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 of the federal workforce 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 As originally enacted, the FMLA entitled eligible federal employees to take up to 12 weeks of unpaid, job-protected leave during a 12-month leave year for the birth, foster care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 some 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. The FMLA has also been amended to provide paid leave in certain circumstances.

In 2019, the Federal Employee Paid Leave Act (FEPLA) provided certain federal employees with up to 12 administrative work weeks of paid parental leave in connection with the birth, adoption, or foster care placement of a son or daughter. The FEPLA, and the 2020 implementing regulations issued by OPM, are addressed throughout the FMLA Guide, particularly in Chapter 11, Paid FMLA Leave. Additionally, in response to the COVID-19 pandemic, Title I of the FMLA was amended in 2020 by the Families First Coronavirus Relief Act (FFCRA), which, among other leave provisions, included the Expanded Family and Medical Leave Act (EFMLA). The EFMLA provided some eligible employees with up to 12 weeks of leave, 10 of which would be paid, for reasons related to the COVID-19 global pandemic. Chapter 17 addresses recent developments regarding the FFCRA and other pandemic-related leave and workplace issues subsequent to the Fourth Edition of the FMLA Guide.

Four major variants of the FMLA apply to federal sector employees and employers: (1) civil service; (2) non-civil service; (3) congressional employees; and (4) employees of the Executive Office of the President. Some federal employees and employers may be covered by special personnel authorities that include or exclude them from these major categories and may create their own unique rules regarding FMLA leave. With respect to the major federal sector FMLA variants, 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 time. While the core entitlements of the four major federal sector 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. In some instances, 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 financial liability. Under some, but not all, FMLA variants, 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 basics. Second, it guides the reader to ask the right questions 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 federal 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 are guided by the DOL Title I FMLA regulations. 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. The statute 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 2009, Airline Flight Crew Technical Corrections Act (AFCTCA), the 2010 National Defense Authorization Act (2010 NDAA), the 2020 Families First Coronavirus Relief Act (FFCRA), and the 2020 Coronavirus Aid, Relief, and Economic Security Act (CARES Act). 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, and the PEOAA. 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. S*ee* 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 Fourth Edition of the *FMLA Guide* the federal sector FMLA statutes have been amended by the 2019 Federal Employee Paid Leave Act (FEPLA), the 2020 FFCRA, and the 2020 CARES Act. The DOL and OPM have issued proposed and final FMLA regulations on multiple occasions. The FEPLA revised the Congressional Accountability Act FMLA provisions regarding the availability of paid leave. The congressional FMLA regulations have not been revised since their enactment, although revised regulations were proposed in 2016 that would update and align the CAA FMLA regulations. *See* Congressional Record S4475-S4515 (June 22, 2016); H4128-4168 (June 22, 2016). The proposed regulations have not been adopted. FMLA regulations have not been issued to implement the PEOAA. As addressed more fully in Chapter 17, the FFCRA and American Rescue Plan Act provided certain federal employees with the right to paid leave in connection with the COVID-19 pandemic.

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), non-civil service (Title I), and employees of the Executive Office of the President covered by the NDAA amendments are entitled to take FMLA leave for two additional circumstances:

- Qualifying exigency leave.
- Military caregiver leave.

The military family leave provisions of the 2008 and 2010 NDAA amendments do not specifically apply to the legislative branch.

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 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 for 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 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, covered federal employers 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, with noted exceptions, 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 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 of FMLA entitlement.

I have ordered the questions in a way that 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 major 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 are covered by each variant 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, albeit to different categories of employees. 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(s) apply to your federal agency, 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 major 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 defines the U.S. government as a "covered employer," 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) (2022). 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) (2022).

2. Title II

Under Title II a covered "employee" is an appointed civil service employee, as defined in 5 USC 2105. 5 CFR 630.1201(b) (2022). 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 major 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 covered employee means the employee of the House of Representatives, the Senate, the Office of Congressional Accessibility Services; the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Workplace Rights, the Office of Technology Assessment, the Library of Congress, and the John C. Stennis Center for Public Service Training and Development. 2 USC 1301(a)(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 major FMLA federal sector variants, not all covered employees are entitled to take FMLA leave. The FMLA adds another hurdle before an employee is entitled 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 federal sector FMLA variants.

If the employee does not meet the applicable eligibility requirements 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 FFCRA created a separate eligibility requirement for expanded FMLA leave. Moreover, while the 2008 and 2010 NDAA amendments to the FMLA did not modify the existing eligibility requirements qualifying exigency and military caregiver for FMLA leave, the DOL did modify the Title I eligibility requirements. By incorporation, changes to Title I eligibility regulations apply to the PEOAA.

