



## **A G E N D A**

### **PRESIDENTS MEETING**

**Tuesday, February 16, 2010 – 9:00 A.M. (CT)**

1. Legislative Update (Vice Chancellor David Gregory)
2. Budget Update - (Vice Chancellor Dale Sims)
  - Governor's Recommendations
  - 6% and 3% Reduction Plans
  - Payment of Bonus
3. February 19 Board Finance and Business Operations Committee Meeting – (Vice Chancellor Dale Sims)
  - Mandatory and Incidental Fee Discussion
  - Discussion on Tuition and Maintenance Fees
4. Proposed Revisions to TBR Guideline B-060 – Fees, Charges, Refunds and Fee Adjustments (Vice Chancellor Dale Sims) – *Attachment*
5. Proposed Revision to TBR Policy 5:01:01:14 – Family and Medical Leave (Vice Chancellor Dale Sims) - *Attachment*
6. Update on Optional Retirement Program (Vice Chancellor Dale Sims)
7. Discussion of Recent Fair Labor Standards Act Activities (Vice Chancellor Dale Sims)

**PRESIDENTS/DIRECTORS QUARTERLY MEETINGS  
FEBRUARY 2010**

DATE: Presidents Meeting (February 16, 2010)  
Directors Meeting (February 17, 2010)

AGENDA ITEM: Proposed Revisions to Guideline B-060  
Fees, Charges, Refunds and Fee Adjustments

ACTION: Voice Vote

PRESENTER: Vice Chancellor Dale Sims

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**BACKGROUND INFORMATION:**

There are proposed revisions to two sections of Guideline B-060 as follows:

1. Implements an E-Rate for the out-of-state students taking online courses exclusively. For these students, the E-Rate would be composed of the maintenance fee and a 50% markup that represents the out-of-state portion.
2. Suggested revisions to the language regarding the technology access fee spending plans. The new language states that each institution shall prepare a detailed spending plan for the use of funds generated by TAF. This plan is not to be submitted to TBR unless selected for review. TBR will randomly select 25% of universities/community colleges and 25% of technology centers for review. Those institutions selected will submit their plan as part of their July budget to be reviewed.

## C. Accounting Treatment

### IV. eRate

#### A. Description of Fee

1. The eRate is available to students who enroll at TBR institutions, who are classified as non-residents of Tennessee, and who are enrolled exclusively in online courses.
2. The eRate is 150% of the institution's approved undergraduate or graduate maintenance fee.
3. To qualify for an eRate, students must (a) meet all institution admission requirements and must (b) be verified as an online out-of-state student enrolled exclusively in courses delivered online by a procedure documented by the institution.
4. Students enrolled in any type courses other than online (on-ground, telecourse, distance education, etc.) will not be eligible for the eRate specified in this guideline and will instead incur traditional non-resident fees and charges. Students who enroll in both online courses and other type courses and subsequently drop the other type courses will not then become eligible for the eRate.
5. Institutions enrolling eRate students as defined in this guideline must provide a method to mitigate any negative impact on the opportunity for Tennessee student enrollment in online courses.

#### B. Accounting Treatment

1. The eRate is comprised of the maintenance fee and a 50% markup that represents the out-of-state tuition portion.
2. The maintenance fee and the out-of-state tuition should each be recorded as outlined in sections II and III above.

## **V. Student Fees**

A. A student government activity fee may be established pursuant to T.C.A. § 49-8-109. Any increase in this fee shall be subject to a referendum for student body approval or rejection. The fee will be administered in accordance with the provisions adopted by each institution. These fees will be restricted current funds additions. These fees are refundable on the same basis as maintenance fees or as established by the institution.

B. Student activity fees (other than student government activity fees) will be approved by the Tennessee Board of Regents. Such fees may be recommended by each institution based on services to be provided which are related to the activity fee. These fees will be unrestricted current funds revenues. These fees are refundable on the same basis as maintenance fees or as established by the institution.

## **VI. Technology Access Fees**

**(A) A fee shall be levied by each institution for the purpose of providing student access to computing and similar technologies. It is refundable on the same basis as maintenance fees or as established by the institutions. Institutions shall establish expenditure accounts and designated revenue accounts for purposes of recording technology access fees and expenditures.**

**(B) Use**

**(1) Technology Access Fees (TAF) are composed of two pools. Pool 1 represents the TAF prior to FY 1997-98 when it did not exceed \$30 annually. Pool 2 represents the difference between the current TAF rate and the pre-1997-98 TAF rate. Items (2) and (3) below shall apply to use of Pool 2 TAF funds.**

**(2) The TAF should be used by TBR institutions for direct student benefit, for items such as new and improved high technology laboratories and classrooms, appropriate network and software, computer and other equipment, and technological improvements that enhance instruction. Use of Pool 2 TAF is limited to the following items:**

- **Computers and other technical laboratory supplies, equipment, software and maintenance.**
- **Network costs (WWW, internet, interactive video, etc.)**
- **"Smart" or multi-media classroom equipment and classroom modifications**
- **Lab and course staffing – student and staff assistance for lab and classroom uses; universities are limited to a 12% maximum (Pool 2 current-year TAF revenues) and student employees only; community**

colleges are limited to 25% maximum (Pool 2 current-year TAF revenues) for student or staff employees.

- **Renewal and replacement reserves as necessary.**
- **New machines for faculty use when faculty are actively engaged in developing and conducting on-line courses.**
- **Faculty and staff development directly related to the introduction or application of new technology which impacts students. These guidelines should have the flexibility to place instructional technology in a faculty lab where course materials are being prepared. For example, TAF funds can be used to create faculty labs to include the purchase of computers and to conduct faculty training and course development. (Travel costs for faculty and staff are excluded; however, consultants may be hired as needed for training.)**
- **Infrastructure (wiring, network, servers, etc.) necessary to provide students maximum computing capability. A ceiling is established of 50% of the total project costs from which technology access fees can be used.**
- **Expand technology resources in library, i.e., video piped anywhere on campus, interactive video room for distance education, network for web video courses.**

