue under another federal statute or pursuant to agency policy, such as the requirements of a collective bargaining agreement, but you do not have an FMLA issue. In order to be entitled to FMLA leave the individual requesting leave must be an "employee" within the meaning of the FMLA variant at issue.

The four federal sector FMLA laws define a covered "employee" differently. Proper identification of the individual as a covered employee under one of the four federal sector FMLA laws will have a major impact on the entitlements and obligations placed on the employee and the federal employer. Make a mistake here and a federal employer can find itself in deep trouble as it follows the requirements of one federal FMLA law, when it should be following completely different requirements of another federal FMLA law.

1. Title I

While Title I applies to the U.S. government as a whole, it only applies to certain non-civil service federal employees. Federal employees covered by Title I include employees of the United States Postal Service and the Postal Rate Commission. 29 CFR 825.109(b)(1)–(2). Title I also applies to certain employees serving under an intermittent or temporary appointment of one year or less, certain part-time employees, and employees of other federal executive agencies who are not covered by Title II. Finally, Title I applies to employees of the legislative or judicial branch, but only if they are employed in a unit which has employees in the competitive service, such as employees of the Government Printing Office and the US Tax Court. 29 CFR 825.109(b)(3)-(4), (c), (d) (2013).

2. Title II

Under Title II a covered "employee" is an appointed civil service employee, as defined in 5 USC 2105. This covers many, but by no means all, federal employees. There are many categories of employees that fall outside the definition of civil service employee, for purposes of Title II. Just because an individual is not an employee for purposes of Title II does not mean that they are not a covered employee for purposes of one of the other three federal sector variants of the FMLA. In fact, the regulations implementing Title I include a catch-all provision that says that Title I covers any federal employee who is not covered by Title II.

3. CAA

An "employee," for FMLA purposes of this variant, includes any employee of the House, the Senate, the Capitol Guide Service, the Capital Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology. 2 USC 1301(3).

4. PEOAA

For purposes of the PEOAA, a covered employee is an employee of the Executive Office of the President. The Executive Office of the President includes the White House Office, the Executive Residence at the White House, the Office of the Vice President, the Office of Policy Development, the Council of Economic Advisors, the National Security Council, the Office of Management and Budget, and the Office of National Drug Control Policy. 3 USC 431(d)(2).

C. IS THE EMPLOYEE ELIGIBLE FOR FMLA LEAVE?

Having determined in the preceding questions what FMLA law applies to the federal employer and the employee, the next question is whether the employee meets the eligibility requirements for entitlement to FMLA leave. While all federal employees are covered by one of the four FMLA federal sector variants, not all covered employees are entitled to take FMLA leave. The FMLA adds another hurdle in order for an employee to take FMLA leave. To be entitled, an employee must meet certain eligibility requirements, which, while similar in some respects, are not identical among the variants.

If the employee does not meet the applicable eligibility requirements for FMLA coverage, the request for leave at issue is not covered by the FMLA. The request, of course, may be covered by another law, agency policy, or the requirements of a collective bargaining agreement, but it is not FMLA leave.

The 2008 and 2010 NDAA amendments to the FMLA did not modify the existing eligibility requirements for FMLA leave. However, the DOL's modification of its existing FMLA regulations did alter the Title I eligibility requirements.

1. Title I

To be eligible for FMLA leave an employee must meet three requirements: (1) the individual must have been employed for at least 12 months before leave commencement; (2) the individual must have worked 1250 hours in the 12 months immediately preceding leave commencement; and (3) the individual must be employed in a worksite that has at least 50 employees within 75 miles at the time the employee requests leave. The eligibility requirements for non-civil service employees (Title I) were modified in two respects. First, the DOL confirmed that the 12-months of employment need not be consecutive. If, however, an employee left the federal service for seven or more years, the employer need not count federal employment prior to the break in service, unless the break in service was due to fulfillment of National Guard or Reserve duty. Second, as modified, the DOL Title I FMLA regulations clarify that the time an employee serves performing military service must be counted towards the 12-month and 1250-work hour eligibility requirements.

2. Title II

Title II has only one eligibility requirement: the employee must have worked 12 months as a civil service employee before leave commencement. Moreover, this 12-month requirement is significantly narrower than the comparable requirement under Title I. As a result, any time spent working for the federal government outside the definition of a Title II civil service employee does not count towards employee eligibility for purposes of Title II. By comparison, time spent as an employee of the federal government in any capacity would count towards Title I eligibility.

3. The CAA, and the PEOAA

The CAA and PEOAA each impose two FMLA eligibility requirements: (1) employment for at least 12 months; and (2) that the employee has worked at least 1250 hours. These are essentially the same standards as those for Title I, with one important difference. Title I counts all time worked as an employee of the federal government towards the eligibility requirements. The CAA and PEOAA, on the other hand, only count time worked as an employee of a CAA or PEOAA-covered employer. For example, only the time spent as a congressional employee would count towards the 12 months and 1250 hours CAA FMLA eligibility requirements. The employee's prior employment elsewhere in the federal government would not count for FMLA eligibility purposes.

D. DOES THE LEAVE INVOLVE A COVERED INDIVIDUAL?

To be covered by the FMLA, the leave must involve a *covered individual*. Until the 2008 and 2010 NDAA military family leave expansion of the FMLA, the four federal sector FMLA variants identified the same four individuals as *covered individuals* entitling an eligible employee to FMLA leave. They are:

- The employee;
- Spouse;
- Son or daughter; or
- Parent.