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. The eligibility requirement is incorporated into the definition of a covered "employee." 5 CFR 630.1201(b) (2022). 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 major 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. As a result of the decision of the U.S. Supreme Court in *United States v. Windsor* and the resulting regulatory changes, a "spouse" includes a partner in a same-sex marriage. 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- or 26-week FMLA leave entitlement. Of course, leave to care for someone other than an FMLA-covered individual may be required by another federal law, agency policy, or the terms of a collective bargaining agreement.

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 as most members of the military are over age 18.

The 2008 and 2010 NDAA military leave amendments also 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?

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*. All four federal sector variants originally recognized 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 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 and OPM has issued regulations fleshing out the meaning of the statutory language for civil service (Title II) employees. Proposed regulations governing military family leave for congressional employees have been developed but have not been approved by Congress. The PEOAA has not issued its own FMLA regulations but follows the DOL Title I FMLA regulations.

Regulations implementing the FMLA variants have greatly expanded the meaning of these covered conditions. The regulations of the four major federal sector variants of the FMLA, 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.

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 general notice of FMLA rights, include information on FMLA entitlements and benefits in employee handbooks or other written leave or benefit information, notify employees whether they are eligible for FMLA leave, that leave has been designated as being covered by the FMLA, and provide specific notice of FMLA rights and obligations. The timing and content of such notices are prescribed. An employer's failure to provide the employee with timely and adequate notice of FMLA rights and obligations is a prohibited act that could expose the employer to legal liability. An employer's failure to abide by the FMLA's notice requirements may excuse an employee's failure to satisfy his or her FMLA responsibilities.

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 is not 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 is not 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?

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. As in other areas, there are significant similarities and differences among the documentation requirements of the four major federal sector variants.

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 vastly different in other respects among the four major 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. Over the years, the DOL has revised the serious health condition certification rules and forms. 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 DOL medical certification forms.

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 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 Title I WH-384. Under proposed regulations, congressional employees may use DOL forms or similar forms created by the Office of Congressional Workplace Rights.

The FFCRA expanded FMLA provisions to Title I permit an employer to require an employee to substantiate their need for FMLA leave for a COVID-19 related reason with documentation.

An employee has a minimum of 15 days to provide an initial medical certification to substantiate the need for FMLA leave.

That period 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 and Office of Congressional Workplace Rights have 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. The Executive Office of the President has not created their own forms but accept DOL forms.

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 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. Unlike serious health care certifications, recertification may not be required for military caregiver leave.

Finally, the four major 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 major federal sector FMLA variants.

A. LEAVE AMOUNT AND SCHEDULING

All eligible federal employees covered by the FMLA are entitled to 12 workweeks of leave for a 12-month period for birth, adoption, foster care placement or a serious health condition. The FFCRA added expanded FMLA leave as another reason for an employee to take up to 12 workweeks of leave during a 12-month period. Titles I, II and the PEOAA add qualifying exigency leave as a reason to draw on that 12 workweeks of leave each leave year. Titles I, II and the PEOAA also permit federal to 26 workweeks of leave during a single 12-month period for military caregiver leave. Military family leave has not been extended to congressional employees.

The calculation of the 12-month FMLA period 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- or 26-week entitlement differs depending on the FMLA variant at issue.

With respect to calculating the 12-month FMLA period 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. Title II calculates the 12-week FMLA leave entitlement based on the measuring forward method only. For military care giver leave, all federal sector FMLA variants apply the same standard: up to 26 workweeks of leave during a single 12-month period. The entitlement to take up to 12 weeks of expanded FMLA leave under the FFCRA expires on December 31, 2020.

Employers must calculate the exact amount of FMLA leave available to each employee, as the 12- or 26-workweek entitlement, in some cases, differ 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 federal sector FMLA regulations. What is clear, however, is that under all of the federal sector FMLA variants, the calculation of the exact amount of FMLA leave available to an eligible employee is made on a case-by-case basis.

The leave that counts against the employee's 12- or 26-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 II 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. Similarly, intermittent leave for expanded FMLA requires the agreement of both the employer and the employee.

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.

Under all federal sector FMLA variants, where leave is taken intermittently or on a reduced leave schedule for a serious health condition or military care giver leave, 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. For qualifying exigency leave taken on an intermittent or reduced leave schedule basis an employee is not obligated to make reasonable efforts to schedule the leave to minimize disruption to the employer's operations.

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.

All federal sector FMLA variants also allow eligible employees take up to 12 weeks of military qualifying exigency leave during a 12-month period. 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.

Similarly, Title of the FMLA permits an eligible employee to take up to 12 weeks of expanded FMLA leave by December 31,