**(3) Effective July 1, 2005, institutions may use Technology Access Fee (TAF) revenues for the purpose of supporting the financing of the implementation of the Banner Enterprise Resource Planning (ERP) project including subsequent software and hardware upgrades. Use of TAF funds for this purpose is limited to a maximum of 25% of the annual revenue collected at universities, community colleges and technology centers. Use of TAF fees for the ERP project must be disclosed and justified in the annual spending plan which requires approval by the Board. The provision for use of TAF fees for this special purpose is repealed for fiscal years beginning on or after July 1, 2010.**

**(4) As part of the July budget process, each institution shall prepare a detailed spending plan for the use of funds generated by the TAF. Prior to submission of July budgets, the Chancellor or his designee shall randomly select 25% of universities/colleges and 25% of technology centers for review of TAF spending plans. Each institution selected shall submit their TAF spending plan as part of their July budget. These spending plans shall be reviewed by the Chancellor or his designee for compliance with TAF use guidelines and Board policy. A report of this review shall be filed with the Board.**

**(5) The spending plan will be maintained by the institution and will be updated throughout the year as needed. The President shall ensure that the spending plan is prepared. At the end of the fiscal year, a summary of the actual money generated and actual use of the money shall be prepared and maintained by the institution.**

**(6) Compliance with these guidelines will be audited by the internal audit staff and reported to the Board as determined by the internal auditor's annual risk-based planning process or other appropriate means.**

#### **~~VI.~~ VII. Specialized Academic Fees**

Certain academic programs require expensive maintenance/updating of equipment and software and the employment of highly qualified staff. The high costs of instruction for these programs can be offset by establishing specialized academic fees, with the Board's approval. To receive approval for a specialized academic fee, a program will be required to meet criteria A, High Cost of Instruction as defined below. Additionally, the program should document meeting criteria B-G, as applicable.

A. High Cost of Instruction. Programs qualifying for charging specialized academic fees must demonstrate that they are more costly than other programs offered by the institution. If appropriate, the extraordinary cost of the program must be validated including benchmarking with similar programs in the region and nation.

B. High Demand. The number of students enrolled in the program and the student credit hours generated are sufficient to justify additional fees.

C. High Cost of Updating/Maintaining Equipment and Software. Programs qualifying for charging specialized academic fees are expected to be those that require extensive maintenance and regular updating of equipment and/or software, all of which are very expensive. An average hardware/software cost per student credit hour serves as the basis for determining the amount of the fee.

D. Accreditation. Meeting standards of specific accrediting agencies may also qualify a specialized program for charging specialized academic fees. The accrediting standards that justify a fee are those that specify the possession and use of certain equipment and unique software that are extraordinarily costly and/or the employment of faculty with specific credentials that demand high salaries.

E. High Recognition and Quality. The programs approved for specialized academic fees are expected to be distinctive and with a regional or national reputation. The program must demonstrate that it has achieved exceptional recognition in its particular enterprise.

F. High Value to Tennessee. The program must demonstrate that it is a good investment for the State of Tennessee to justify charging extra fees to the student. The program should be distinctive and not one duplicated in other TBR institutions and should be of integral value to Tennessee. The graduates' earning potential and the associated benefit to the state economy should be projected, as well as the efforts taken by the institution to aid graduates in finding appropriate employment in Tennessee.

G. Impact on Affected Students. Through surveys, questionnaires, or other suitable means, the program must demonstrate that the charging of additional fees will not diminish enrollment. The program should demonstrate that enrolled students realize that the potential earning power in the work force justifies their additional investment.

Institution must submit documentation of the above applicable criteria when requesting approval of a specialized academic fee.

#### **~~VII~~. VIII. Miscellaneous Course Fees**

All miscellaneous fees must be approved by TBR. Fees for courses requiring special off-campus facilities or services do not require Board approval but should reflect the cost of the facilities or services.

#### **~~VIII~~. IX. Incidental Fees and Charges**

##### **A. Uniform Rates and Policies**

##### Institutions

The following fees will be uniformly charged (or, if applicable, to the extent that they remain within the set range) at all institutions both as to the amount and condition of assessment. Charges are subject to approval by the Tennessee Board of Regents.

1. Application Fee: Undergraduate - Not less than \$5.00 nor more than \$25.00. Graduate - Not less than \$5.00 nor more than \$35.00. ETSU College of Medicine and College of Pharmacy – Not less than \$50 or more than \$100. This is a non-refundable fee paid by an individual who applies for admission to the institution. A student is required to pay this fee when he/she applies for admission as a graduate student even if the student attended a TBR institution as an undergraduate student. Additionally, the student is required to pay this fee when he/she applies for admission to a doctoral-level program after receiving a masters-level degree from the institution.

2. Graduation Fee: This fee shall be assessed according to degree level as follows and shall include the cost of the diploma and rental of academic regalia:

Associate Degree	\$25.00
Baccalaureate	30.00
Master and Specialist	35.00
Doctor and Juris Doctor	45.00

The fee is refundable only if the institution has incurred no costs on the student's behalf. Other items may be included in the fee, as determined by the institution. Additional fees may be charged for optional graduation-related activities or services.

### 3. Late Exam Fee: None

#### Institutions and Technology Centers

4. Returned Check Fee: \$30.00 per check - nonrefundable. All institutions will charge a returned check fee that is the maximum set by state law. This fee will apply to all returned checks received by the institution, whether from students, faculty, staff, or other parties. The Board will review state statutes each spring to determine any changes.

#### Technology Centers

Each technology center will assess a nonrefundable fee for individual instructional projects pursuant to a schedule approved by the Tennessee Board of Regents.

### B. Other Fees and Charges Subject to Board Approval

#### Institutions

The following fees may be assessed by all institutions. Specific rate recommendations will be developed separately by each institution for approval by the Tennessee Board of Regents. In review of the recommendations, the Board staff will consider the consistency of fees for comparable services among institutions.

1. Motor Vehicle Registration - nonrefundable. A fee may be levied by each institution per academic year, per fiscal year and/or per academic term for motor vehicle registration, and such fee shall be applicable to each student, faculty and staff member.

2. Campus Access Fee - At institutions where registration of specific vehicles is not necessary and where traffic control is not a significant concern, a campus access fee may be assessed in lieu of a motor vehicle registration fee. It is refundable on the same basis as maintenance fees or as established by the institution.