For FMLA leave due to birth, adoption, foster care placement, or serious health condition, if an eligible employee needs leave for an individual other than those identified above, the leave may not be covered by the FMLA. Generally speaking, an employee is not entitled to FMLA leave to care for a brother, sister, grandparent, aunt, uncle, or anyone else, even if the individual is dependent on the employee.

The definitions of family members covered by the FMLA are, in some cases, broader than one might initially think. In other cases, the definitions are narrower. For example, a spouse includes common law marriages where such marriages are recognized. At this time, the term "spouse" does not include a partner in a same-sex marriage or civil union, even where such relationships are legally recognized. A parent, son, or daughter includes biological, legal, and extra-legal relationships. Extra-legal relationships, called *in loco parentis,* can involve individuals such as brothers, sisters, uncles, aunts, and grandparents who would not normally be covered by the FMLA.

These terms are defined in the respective FMLA statutes, and are further refined in the applicable regulations implementing each of the four FMLA federal sector variants. For the leave to be covered by the FMLA, it must involve a covered individual. An employer is prohibited from counting leave for an individual who is not covered by the FMLA from the employee's 12-week FMLA leave entitlement. Of course, an employer could provide leave to care for someone other than an FMLA-covered individual as a matter of policy.

For military caregiver and qualifying exigency leave, the DOL and OPM independently defined a covered *son or daughter.* As defined for FMLA other than military family leave, a 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 due to a mental or physical disability. For purposes of military family leave, the DOL and OPM kept the relationship requirement (e.g., biological, adopted, foster child, etc.) but dropped the age requirement. It dropped the age requirement because keeping this requirement would greatly reduce the ability of eligible employees to take military family leave.

The 2008 and 2010 NDAA military leave amendments added a new category of covered individuals: *next of kin*. An eligible employee who is the *next of kin* of an injured service member may take FMLA leave to care for that service member, all other requirements having been met. As discussed in Chapter 6, under the heading "Next of Kin," the DOL and OPM regulations address who is considered *next of kin* for purposes of military caregiver leave. *Next of kin* is not a covered individual for any other form of FMLA leave, including qualifying exigency military leave. Again, military caregiver leave is not available to congressional employees or employees of the Executive Office of the President.

Note that military caregiver and qualifying exigency leave do not define a covered individual to include the employee. The military family leave amendments provide family leave only. They do not cover, for example, a situation where the employee requesting leave is the service member who has been called-up to active military service, or who was injured while on active military duty.

If the leave is not for a covered individual it is not covered by the FMLA. The leave may be covered by some other law, rule, or regulation, but it is not FMLA leave. If the leave involves a covered individual it may be FMLA leave if it meets the other requirements for FMLA protections.

E. DOES THE LEAVE INVOLVE A COVERED CONDITION?

In order for an eligible federal sector employee to be entitled to FMLA leave for a covered individual, the need for leave must be for a covered condition. There are four primary FMLA covered conditions:

- The birth of a son or daughter of the employee and in order to care for such son or daughter.
- The placement of a son or daughter with the employee for adoption or foster care.
- To care for the spouse, or a son or daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
- A serious health condition that renders the employee unable to perform the functions of his or her position.

The above statutory definitions are expanded upon, to different degrees, in their implementing regulations.

The number of covered conditions available for an eligible employee to take FMLA leave depends on the type of federal employee. All four federal sector FMLA variants allow an eligible employee to take FMLA leave for:

- The birth of a son or daughter, and to care for a newborn;
- The adoption or foster care placement of a son or daughter with the employee, and to care for the newly placed child;
- To care for a spouse, son, daughter, or parent with a serious health condition; or
- A serious health condition that renders the employee unable to work.

For civil service and non-civil service employees covered by Titles I and II of the FMLA, the 2008 and 2010 NDAA amendments added two new covered conditions entitling an eligible employee to FMLA leave: military caregiver leave and qualifying exigency leave. As addressed in Chapter 7, under the subheadings "Military Caregiver Leave" and "Qualifying Exigency Leave," the DOL has issued regulations detailing the meaning of those terms for non-civil service (Title I) employees. The OPM has issued proposed regulations fleshing out the meaning of the statutory language for civil service (Title II) employees.

Regulations implementing the FMLA variants have greatly expanded the meaning of these covered conditions. These regulations, moreover, are at times identical and at other times significantly different. Because of these differences, great care must be exercised by federal employers, employees, unions, or other organizations representing the interests of employees, in determining whether the leave at issue is for a covered condition.

While broad, what constitutes a serious health condition, within the meaning of the FMLA is not limitless (although it often seems that way). Some illnesses will not ring the "serious health condition" bell, and are not protected by the FMLA. Generally, the FMLA does not specify illnesses that will always be considered a covered serious health condition. Employers should not assume that any particular condition is or is not covered by the FMLA. Rather, to determine whether an illness qualifies for FMLA protection, employers must compare the facts of each situation against the regulatory definition of a serious health condition for the applicable version of the FMLA.