3. Post Office Box and/or Postal Service Fee - nonrefundable. There may be a charge for the U.S. Post Office box or for any special arrangements for delivery of U.S. mail and it will be applicable to any person who has a U.S. Post Office box or who has made special arrangements through which regular U.S. mail may be received.

4. Traffic Fines - nonrefundable. These fines will apply to all employees and students.

5. Applied Music Fees. This fee is charged for private music lessons or small group training sessions. It is refundable on the same basis as maintenance fees or as established by the institution.

6. Late Registration Fee. A late registration fee up to \$100 will be charged during the entire period of late registration. The effective date of the fee will be determined by each institution.

7. Facilities Fee. This fee will be used to improve facilities and fund expenditures such as replacing carpets in student lounges, remodeling classrooms, etc. The fee would not be used for routine maintenance or new construction, but would be used to make improvements to areas that have an impact on students. The intended projects will be disclosed during the normal budget cycles. The fee is refundable on the same basis as maintenance fees.

#### Institutions and Technology Centers

~~1. (A) Technology Access Fee—A fee shall be levied by each institution for the purpose of providing student access to computing and similar technologies. It is refundable on the same basis as maintenance fees or as established by the institutions.~~

~~(B) A detailed spending plan of the funding generated by the access fee shall be submitted during the July budget process for approval by the Chancellor or his designee. Revisions to approved spending plans that expand existing projects or add new projects must be approved by the Chancellor or the Chancellor's designee. At the end of the fiscal year, a summary of the actual money generated and actual use of the money shall be submitted during the financial statement process for review by the Chancellor or his designee.~~

~~(C) In both the spending plan and the actual expenditure of the technology access fee as indicated in (B) above, institutions shall report designated expenditure accounts and designated revenue accounts for purposes of recording technology access fees and expenditures.~~

2. Transcript Fee. There will be no charge for transcripts; however, institutions and technology centers shall set a limit on a reasonable number of copies at any one time and

may establish a nonrefundable charge for the cost of copying transcripts in excess of that number.

## **PRESIDENTS/DIRECTORS QUARTERLY**

DATE: February 16-17, 2010

AGENDA ITEM: **Proposed Complete Revision to TBR Policy 5:01:01:14 Family, Medical Leave**

ACTION: Requires Vote

PRESENTER: Vice Chancellor Dale Sims

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### BACKGROUND INFORMATION:

Policy 5:01:01:14, Family and Medical Leave (FMLA) has been revised and the proposed title is Family, Medical and Servicemember Leave. The policy has been updated to reflect the new military family leave entitlements under the National Defense Authorization Act for FY 2008; as well as other recently issued revisions to the Department of Labor Regulations. The proposed revisions have been reviewed and recommended for approval by the Human Resources Officers Committee and the Business Officers Sub-Council.

**Policy No. 5:01:01:14**

**Subject: Family, Medical and Servicemember Leave (FMLA)**

In compliance with the Family and Medical Leave Act of 1993, as amended, ("FMLA" or "the Act") it is the policy of the Tennessee Board of Regents ("TBR") to provide eligible employees up to 12 workweeks of leave during a 12-month period for family or medical leave, or for a qualifying exigency; or, up to 26 workweeks of leave for military caregiver leave during a 12-month period for reasons specified in this Policy, to provide continued health insurance coverage during the leave period and to insure employee reinstatement to the same or an equivalent position following the leave period. For purposes of this policy, "State" shall be defined as any State agency, the TBR System, and/or the University of Tennessee System.

**I. Employee Eligibility**

A. In order to be considered "eligible," an employee must: (1) have worked for the State for at least 12 months; and, (2) have worked at least 1,250 hours during the year preceding the start of the leave.

B. The determination of whether an employee meets the eligibility criteria for receiving FMLA leave is based on the amount of service (including prior service) the employee has as of the date the leave actually begins.

C. This policy applies to both regular and temporary employees.

D. The right to take FMLA leave applies equally to male and female employees.

E. This policy contains no exceptions for "key employees" (e.g., a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees of the institution/technology center/Central Office).

F. The 12 months of required work with the State do not have to be consecutive in order for an employee to be eligible. However, employment prior to a break in service lasting 7 or more years will not be counted unless the break was due to fulfillment of a National Guard or Reserve military service obligation. The time served performing the military service must also be counted in determining whether the employee has been employed for at least 12 months by the employer.

G. If an employee is maintained on the payroll for any part of a week, that week is considered a week of employment, with 52 weeks of such employment considered equal to 12 months.

H. In determining "hours worked" for the purposes of FMLA eligibility, all hours actually worked by an employee (including overtime hours) should be calculated. Annual and sick leave hours which have been used during the 12-month period preceding the start of the leave are not counted as hours worked. In situations where a full-time employee is considered "exempt" from the overtime provisions of the Fair Labor Standards Act (FLSA) and no record of overtime hours worked has been maintained, the employee

is presumed to have met the 1,250 hour requirement if he/she has worked for the State for at least 12 months. For purposes of this policy, full-time faculty satisfy the 1,250 hour test.

I. The determination of eligibility must be made as of the date the leave commences or within 5 business days (absent extenuating circumstances) of when notification of an FMLA qualifying event has been received. If an employee gives notice that leave is required before he/she meets the eligibility criteria, he/she must either be: (1) provided with confirmation of when eligibility will be attained, based upon a projection; or, (2) advised when the criteria have been met. In the latter case, the notice of leave will remain current and outstanding until the employee is advised that eligibility has been attained. Eligibility that is confirmed at the time the notice is received may not be subsequently challenged. If notice of leave has been given and confirmation of eligibility is not given prior to commencement of the leave, the employee is deemed eligible; FMLA leave may not be denied. In addition, if notice of the need for leave has not been given more than 5 business days prior to commencement of the leave, a determination of eligibility must be confirmed within 5 business days following notice. If such a determination is not provided, the employee will be considered eligible.

J. Leave requests for regular employees who do not satisfy the FMLA eligibility requirements shall be processed in accordance with the appropriate TBR leave policies.

## **II. Leave Entitlement - FMLA Qualifying Events**

### **A. Family Leave**

1. The birth of a son/daughter and to care for the newborn child. In addition to leave taken after the birth of a child, FMLA leave may be taken by an expectant mother for the purpose of prenatal visits, pregnancy-related symptoms, and in situations where a serious health condition prevents her from performing her job duties prior to the child's birth. Husbands may also use FMLA to accompany an expectant spouse to prenatal visits, to care for an expectant spouse with a serious health condition, or if needed to care for the spouse following the birth of the child if the spouse has a serious health condition.