F. DID THE EMPLOYER AND THE EMPLOYEE MEET THEIR NOTICE REQUIREMENTS?

All federal sector variants impose notification requirements on federal employers and employees. Generally, federal employers are required to inform employees of their FMLA rights and responsibilities. Employees are required to provide their employer timely and adequate notice of their need for FMLA leave. There are similarities and significant differences, particularly between Titles I (non-civil service) and II (civil service), regarding employee and employer FMLA notice requirements.

1. Title I, the CAA, and the PEOAA

The notice requirements governing employees and employers are very specific. This is particularly true regarding the notice obligations imposed on employers. Generally, employers must post a notice of FMLA rights, include information on FMLA entitlements and benefits in employee handbooks or other written leave or benefit information, and periodically provide specific notice of FMLA rights and obligations at the time the employee requests FMLA leave. In some instances, the contents of such notices are dictated by regulation. An employer's failure to provide the employee with timely and adequate notice of FMLA rights and obligations may result in FMLA protections being extended to individuals who otherwise do not meet the eligibility requirements. As a consequence, the employer may also be unable to raise an employee's failure to meet FMLA requirements, where the requirement is contained in the notice the agency failed to provide.

The regulations also place notification obligations on employees. Employees must provide timely and adequate notice of the need for FMLA leave in order to perfect entitlement to the protections of the FMLA. The timeliness of employee notice depends on whether the need for leave is foreseeable or non-foreseeable. An employee's failure to provide timely notice may result in a delay of the start of FMLA leave. If an employee fails to provide adequate notice of the need for FMLA leave, leave may be denied altogether. For example, an employee who requests leave because they are "sick" may have failed to provide adequate notice of the need for FMLA leave. In that case, the leave would not be protected by the FMLA.

2. Title II

Compared with Title I, the CAA, and the PEOAA, the notice requirements of Title II are much less specific. Where there is specificity, the burden is placed on the employee rather than the employer. An employee must provide timely and adequate notice of their need for FMLA leave depending on whether the need for leave is foreseeable or non-foreseeable. The consequences of an employee's failure to provide such notice is denial of FMLA leave protections. That is certainly greater punishment than is imposed by comparable regulations implementing Title I, the CAA, and the PEOAA.

The notice requirements imposed on employers under Title II are far less onerous than the comparable requirements under Title I, the CAA, and the PEOAA. There is no requirement for an FMLA poster, or that a statement addressing FMLA leave benefits be included in an employee handbook or other written materials addressing leave or benefits. Nor is there a specific requirement that an employee be provided notice of FMLA rights and obligations at the time FMLA leave is requested. There is a generalized requirement that an employer notify an employee of FMLA rights and obligations. According to OPM, employers can satisfy this requirement by providing the employee with an OPM factsheet and brochure on the FMLA. The regulations do not specify when this needs to be done.

G. DID THE EMPLOYEE PROVIDE PROPER DOCUMENTATION TO SUBSTANTIATE THEIR NEED FOR FMLA LEAVE?

The FMLA permits employers to require that employees substantiate their need for FMLA leave due to a serious health condition with medical certification from a health care provider. Congress felt that the right of an employer to request medical certification was one of the strongest checks against employee leave abuse.

There are several medical certification requirements generally recognized by all four federal sector variants of the FMLA:

- Certification to substantiate the need for FMLA leave;
- Periodic status reports;
- Medical recertification; and
- Fitness to return to duty certification.

There are significant similarities and differences among the certification requirements of the four federal sector variants.

All federal sector variants of the FMLA allow covered federal employers to require employees to substantiate their need for FMLA leave with documentation. The right is permissive and, absent a request, an employee is not automatically obligated to provide supporting documentation.

There are generally two types of documentation that a federal employer may require to substantiate an employee's request for FMLA leave: medical documentation and non-medical documentation. The standards for medical and non-medical documentation are similar in some respects, and very different in other respects among the four federal sector FMLA variants. The addition of certification requirements in support of military caregiver and qualifying exigency leave has greatly impacted this area, as has substantial revisions to this area by the DOL.

With respect to medical documentation due to a serious health condition, all federal sector FMLA variants recognize the same four types of documentation:

- Health care provider certification;
- Recertification by a health care provider;
- Periodic status reports; and
- Fitness to return to duty certification.

There have always been significant similarities and differences among the serious health condition certification requirements. The DOL's recent

revisions to the Title I FMLA regulations include major changes to the serious health condition certification rules. For example, DOL created separate medical certification forms depending on whether the employee needs leave for his or her own serious health condition or to care for a covered family member with a serious health condition. None of the other FMLA variants have changed their comparable medical certification requirements. Nor have they issued revised prototype certification forms. OPM has opined that agencies should continue to use the old DOL WH-380 form and not the new WH-380-E and WH-380-F forms recently created by the DOL.

Employers may also require an employee to support their request for military caregiver leave with medical documentation. Because this type of leave is triggered based on the "serious illness or injury" of a covered service member, which is defined differently than a "serious health condition," the DOL created a new medical certification form addressing the limited information an employer is entitled to receive for this form of leave. Employees must be afforded a minimum of 15 calendar days from the request to provide the certification. Under the DOL regulations, an employer may deny FMLA leave where an employee fails to provide a complete and sufficient medical certification in support of his or her request for military care giver leave. This is the same standard that applies to serious health condition leave. OPM has proposed that agencies use the DOL WH 385 to substantiate a request for military caregiver leave.