2. The adoptive or foster care placement of a son or daughter with the employee.

a. FMLA leave may be taken prior to an adoptive or foster care placement if the leave is necessary for the placement to proceed. This would include granting leave for required counseling sessions, court appearances, and legal or medical consultations.

b. Adoption: There is no requirement in the Act that the source of an adoption be from a licensed adoption agency in order for an employee to be eligible for FMLA leave. (See Section II, A.3., for age limitations for son/daughter.)

c. Foster Care: This is defined as "24-hour care for children in substitution for, and away from, their parents or guardian." The Act requires that this placement be made by or in agreement

with the State and that State action be involved in the removal of the child from parental custody. Foster care may include children of relatives placed within the employee's home by the State.

3. To care for the employee's spouse, son, daughter, or parent with a serious health condition, as defined below:

a. Spouse: Husband or wife as defined or recognized under Tennessee law for purposes of marriage.

b. Parent: Biological parent or an individual who currently stands or stood in place of an absent parent to an employee when the employee was a child as defined in son/daughter below. The definition does not include parents-in-law.

c. Son/Daughter: Biological, adopted, foster child, stepchild, legal ward, or child of a person standing in place of an absent parent, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability. An individual "incapable of self-care" means that the individual requires active assistance or supervision in performing 3 or more activities of daily living. An individual with a "physical or mental disability" means that the individual has an impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR Part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), 42 U.S.C. 12101 et seq., define these terms.

For purposes of confirmation of family relationship, the president/director/Chancellor/or his/her designee (hereafter referred to as "Employer") may require the employee giving notice of a need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, a birth certificate, a court document, etc. After examination, the employee is entitled to the return of the official document.

B. Medical Leave. The employee has a serious health condition resulting in his/her inability to perform job functions.

1. An employee is unable to perform the functions of his/her position if the Health Care Provider ("HCP") finds that the employee is: (1) unable to work at all; or, (2) unable to perform any one of the position's essential functions within the meaning of the ADAAA, 42 USC 12101, et. seq., and the regulations at 29 CFR Sec. 1630.2(n). For FMLA purposes, the essential functions must be determined with reference to the employee's position when the notice is given or the leave commenced, whichever is earlier.

2. An employee absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. The Designator may provide a copy of the essential functions of the employee's position for the HCP to review when requiring certification.

### C. Servicemember [or Military Family] Leave

1. “Qualifying Exigency.” Employees with a spouse, son, daughter, or parent (“the servicemember”) on covered active duty or a Federal call to covered active duty in the regular Armed Forces, the National Guard or Reserves, or a retired member of the regular Armed Forces or Reserves may use leave to address exigencies listed below arising out of the covered active duty or impending covered active duty deployment of the servicemember to a foreign country:

- a. Short-notice deployment (up to 7 days of leave);
- b. Attending certain military events;
- c. Child care or school activities;
- d. Addressing financial and legal arrangements;
- e. Periods of rest and recuperation with the servicemember (up to 5 days of leave)
- f. Attending counseling sessions related to active duty;
- g. Attending post-deployment activities (available for up to 90 days after the termination of the covered servicemember’s active duty status);
- h. Other activities arising out of the servicemember’s active duty or call to active duty, and agreed upon by the institution and employee.

#### 2. Military Caregiver Leave.

a. An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 work weeks of leave during a 12-month period to care for the covered servicemember who has a serious injury or illness incurred in the line of duty while on covered active duty in the Regular Armed Forces, National Guard or Reserves provided that such injury or illness may render the servicemember medically unfit to perform his/her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list. A serious health condition also includes any injury or illness that existed before the beginning of the servicemember’s covered active duty that was aggravated by service in the line of duty on covered active duty. A veteran of the regular Armed Forces, National Guard or Reserves will be considered a covered servicemember for purposes of this leave entitlement if: 1.) he/she is undergoing medical treatment, recuperation or therapy for a serious injury or illness that was incurred by or aggravated while on covered active duty in the Armed Forces, whether or not the illness or injury manifested itself before or after the member became a veteran; and, 2.) he/she was a member of the Armed Forces, National Guard, or Reserves at any time during the five-year period before he/she began the treatment, recuperation or therapy.

b. An employee may take up to 26 workweeks of leave on a per servicemember, per injury/illness basis during a 12-month period, beginning on the first day of leave. However, no more than 26 workweeks of leave may be taken within any single 12-month period.

c. "Next of kin" means the nearest blood relative other than the covered servicemember's spouse, parent or child designated by the servicemember in the following order of priority: a legal guardian or custodian; or a sibling, grandparent, aunt/uncle, or first cousin, unless the servicemember has specifically designated in writing another blood relative as his/her nearest blood relative.

**III. FMLA definition of "a serious health condition" and "period of incapacity"** A. "Serious health condition" means an illness, injury, impairment, or physical or mental condition involving any of the following:

1. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity; or,

2. Continuing treatment by a HCP which includes:

a. A period of incapacity lasting more than 3 consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes:

- treatment 2 or more times by or under the supervision of a HCP (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or,

- treatment on at least one occasion by a HCP (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy) or,

b. Any period of incapacity related to pregnancy or for prenatal care. A visit to the HCP is not necessary for each absence; or

c. Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a HCP, and may involve episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.). A visit to a HCP is not necessary for each absence; or

d. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, severe stroke, or terminal stages of a disease). Only supervision by a HCP is required, rather than active treatment; or,



e. Any absences to receive multiple treatments, including any period of recovery therefrom, for restorative surgery after an accident or other injury; or, for a condition that would likely result in a period of incapacity of more than 3 days if not treated.

B. "Period of incapacity" means an inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment or recovery.

C. Absences due to pregnancy or prenatal care, or chronic conditions as specified above, fall within FMLA even if no treatment from a HCP is received, and even if the absence does not last more than 3 consecutive, full calendar days.