All federal sector variants of the FMLA permit employers to require an employee, on request, to submit written proof of a claimed familial relationship where the employee seeks leave for a spouse, son, daughter, or parent. The DOL extended that right to an employee claiming to be the *next of kin* for purposes of military caregiver leave. OPM allows an agency to require an employee to certify the relationship with the covered servicemember.

Additionally, DOL and OPM regulations permit an employer to require non-civil service (Title I) employees to provide documentation substantiating their need for qualifying exigency leave related to the military call-up or service of a family member in the Armed Forces. DOL created an optional form (WH-384) for this purpose. OPM elected not to create its own form, but has advised federal employers they may use the WH-384.

Generally speaking, an employee has a minimum of 15 days to provide an initial medical certification to substantiate the need for FMLA leave. That period of time may be extended where it is not practicable for an employee to provide the certification, as long as the employee makes a good faith effort to provide the certification. Under Title I, the CAA, and the PEOAA, there is no limit on the amount of time that an employee, acting in good faith, may have to provide the initial medical certification. Title II caps the time at 30 days from the date of the request.

The amount of medical information to which an employer is entitled is tightly regulated under all of the FMLA federal sector variants. The DOL has developed an optional form that meets the certification requirements. OPM has not developed a similar form. Rather, it makes the DOL form available for use with Title II employees.

Under all of the federal sector FMLA statutes, an employer who doubts the validity of the initial medical certification may, at the employer's expense, require the employee, or the employee's covered family member, to submit to a second health care opinion provider. If the certification from the second health care opinion provider differs from the first, the employer may, at its expense, require submission to a third health care opinion provider, whose opinion is final and binding. Unlike serious health care certifications, second/third opinions may not be required for military caregiver leave.

An employee's failure to provide medical certification has different consequences depending on the federal sector FMLA law involved. The differences impact the length of time an employer must wait before it can declare that an employee has failed to timely provide medical certification. Under all federal sector FMLA variants, an employee that fails to provide the medical certification requested by an employer is not entitled to the protections of the FMLA. Under Title I, the CAA, and the PEOAA, an employer may delay the start or continuation of leave until certification is provided. The law does not specify the length of time an employer must wait. Under Title II, the employee has, at most, 30 days to provide the initial medical certification.

All of the federal sector FMLA laws permit employers to require employees to periodically update their medical certifications through medical recertification. The frequency of such a requirement differs substantially depending on the civil service status of the employee. In several instances, an employer is prohibited from requesting recertification more often than every 30 days. There are other instances where recertification may not be requested for periods in excess of 30 days. Exceptions permit an employer to require recertification more often than every 30 days or other applicable minimum period of time. Unlike serious health care certifications, recertification may not be required for military caregiver leave.

Finally, the four federal sector variants of the FMLA permit employers to require employees, as a condition of returning to work, to provide certification of fitness for duty. The requirements governing a return-to-work, fitness-for-duty certification, as with other areas, contain similarities and differences. Again, employers must exercise care to ensure that it is applying the appropriate FMLA requirements or risk violating the FMLA.

III. OTHER FMLA ENTITLEMENTS AND OBLIGATIONS

Where all of the above questions are answered in the affirmative, an eligible employee is likely entitled to FMLA leave. The determination that an eligible employee is entitled to FMLA leave raises issues regarding additional employee and employer rights and obligations. This section will provide an overview of some of these issues, highlighting basic rights and areas of difference among the four federal sector FMLA variants.

A. LEAVE AMOUNT AND SCHEDULING

All eligible federal employees covered by the FMLA are entitled to 12 workweeks of leave each leave year. The calculation of the FMLA leave year is different depending on which federal sector FMLA law applies. So too, the exact amount of leave that an employee is entitled to receive as part of their 12-week entitlement differs depending on the FMLA variant at issue.

With respect to calculating the 12-month FMLA leave year (during which employees are entitled to take their 12 weeks of leave), Title I, the CAA, and the PEOAA offer employers four options: (1) the calendar year; (2) any other fixed leave year; (3) the measuring forward method; and (4) the rolling back method. Only the measuring forward leave year is permitted under Title II. As discussed more fully in Chapter 10, "Leave Amount and Scheduling," there are benefits and drawbacks to each of the leave year calculation options.

Employers must calculate the exact amount of FMLA leave available to each employee, as the 12-workweek entitlement differs substantially

between Title II and Title I, the CAA, and the PEOAA. Federal employers, employees, unions, and other employee organizations must carefully analyze the applicable standards for calculating the amount of FMLA leave available to each eligible employee. This is not an easy task, given the absence of key definitions in all of the federal sector FMLA regulations. What is clear, however, is that under all of the federal sector variants of the FMLA, the calculation of the exact amount of FMLA leave available to an eligible employee is made on a case-by-case basis. There is no uniform cap on the amount of FMLA leave available to all eligible employees during the FMLA leave year.

The leave that counts against the employee's 12-week FMLA entitlement differs under the various federal sector FMLA laws. For example, under Title II, a legal holiday that occurs during an eligible employee's FMLA leave does not count against the employee's 12-week entitlement. Under Title I, the CAA, and the PEOAA, a holiday that falls during a period of FMLA leave counts against the employee's 12-week entitlement.

Title I, the CAA, and the PEOAA also impose a penalty on married employees who work for the same agency. The "marriage penalty" reduces the total amount of FMLA leave available to both employees to a combined total of 12 weeks of leave for certain covered conditions. Title I does not impose a marriage penalty.