#### **IV. Determination of the 12 Workweek/26 Workweek Period**

##### **A. Limitations on Length and Duration**

1. Eligible employees are entitled to up to a total of 12 workweeks of leave for family or medical leave, and for a qualifying exigency under servicemember leave; and, up to 26 workweeks of leave to care for a servicemember with an injury or illness during a 12-month period. The initial 12-month period starts on the date the employee's FMLA leave first begins. A new 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. For example, an employee who first uses FMLA leave on October 7, 2008, would have his/her 12-month period begin on that date and continue through October 6, 2009. If this employee subsequently needed to use FMLA leave starting on December 2, 2009, a new 12-month period would be established from that date forward through December 1, 2010.

2. A holiday that occurs within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. Exception: If the institution/technology center/Central Office is temporarily closed for work for 1 or more weeks (e.g., closing for the Christmas/New Year holiday, summer breaks), those days do not count as FMLA leave. If the employee takes intermittent leave, the holiday is not counted unless the employee would have been scheduled to work the holiday.

3. Overtime hours. If the employee is normally scheduled to work overtime but is unable to do so because of his/her serious health condition, the overtime missed may be counted as FMLA leave. For example, if an employee would normally be required to work 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize 8 hours of FMLA-protected leave. Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

4. Part-time employees receive FMLA leave on a pro rata or proportional basis.

5. If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 workweeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

B. Leave entitlement for the birth of a child, or for adoption or foster care placement of a child expires at the end of the 12-month period beginning on the date of the birth or placement. FMLA leave for these reasons must be concluded within this time period.

C. Leave to care for an injured or ill servicemember is to be applied on a per-covered servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness. However, no more than 26 workweeks of leave may be taken within any single 12-month period.

D. FMLA leave limitations when both spouses are State employees.

1. Spouses who are both employees of the State are limited to a combined total of 12 workweeks of FMLA leave during a 12-month period if the leave is taken for the following reasons: (1) birth of a child or for care of the child after birth; or (2) adoptive or foster care placement of a son or a daughter or for care of the child after placement; or, (3) to care for a parent with a serious health condition. However, each employee would be entitled to take 12 workweeks of FMLA leave to care for a child, including a newborn, with a serious health condition.

2. In situations where both the husband and wife use a portion of FMLA leave for one of the reasons listed in the previous paragraph, each spouse is entitled to the difference between the amount he/she has taken individually and 12 workweeks of FMLA leave for reasons other than those listed. For example, if both spouses use 6 workweeks of leave for the birth of a child, each could take an additional 6 workweeks of leave for personal illness, or to care for a family member with a serious health condition. In situations where FMLA leave is not taken due to birth, adoption, or foster care, or to care for a parent during a given year, each spouse is entitled to a full 12 workweeks of leave. Additionally, each employee would be entitled to take 12 workweeks of FMLA leave to care for a newborn child or child if that child has a serious health condition.

3. If one spouse is ineligible for FMLA leave, the spouse who meets the eligibility requirement is entitled to 12 workweeks of FMLA leave.

4. Servicemember Leave. The aggregate number of workweeks of leave to which both that husband and wife may be entitled is limited to 26 workweeks during a 12-month period.

E. Use of an intermittent or reduced leave schedule.

1. "Intermittent Leave" is leave taken in separate blocks of time due to a single qualifying reason and may include leave periods from an hour to several weeks. A "reduced leave schedule" reduces an employee's usual number of working hours per work-day or work-week.

2. An employee may take intermittent FMLA leave or have a reduced leave schedule over a 12-month time period when medically necessary for: (1) planned and/or unanticipated medical treatment of a serious health condition by or under the supervision of a HCP, (2) recovery from the condition, (3) recovery from treatment of the condition, or (4) to provide care to an immediate family member with a serious health condition. Employees may not use intermittent FMLA leave following the birth of a child, or adoptive or foster care placement for any reason other than medical necessity.

3. Intermittent leave or a reduced schedule may also be used for absences where the employee or family member is incapacitated or unable to perform the position's essential functions due to a chronic serious health condition even if treatment is not rendered by a HCP.

4. If an employee requests intermittent leave or leave resulting in a reduced work schedule, the employer may require that the employee transfer temporarily to another position for which the employee is qualified and which better accommodates the employee's need for recurring leave periods. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. This temporary position must have equivalent pay and benefits, but need not have equivalent duties. For information regarding benefits (e.g., insurance and longevity) not ordinarily provided to part-time employees that may not be eliminated, see Section XVIII. An employee may not be transferred to an alternative position in an effort to discourage use of FMLA leave or otherwise work a hardship on the employee (e.g., a day-shift employee may not be reassigned to a later shift). When an employee who transferred to an alternative position is able to return to full-time work, he/she shall be placed in the same or equivalent position as the job he/she had when the leave commenced. He/she cannot be required to take more FMLA leave than the circumstance for the leave requires.

5. The employer must account for intermittent or reduced leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.

## **V. Employee Notice Requirements**

A. General. An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements. However, if the employee fails to explain the reasons for the leave, the request may be denied.

B. Foreseeable leave.

1. Timing of notice.

- a. The employee must provide at least 30 days advance notice before the leave is to begin, or if 30 days is not practicable, as soon thereafter as possible. The employer may require the employee to explain the reasons why notice was not given at least 30 days prior to the leave.
- b. Notice need be given only once but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

## 2. Content of notice.

- a. An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.
- b. The employer may request medical certification to support the need for the leave to determine if the condition qualifies as a serious health condition. The employer may request certification to support the need for leave for a qualifying exigency or for military caregiver leave.
- c. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.
- d. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

## 3. Scheduling leave.

- a. The employee must consult with the employer and make a reasonable effort to schedule planned medical treatments so as not to unduly disrupt the employer's operations subject to the approval of the HCP.
- b. Intermittent leave or leave on a reduced schedule must be medically necessary due to a serious health condition, injury or illness. The employee and employer shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employer's operation, subject to the approval of the health care provider.

## C. Unforeseeable Leave.

### 1. Timing of notice.

- a. An employee must provide notice as soon as practicable under the facts and circumstances of the case.
- b. Notice may be given by the employee's spokesperson if the employee is unable to do so personally.