Leave scheduling has to do with how FMLA leave may be taken. Essentially, FMLA leave may be taken in one of three forms: (1) in a single block of time; (2) intermittently; or (3) on a "reduced leave schedule." Leave is taken in a single block of time where the absence is continuous for the same covered condition. Leave is taken intermittently where more than one absence is taken for the same underlying condition. A reduced leave schedule is where a full time employee works part time and is on leave part time. In a sense, a reduced leave schedule is simply a more systemic form of intermittent leave. For the most part, intermittent leave and leave on a reduced leave schedule are treated the same so the reader does not need to know the difference between these two forms of leave. It is more important, however, to know the difference between leave taken in a single block of time and leave taken in more than one block of time.

Whether leave is taken in a single block of time, intermittently, or on a reduced leave schedule impacts an employee's FMLA rights and obligations. For example, leave taken intermittently or on a reduced leave schedule following the birth, adoption, or foster care placement of a child can be denied outright by an employer. If the same leave were taken in a single block of time, the leave could not be denied, all other things being equal.

In order for an employee to take FMLA leave intermittently or on a reduced leave schedule for a serious health condition, the leave must be "medically necessary." The employee's health care provider generally determines whether leave is medically necessary. Employers confirm this fact by requesting medical certification from the employee. There are substantial similarities and differences between Title II and Title I, the CAA, and the PEOAA regarding the circumstances where intermittent or FMLA leave on a reduced leave schedule may be used for a serious health condition.

Where leave is taken intermittently or on a reduced leave schedule, the employee is required to make a reasonable effort to schedule the leave so as not to disrupt employer operations. A reasonable effort does not require success. On the other hand, an employee who fails or refuses to make a reasonable effort to structure their intermittent or reduced schedule leave in order to minimize workplace disruption will lose the protections of the FMLA.

An area of great difference among the four variants of the FMLA involves notice obligations where leave is taken on an intermittent or reduced leave schedule basis. Title I, the CAA, and the PEOAA impose specific notice obligations on employees and employers. Title II does not contain comparable notice obligations in these circumstances.

All federal sector variants of the FMLA permit employers to transfer the employee to an equivalent alternative position that better accommodates the employee's need for FMLA leave on an intermittent or reduced leave schedule basis. However, there are material differences among the four federal FMLA laws in how the implementing regulations apply this employer right.

All federal sector FMLA variants allow eligible employee to take up to 12 weeks of leave during a 12-month leave year due to birth, adoption, foster care placement and/or care of a new born or newly placed son or daughter, and due to the serious health condition of the employee, spouse, son, daughter, or parent.

Eligible civil service and non-civil service employees covered by Titles I or II of the FMLA may also take up to 12 weeks of military qualifying exigency leave during a 12-month leave year. This is not a new 12 weeks of leave. Rather, qualifying exigency leave is simply a new reason to take or draw on the employee's existing entitlement to 12 weeks of FMLA leave for birth, adoption, foster care placement and serious health conditions.

Eligible civil service and non-civil service employees are entitled to take up to 26 weeks of military caregiver leave during a single 12-month period. DOL and OPM regulations provide that the single 12-month period is based on a per injury, per covered service member basis. That means that a Title I or II eligible employee with two or more children in the military who both had the misfortune of being seriously injured while serving in Iraq or Afghanistan may be entitled to 26 weeks of leave for each child. Similarly, an employee whose spouse was injured while serving in Iraq may be entitled to 26 weeks if, for example, the spouse was injured a second time while serving a second deployment in Iraq.

The DOL and OPM regulations cap the total amount of FMLA leave an employee may take for all FMLA-qualifying conditions at 26 weeks during the "single 12-month period" involving military caregiver leave. For both the DOL and OPM, the 12-month period begins to run when the employee first uses military caregiver leave. As such, the "single 12-month period" for military caregiver leave may be different than the 12-month period for purposes of all other forms of FMLA leave. The DOL and proposed OPM regulations provide some guidance on how to administer these different 12-month FMLA leave years.

Finally, the DOL and OPM regulations address how an employer records FMLA leave when an employee is concurrently entitled to military caregiver leave and leave to care for a covered family member with a serious health condition. Basically, employers are directed to record the absence against the employee's military care giver leave entitlement first.

B. SUBSTITUTION OF PAID LEAVE

FMLA leave is unpaid. In certain circumstances, however, a federal employee may be permitted to substitute paid leave for unpaid FMLA leave. The four federal sector variants of the FMLA differ regarding the circumstances permitting paid leave substitution, what paid leave may be used in substitution, and who makes the election, the employee or the employer.

More fundamentally, it is not clear what the term "substitute" means. The term is not defined in the FMLA statutes or implementing regulations. The majority position is that "substitute" should be read as meaning "in conjunction with" or "concurrent." That is, where paid leave is substituted for unpaid FMLA leave, the employee retains the benefits and protections of the FMLA but also draws on available paid leave for the absence. A minority view is that "substitute" means that the benefits and protections of the FMLA extinguish where paid leave is substituted for unpaid leave. The employee's leave is governed solely by the requirements of the substituted paid leave.

Under Title I, the CAA, and PEOAA, an eligible employee or the employer may elect to substitute paid leave for unpaid FMLA leave. There are rules, however, governing when an employer may elect to substitute paid leave. Under Title II, the election is solely the right of the eligible employee.