## 2. Content of notice.

- a. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request, and the anticipated duration of the absence.
- b. Calling in sick without providing more information will not be considered sufficient notice to trigger an employer's obligations under the FMLA. The employer may obtain any additional required information by contacting the employee or the employee's spokesperson through informal means.
- c. The employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.
- d. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. If an employee requires emergency medical treatment, he/she would not be required to follow the call-in procedure until his/her condition is stabilized and he/she has access to, and is able to use, a phone.

## **VI. Employer Notice Requirements**

- A. Posting general notice. All employers are required to post, in conspicuous places, notices explaining the provisions of the FMLA. Electronic posting is sufficient. See the Department of Labor (DOL) Web site for a prototype notice. The DOL notice form may be used, or another format may be used so long as the information provided includes, at a minimum, all the information contained in the DOL notice.
- B. If the employer has an employee handbook or other document explaining employee benefits or leave rights, information concerning FMLA entitlement, and employer/employee responsibilities and obligations must be included.
- C. Eligibility notice.
  1. When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of his/her eligibility to take FMLA leave within 5 business days, absent extenuating circumstances.
  2. If the employee is not eligible, the notice must state at least one reason why.
  3. Notification of eligibility may be oral or in writing and employers may use DOL forms to provide notice.
- D. Rights and responsibilities notice.

1. Employers must provide written notice detailing the specific expectations and obligations of the employee and explain any consequences of a failure to meet these obligations.
2. This notice must be provided each time an eligibility notice is provided.
3. The notice must, at minimum, include, as appropriate:
  - a. That the leave may be designated and counted against the employee's annual FMLA leave entitlement;
  - b. Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so;
  - c. That the employer will substitute paid leave, and the employee's entitlement to take unpaid FMLA leave if he/she does not have sufficient accrued paid leave;
  - d. Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis;
  - e. The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and,
  - f. The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.
4. The employer may use the appropriate DOL form as the notice of rights and responsibilities. This notice may be distributed electronically so long as it otherwise meets the requirements of this section.

E. Designation Notice.

1. When the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason, the employer must notify the employee whether the leave will be designated and counted as FMLA leave within 5 business days absent extenuating circumstances. At the time of designating the leave as FMLA leave, the employer must indicate that paid leave will be utilized when the employee has accumulated leave balances. An employee with no accumulated sick or annual leave balances must take his/her leave as unpaid, unless otherwise stipulated in other TBR leave policies. TBR leave policies and the FMLA leave policies shall run concurrently and not consecutively.
2. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave, or intermittent or reduced schedule leave.

3. If the employer determines that the leave will not be designated as FMLA-qualifying, the employee must be so notified.
4. If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the fitness-for-duty certification must address the employee's ability to perform the essential functions of his/her position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the position.
5. The designation notice must be in writing and the appropriate DOL form may be used for this purpose. If the leave cannot be designated as FMLA leave, the notice may be in the form of a simple written statement.
6. The employer must notify the employee of the amount of leave counted against his/her FMLA leave entitlement. If the amount of leave needed is known at the time the leave is designated as FMLA leave, the employer must notify the employee of the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide this information, such as in the case of unforeseeable intermittent leave, the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement at the request of the employee, but no more often than once in a 30-day period and only if FMLA leave was taken in that period.

## **VII. Designation of FMLA Leave**

- A. Employer responsibilities. The decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson. If the employer does not have sufficient information about the reason for the use of leave, the employer should inquire further of the employee or spokesman. The employer must then provide the appropriate notice pursuant to the prior section.
- B. Employee responsibilities.
  1. An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the FMLA or even mention the FMLA to meet his/her obligation to provide notice, though he/she would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements of Section V.
  2. If an employee fails to adequately explain the need for FMLA leave, the request may be denied.
- C. Retroactive designation. The employer may retroactively designate leave as FMLA leave with appropriate notice to the employee provided the employer's failure to timely designate leave does not cause harm or injury to the employee.

## **VIII. Certification**

### **A. General**

1. A request for certification must be made in writing.
2. The employer should make a request for certification at the time the employee gives notice of the need for leave or within 5 business days thereafter; or, in the case of unforeseen leave, within 5 business days after the leave begins.
3. The employee must provide the requested certification within 15 calendar days after the request unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. The employee is responsible for paying any costs associated with obtaining a certification or recertification, and any necessary clarification or authentication.
4. If the employee does not provide a complete and sufficient certificate, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. If items on the certification are not filled in, or the information provided is vague, ambiguous or non-responsive, the certification may be considered incomplete. The employee must be allowed 7 calendar days to cure any deficiencies.
5. No information beyond that specified below in Section IX may be required to be provided.
6. The employee may provide the employer with an authorization, release or waiver allowing the employer to communicate directly with the HCP, but the employee must not be required to do so.

### **B. Consequences**

1. At the time the employer requests certification, the employee must be advised that the FMLA leave request may be denied if the certification is incomplete or insufficient despite the opportunity to cure the deficiencies, or if the employee fails to provide any certification.
2. It is the employee's responsibility to furnish a complete and sufficient certification, or to furnish the HCP the necessary authorization to complete the certification.
3. These principles apply whether the request is the initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient.

## **IX. Certification of Serious Health Condition of Employee or a Covered Family Member**

### **A. Permissible information.**

1. The name, address, telephone number and fax number of the HCP, and type of medical practice/specialization;



2. The approximate date on which the serious health condition began, and its probable duration;
3. A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. These facts must be sufficient to support the need for leave and may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment, or any other regimen of continuing treatment;
4. If the employee is the patient, information sufficient to establish that he/she cannot perform the essential functions of his/her job, the nature of any other work restrictions; and, the likely duration of such inability;
5. If the patient is a covered family member, information sufficient to establish that the family member is in need of care, and an estimate of the frequency and duration of the leave required to care for the family member;
6. If the employee requests leave on an intermittent or reduced schedule basis for planned medical treatment for him/herself or a family member, information sufficient to establish the medical necessity and an estimate of the dates and duration of such treatments and any periods of recovery;
7. If the employee requests leave on an intermittent or reduced schedule basis for his/her serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such leave and an estimate of the frequency and duration of the episodes of incapacity;
8. If the employee requests leave on an intermittent or reduced schedule basis to care for a covered family member, a statement that such leave is medically necessary to care for the family member which can include assisting in recovery, and an estimate of the frequency and duration of the required leave.

B. The appropriate DOL form may be used to obtain information concerning the employee's serious health condition or the serious health condition of a covered family member. These forms may also be used if seeking second and third opinions.

C. Workers' compensation. If the employee is concurrently on FMLA leave and workers' compensation leave, the FMLA does not prevent the employer from following the workers' compensation provisions in seeking information even if such would allow inquires beyond that allowed under the FMLA. Information received may be considered in determining the employee's entitlement to FMLA-protected leave.

D. ADAAA. If the employee's serious health condition may also be a disability pursuant to the ADAAA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADAAA. Any information received may be considered in determining the employee's entitlement to FMLA-protected leave.

#### E. Clarification and authentication of certification

1. If the employee submits an incomplete or insufficient certification signed by the HCP, the employer may contact the HCP for purposes of clarification and authentication. The employee must first have been given 7 calendar days to cure the deficiency. Employers may not ask for additional information beyond that required by the certification form as set out in Section IX.A.
2. The employee must provide an authorization for the employer to contact the HCP.
3. A HCP, human resources professional, leave administrator or a management official may contact the HCP for clarification or authentication. Under no circumstances shall the employee's direct supervisor contact the HCP.
4. "Authentication" means providing the HCP with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the HCP who signed the document.
5. "Clarification" means contacting the HCP to understand the handwriting on the medical certification or to understand the meaning of a response.
6. It is the employee's responsibility to provide a complete and sufficient certification and to clarify the certification if necessary. Failure to do so or failure to provide authorization to contact the HCP may result in the denial of FMLA leave.

#### F. Second and Third Opinions

1. Second opinion.
  - a. If the employer doubts the validity of a certification, the employee may be required to obtain a second opinion which shall be at the employer's expense.
  - b. The employer is permitted to designate the HCP but the HCP must not be employed on a regular basis by the employer.
2. Third opinion.
  - a. If the first and second opinions differ, the employer may require the employee to obtain certification from a third HCP at the employer's expense.
  - b. The third HCP must be designated or approved jointly by the employer and the employee.
  - c. The third opinion shall be final and binding.
3. Pending receipt of a second or third opinion, the employee is provisionally entitled to the benefits of the FMLA, including maintenance of group health benefits.

G. FMLA leave may be denied and the leave designated as paid or unpaid under the employer's established leave policies if:

- a. The certifications do not ultimately establish entitlement to FMLA leave; or,
- b. The employee fails to provide authorization for his/her HCP to release all relevant medical information pertaining to the serious health condition at issue if requested by the HCP designated to provide the second or third opinion.

H. Recertification.

1. 30-day rule. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless sections 2 or 3 apply.

2. More than 30 days.

- a. If the medical certification indicates the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration period expires before requesting a recertification.

- b. Notwithstanding the limitation set forth above, an employer may request a recertification every 6 months in connection with an absence by the employee.

3. Less than 30 days. An employer may request certification in less than 30 days if:

- a. The employee requests an extension of leave;
- b. Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, or complications); or,
- c. The employer receives information that casts doubt on the stated reason for the absence or the continuing validity of the certification.

4. The employee must provide the recertification within the timeframe requested by the employer which must allow no less than 15 calendar days.

5. The employer may ask for the same information as that permitted for the original certification, and the employee has the same obligation to participate and cooperate in providing a complete and sufficient certification.

6. The employer may provide the HCP with a record of the employee's absence pattern and ask if the serious health condition and need for leave is consistent with such a pattern.

7. Any recertification requested by the employer may be at the employee's expense.

8. No second or third opinion on recertification may be required.

## **X. Certification of Qualifying Exigency**

### **A. Active duty orders.**

1. The first time an employee requests leave based on a qualifying exigency arising out of the active duty or call to active duty status of a covered military member, the employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates that the covered military member is on active duty or call to active duty status in support of a contingency operation, and the dates of the active duty service. This information need only be provided once.

2. A copy of new active duty orders or other documentation issued by the military shall be provided to the employer if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty status of the same or a different covered military member.

### **B. Required information. The employer may require a certification from the employee that sets forth the following information:**

1. A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency, including the type of qualifying exigency and any documentation which supports the request for leave.

2. The approximate date(s) of the qualifying exigency. If the event is a single, continuous period of time, the beginning and end dates. If the leave request is for an intermittent or reduced schedule, an estimate of the frequency and duration of the qualifying exigency.

3. If the event involves meeting with a third party, appropriate contact information for the third party, and a brief description of the purpose of the meeting.

### **C. The appropriate DOL form may be used. No information beyond that specified may be required.**

### **D. Verification.**

1. If the certification is complete and sufficient to support the request for leave, no additional information may be requested.

2. However, if the qualifying exigency concerns meeting with a third party, the employer may contact the third party to verify the nature and time of the meeting.

3. The employer may contact the Department of Defense to request verification that a covered military member is on active duty or call to active duty status.

4. If verification occurs pursuant to either item 2 or 3, no additional information may be requested and the employee's permission is not required.

## **XI. Certification for Servicemember (Military Caregiver) Leave**

A. Required information from HCP. An employer may require an employee to obtain a certification completed by any one of the following:

1. A United States Department of Defense ("DOD") HCP;
2. A United States Department of Veterans Affairs ("VA") HCP;
3. A DOD TRICARE network authorized private HCP;
4. A DOD non-network TRICARE authorized private HCP.

B. If the authorized HCP is unable to make certain military-related determinations specified below, the authorized HCP may rely on determinations from an authorized DOD representative. An employer may request that the HCP provide the following information:

1. The name, address and appropriate contact information (telephone number, fax number, and/or email address) of the HCP, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:
  - a. A DOD HCP;
  - b. A VA HCP;
  - c. A DOD TRICARE network authorized private HCP; or,
  - d. A DOD non-network TRICARE authorized private HCP.
2. Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty;
3. The approximate date on which the serious injury or illness began and its probable duration;
4. A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. These facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank or rating and whether the member is receiving medical treatment, recuperation or therapy;
5. Information sufficient to establish that the covered servicemember is in need of care and whether he/she will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;
6. If intermittent or reduced schedule leave is requested for planned medical treatment appointments, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments;

7. If intermittent or reduced schedule leave is requested for other than planned medical treatment (e.g., episodic flare-ups of a medical condition), whether there is a medical necessity to have such periodic care, which can include assisting the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