The timing of the paid leave election is another area of difference among the four federal sector FMLA laws. Under Title II, the eligible employee must make the election to substitute paid leave for unpaid FMLA leave before leave commences. Title I, the CAA, and the PEOAA do not have such a bright-line rule. Rather, the election must be made within two business days of when the employer is on notice that the leave is covered by the FMLA. In most instances, that will occur at the time the employee requests FMLA leave. In other instances, such as where additional information is needed from the employee to determine if the leave qualifies under the FMLA, it may be at some later time.

Federal sector FMLA laws permit the substitution of accrued paid leave for unpaid FMLA leave. The four variants of the FMLA differ, however, on what accrued leave is available for paid leave substitution. Under Title I, the CAA, and the PEOAA, the only limitation placed on the substitution of accrued paid leave is that the paid leave must be available for the FMLA leave at issue. For example, an employer with paid pregnancy leave benefits would not have to make paid leave available to an employee who is not pregnant simply because the employee is seeking to substitute paid leave for unpaid FMLA leave.

Title II, on the other hand, specifies exactly which paid leave programs are available for substitution with unpaid FMLA leave. No other accrued paid leave may be drawn upon for FMLA substitution purposes, even if the leave is accrued, available, and applicable to the need for FMLA leave at issue.

Note that the substitution of paid leave may affect the manner in which an employee may request FMLA leave. Pursuant to Title I, the CAA, and the PEOAA, if the paid leave program has less stringent procedural requirements (e.g., notice and certification) than those required by the FMLA, only the less stringent paid leave requirements apply. This is not the case under Title II. The substitution of paid leave for unpaid FMLA leave has no impact on notice, certification, or other FMLA procedural requirements under Title II. Rather, the procedural requirements of the FMLA and the paid leave are determined separately.

The 2008 and 2010 NDAA amendments permit civil service (Title II) and non-civil service employees (Title I) to substitute accrued paid leave for unpaid FMLA military caregiver leave. Additionally, non-civil service employees may substitute accrued paid leave for unpaid military qualifying exigency leave.

The DOL regulatory revisions clarified that "substitution" of paid leave for FMLA leave means that the unpaid FMLA leave and paid leave run concurrently. DOL revisions did away with the distinction between the substitution of paid sick or medical leave and paid vacation or personal leave for purposes of applying the employer's normal rules for securing paid leave. DOL also substantially untangled the procedural requirements for securing paid leave and unpaid FMLA leave. As revised, to receive paid leave, employees must comply with the employer's normal paid leave policies. To secure unpaid FMLA leave, the employee must comply with the minimum requirements of the FMLA. Where paid leave is substituted, DOL imposed a new requirement on employers to notify employees that they must satisfy the procedural requirements of the paid leave policy. If the employee does not meet the additional requirement for paid leave, he or she may remain entitled to unpaid FMLA leave, provided he or she continues to meet the FMLA's requirements.

OPM also modified its paid leave substitution rules. It extended the availability of accrued and accumulated annual and sick leave to military caregiver leave. It also clarified and expanded the availability of advanced paid sick leave for FMLA and other purposes.

C. MAINTENANCE OF BENEFITS DURING LEAVE

The FMLA addresses what happens with employee benefits during the pendency of, and on an employee's return from, FMLA leave. Generally speaking, there are four issues in this area: (1) the retention of accrued benefits at the start of FMLA leave; (2) the accrual of benefits during FMLA leave; (3) the maintenance of health benefits during FMLA leave; and (4) the resumption of benefits on return from FMLA leave.

Eligible employees are entitled to retain all employment benefits accrued before the start of FMLA leave. The FMLA does not require the accrual of seniority or other employment benefits during FMLA leave. Where, however, an employer's policy permits the accrual of employment benefits when an employee is on paid or unpaid leave, then accrual while an employee is on FMLA leave is permitted. As an exception to this general rule, Title II does not explicitly prohibit the accrual of seniority during FMLA leave. Title I, the CAA, and the PEOAA do not require seniority to accrue during FMLA leave.

The provisions governing the maintenance of health benefits during FMLA leave differ among the four federal sector variants of the FMLA. The core differences among the federal sector implementing regulations are the types of benefits that must be maintained. Title II speaks only in terms of maintaining health benefits pursuant to the Federal Employees Health Benefits Program (FEHBP). Title I and the PEOAA do not mention that program at all, but require maintenance of any group health plan benefits or multi-employer health plans. The CAA splits the difference, requiring maintenance of benefits under the FEHBP or any group health plan.

Under all federal sector variants of the FMLA, an employer is required to maintain health benefits coverage during FMLA leave at the same level and under the same conditions as though the employee had been continuously employed. The regulations implementing Title I, the CAA, and the PEOAA detail what happens when changes occur to employment benefit programs and agency notice requirements. These matters are largely unaddressed by Title II.

An employee's obligation to pay their share of health benefits premiums, if any, continues during FMLA leave. The payment options and procedural requirements governing an employee's payment of health benefit premiums during FMLA leave are detailed in each of the four federal sector variants of the FMLA. Generally speaking, the requirements of Title II differ from those of Title I, the CAA, and the PEOAA.

Under all versions of the FMLA, an employee may forego health benefits coverage during FMLA leave. Employees may make such an election to avoid having to pay their share of health benefit plan premiums, which the FMLA would otherwise require. Employers often elect to pay the employee's share of health benefits payments in the interim in order to resume an employee's health benefits under the same conditions and terms as when the employee started FMLA leave.

Title I, the CAA, and the PEOAA regulate an employer's ability to collect premium payments it made on behalf of an employee to continue health benefits coverage during FMLA leave. The regulations issued under Title II on this matter are substantially different. For example, Title II offers two methods an employee may use to pay health benefit premiums during FMLA leave. Title I, the CAA, and the PEOAA, in contrast, offer five ways for an employee to make health benefit premium payments during the pendency of FMLA leave.

Under Title I, the CAA, and the PEOAA, an employer may terminate an employee's health benefits coverage during FMLA leave under certain limited circumstances. Title II does not specifically provide that an employer may terminate an employee's health coverage while the employee is out on FMLA leave.

Under all four federal sector variants of the FMLA, an employee returning from FMLA leave is entitled to the same level of employment benefits as they enjoyed before they took FMLA leave. Employees may not be required to submit to medical examination or other tests in order to re-qualify for health benefits coverage on return from FMLA leave. Changes in health benefits coverage during the employee's absence from FMLA leave are handled differently by the federal sector FMLA laws.

As with other forms of FMLA leave, federal employers are required to maintain health benefits of civil service or non-civil service employees who takes military care giver or qualifying exigency leave. Except for extending the rules to cover military caregiver leave, the DOL and OPM did not materially revise this section of the Title I FMLA regulations.

D. RETURN TO WORK

An employee is entitled to be returned to their same or an equivalent position on the conclusion of FMLA leave. To qualify for that right, an employee must satisfy certain conditions. Not surprisingly, there are differences among the four variants of the FMLA on this issue. A major difference is the right of return of an employee who is unable to perform all essential job functions at the conclusion of FMLA leave. Under Title I, the CAA, and the PEOAA, an employee who is unable to perform all essential job functions at the end of FMLA leave has no FMLA right to return to work. Of course, the employee may have the right to return to work pursuant to other laws, employer policy, or the terms of a collective bargaining agreement. On the other hand, Title II does not require, as a condition of an employee's FMLA right to return to work that the employee be able to perform all essential job functions.

The FMLA permits all federal employers to condition an employee's return to work from leave on the submission of a medical certification that the employee is fit to return to duty. Substantial differences exist between the procedural requirements for return to work attendant under Title I, the CAA, and the PEOAA, with the comparable requirements under Title II.

Under Title I, the CAA, and the PEOAA, an employee generally need only provide a short statement from a health care provider that an employee returning to work from FMLA leave due to his or her own serious health condition is fit for duty. Title II, on the other hand, permits employers to require employees to submit a complete medical certification. Under Title I, the CAA, and the PEOAA, the terms of a collective bargaining agreement may impose increased burdens on the medical information that an employer may require an employee to provide as a condition of returning to work. Title II does not have a similar provision permitting the terms of a collective bargaining agreement to alter the employee's right to return to work.

Another major area of difference involves the notification requirements imposed on employers of the requirement of a fitness-for-duty certification as a condition of an employee's return to work. For employers with non-civil service employees covered by Title I, the CAA, or the PEOAA, the obligation to provide notice of the requirement of a fitness to return to duty certification is detailed and specific. The comparable notice requirements under Title II are less onerous and less specific. This difference in notice requirements is problematic for federal employers with civil service and non-civil service employees covered by Titles I and II of the Act.

Generally, employers are not required to return an employee to the same or an equivalent position on the conclusion of FMLA leave if the employee would not have had a job had the employee not taken FMLA leave. For example, if an employee would have been terminated for cause, the fact that they took FMLA does not entitle the employee to be returned to work. Basically, an employee who takes FMLA leave has no greater right to return to work; they just don't have lesser rights because of their exercise of FMLA rights.

Finally, employers with employees covered by Title I, the CAA, and the PEOAA should be mindful of the return to work rules governing "key employees," and special rules governing certain educational employees. Title II does not contain rules regarding these groups of employees.

Key employees are employees in the highest paid top 10% of all employees employed by the employer within 75 miles of the work site. The FMLA does not require an agency to return a key employee to work from FMLA leave where the employee's return (not the taking of FMLA leave) would cause substantial and grievous economic injury to the agency. It is a very limited right conditioned on notice to the employee and several opportunities to return from leave before a denial of job restoration may be imposed. The key employee exception is of questionable practical application in the federal service.

The right of a federal employee to return to his or her same or an equivalent position on the conclusion of the need for FMLA leave applies to civil service (Title II) and non-civil service (Title I) employees returning from military caregiver or qualifying exigency leave.

The DOL revised the definition of *equivalent position* to permit employers to deny a bonus to an employee who failed to achieve a specified goal, such as hours worked, products sold, or perfect attendance, because the employee was out on FMLA leave, provided similarly situated employees who took non-FMLA leave were also denied the bonus. OPM has not addressed the issue.

All federal sector variants allow an employer with a uniformly applied policy to condition an employee's return to work from leave due to his or her own serious health condition on the proffer of a fitness for duty certification from a health care provider attesting to the employee's fitness

to return to work. DOL revisions allow an employer to require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's job provided the employer provides the employee with a list of those essential job functions. DOL will now allow employers to contact an employee's health care provider directly to authenticate or clarify the fitness-for-duty certification. DOL added language confirming that an employee who fails to provide the fitness-for-duty certification loses the FMLA right to return to work. Finally, DOL revisions allow employers with a uniformly-applied policy to require an employee to periodically provide a fitness-for-duty certification where an employee uses intermittent or reduced schedule leave for his or her own serious health condition if legitimate safety concerns exist regarding the employee's ability to perform his or her duties.

The other federal sector variants of the FMLA have not similarly modified their exiting FMLA regulations on this issue.

E. ENFORCEMENT AND REMEDIES

Violations of the FMLA are enforced differently under the four federal sector variants of the FMLA. Under Title I, an aggrieved employee may file a complaint with the Department of Labor or initiate a civil action in federal court. The FMLA does not require an employee to exhaust administrative remedies by first filing a complaint with DOL before filing suit. Rather, DOL can investigate the violation and recommend remedial relief to the employee, if warranted. DOL also has the power to subpoena documents in order to enforce FMLA regulations. DOL may file suit against the employer on behalf of the employee. In that event, the employee is unable to bring his or her own lawsuit.

As indicated previously, a civil action may name as defendants the federal employer and, possibly, individual supervisors who allegedly violated the employee's FMLA rights. The employee must file the action within 2 years of the violation, or 3 years in the case of willful violations.

As a remedy, an employee may obtain damages in the amount of any wages, salary, employment benefits, or other compensation denied or lost by reason of the violation. This amount is doubled if the violation is willful. An employee is also entitled to equitable relief, such as being returned to their position in the event they were wrongfully terminated. Damages for emotional distress and punitive damages are not available. The Act provides for reasonable attorney fees and costs, which can be substantial in an FMLA case.

Title II does not permit employees to sue in federal court for violations of the Act. Rather, a civil service employee covered by Title II is limited to filing a grievance pursuant to the terms of an agency policy or an applicable collective bargaining agreement. The remedies available are limited to whatever is permitted by the grievance system.

The enforcement scheme under the CAA differs from Titles I and II and the PEOAA. Under the CAA, a congressional employee who believes that his or her FMLA rights have been violated must first file a request for counseling with the Congressional Office of Compliance. If counseling is not successful, the employee is given the right to make a request for mediation. The request is filed with the Office of Compliance. If mediation is unsuccessful, the employee has the right to elect to file a formal complaint with the Office of Compliance, or file a civil lawsuit in federal court.

If the administrative route is elected, the formal complaint is heard by a hearing officer, who renders a decision. The initial decision may be appealed to the Board of Directors of the Office of Compliance (Board). A decision of the Board may be appealed to the Court of Appeals for the Federal Circuit.

The PEOAA enforcement scheme has elements of both Title I and the CAA. According to the Act, the enforcement provisions of Title I apply to PEOAA. 3 USC 412(b) (incorporating § 107 of Title I, 29 USC 2617, into PEOAA). Additionally, the PEOAA mandates an administrative exhaustion procedure initially requiring counseling and mediation efforts. The PEOAA specifically provides that these procedures must be substantially similar to those under the CAA.

If counseling and mediation are unsuccessful, an employee has the right to file an appeal with the MSPB. 3 USC 454. Judicial review of any administrative decision is made by appeal to the United States Court of Appeals for the Federal Circuit.

The existing enforcement and remedial provisions of Titles I and II of the FMLA apply to military caregiver and qualifying exigency leave. The NDAA amendments did not add any new or special enforcement mechanisms or remedial rights to Titles I or II of the FMLA.

DOL revisions to Title I clarify that the prohibition on interference includes a prohibition on retaliation as well as discrimination. The anti-interference provisions apply to employees or prospective employees who have exercised or attempted to exercise FMLA rights. The DOL clarified that the regulations prohibiting an employee from waiving his or her FMLA rights does not prevent an employee from settling past FMLA claims without first securing the approval of the DOL or a court. None of the other federal sector FMLA variants have similarly modified their FMLA regulations.

IV. CONCLUSION

The FMLA is sufficiently complicated that federal employers should exercise great care when addressing an employee's request for FMLA leave. This is particularly true of employers whose workforce contains a mixture of civil service and non-civil service employees. In many instances, the workforce of a federal agency is predominately made up of civil service employees covered by Title II, with a minority of non-civil service employees covered by Title I. Generally, employers should not apply the requirements of Title II to all employees, across the board. The requirements of the four federal sector variants of the FMLA often differ substantially. In many instances, compliance with requirements of Title II will constitute a violation of the law when applied to employees covered by Title I.

Employees, unions, and other organizations representing the interests of federal employees must also become familiar with the applicable FMLA requirements. Unions that advise employees how to comply with the requirements of Title II may be doing more harm than good if the employee is really covered by Title I, and vice versa.

This *Guide* is intended to aid employers, employees, unions, and other professionals to achieve a better understanding of the requirements of the FMLA as applied to the federal sector. I also hope that the questions raised throughout this book regarding various inadequacies with the current FMLA implementing regulations will spur the regulatory bodies to act to bring more clarity to this complicated entitlement.

The military family leave amendments to the FMLA and the revisions and proposed revisions to the existing DOL and OPM FMLA regulations have undoubtedly increased the already difficult task of federal sector FMLA administration and compliance. The differences between the federal sector