C. The employer may also ask the employee and/or the covered servicemember to include the following information in the certification:

1. The name and address of the employer of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

2. The relationship of the employee to the covered servicemember;

3. Whether the covered servicemember is a member of the Armed Forces, the National Guard or Reserves; and his/her military branch, rank and current unit assignment;

4. Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients, and the name of the medical treatment facility or unit;

5. Whether the covered servicemember is on the temporary disability retired list;

6. A description of the care to be provided and an estimate of the leave needed to provide the care.

D. The appropriate DOL form may be used to obtain certification that meets the FMLA's requirements.

1. No information may be required beyond that specified on the certification.

2. Authentication and/or clarification of the certification may be sought.

3. Second and third opinions, and recertifications are not permitted.

4. Confirmation of covered family relationship to the covered servicemember may be required.

E. Invitational travel order ("ITO") or invitational travel authorization ("ITA").

1. An employer must accept an ITO or an ITA as sufficient certification to allow FMLA leave. No additional or separate certification may be required.

2. If leave is needed beyond the period specified in the ITO/ITA, the employer may request certification from one of the authorized HCPs listed in B.1.

3. The employer may seek authentication and clarification of the ITO/ITA. The employer may not seek a second or third opinion, or a recertification during the period of time in which leave is supported by an ITO/ITA.

4. The employer may require an employee to provide confirmation of covered family relationship to the covered servicemember.

## **XII. Intent to Return to Work**

- A. An employer may require an employee on FMLA leave to report periodically on his/her status and intent to return to work.
- B. If an employee gives an unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits and to restore the employee cease. However, these obligations continue if the employee indicates he/she may be unable to return to work but expresses a continuing desire to do so.
- C. An employee may need more leave than initially requested or the employee may not need as much leave as initially requested. In the latter instance, the employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. The employer may require the employee to provide reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

## **XIII. Fitness-for-Duty Certification.**

- A. As a condition for restoring an employee whose own serious health condition required FMLA leave, the employer may impose a uniformly-applied policy or practice that requires all similarly-situated employees to provide certification from their HCPs that the employee is able to resume work.
- B. The fitness-for-duty certification may only pertain to the specific health condition that required FMLA leave.
- C. The certification must state that the employee is able to resume work. Additionally, the employer may require the certification to specifically address the employee's ability to perform the essential functions of his/her job. In order to do so, the employer must provide the employee with a list of the essential functions of his/her job no later than with the designation notice. The designation notice must indicate that the certification must address the employee's ability to perform those essential functions.
- D. Authentication and/or clarification of the certification is allowed. However, the employee's return to work may not be delayed while contact with the HCP is being made.
- E. No second or third opinions may be required.
- F. The cost of a return-to-work certification shall be borne by the employee.

G. Restoration may be delayed until the employee submits a required fitness-for-duty certification if the employer has provided notice of the need for such in the designation notice.

H. If a fitness-for-duty certification is required, an employee who does not provide such or who does not request additional FMLA leave is no longer entitled to reinstatement under the FMLA.

I. Return from intermittent or reduced schedule leave.

1. The employer may not require a new certification after each absence if the employee is on intermittent or reduced scheduled leave.

2. However, an employer is entitled to a certification for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his/her duties, based on the serious health condition for which leave was taken. "Reasonable safety concerns" means a reasonable belief of significant risk of harm to the individual employee or others. The nature and severity of the potential harm, and the likelihood that potential harm will occur must be considered in making this determination.

3. The employer must inform the employee at the time the designation notice is issued that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days.

4. An employee may not be terminated while awaiting such a certification.

J. If an employee's serious health condition may also be a disability under the ADAAA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADAAA.

#### **XIV. Failure to Provide Certification**

A. Foreseeable leave. If the employee fails to provide certification in a timely manner, FMLA coverage may be denied until certification is provided.

B. Unforeseeable leave. FMLA coverage may be denied if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. Absent those circumstances, if the employee fails to timely return the certification, FMLA protections can be denied following expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

C. Recertification.

1. An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts



and circumstances. Failure to do so may result in denial of continuation of FMLA leave protections until a sufficient recertification is produced. If one is never provided, the leave is not FMLA.

2. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

D. Fitness-for-duty. The employee must provide medical certification at the time he/she seeks reinstatement if such is requested pursuant to the employer's policy or practice, if the employer provided the required notice. If the employee fails to do so, restoration may be delayed until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated.

## **XV. Job Restoration**

### **A. Right to Reinstatement.**

1. Upon returning from FMLA leave, an employee must be restored to his/her original position or to an equivalent position. An equivalent position is one that is virtually identical to the former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. This involves restoration to a position having the same or substantially similar duties and responsibilities and having substantially equivalent skill, effort, responsibility and authority. An employee is entitled to such reinstatement even if the employee has been replaced or his /her position has been restructured to accommodate the employee's absence. This applies only to employees returning from FMLA leave and may not apply to employees who used additional leave beyond the 12/26 workweek FMLA entitlement, as provided in other TBR leave policies.

2. An employee returning from FMLA leave is entitled to any general or unconditional pay increases that all other employees have received during the period the employee was on leave.

3. An employee is entitled to shift or work schedule assignments equivalent to those in effect prior to the beginning of the leave period and to the same or a geographically proximate work location where previously employed.

4. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

### **B. Limitations on Reinstatement**

1. An employee has no greater right to reinstatement or to other benefits and conditions of employment than if he/she had been continuously employed during the FMLA leave period. Thus, if a work location is closed, a shift eliminated, overall work hours for an entire unit reduced, or positions

abolished through a reduction in force, the employee is only entitled to conditions that would have been in effect for the employee if the leave had never been taken. For example, if an employee's shift is eliminated during the time period that leave was taken, the employee is not entitled to assignment to the previous shift's work hours or to shift differential pay when he/she returns from leave that other employees formerly on the shift no longer receive. However, the employee is entitled to employment in a position meeting all other previous employment conditions. An employer must be able to show that he/she would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

2. If an employee can no longer perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. However, the provisions of the ADAAA may apply. Such cases should be referred to the ADAAA coordinator.

3. If an employee should require more or less FMLA leave than was originally anticipated, he/she is required to provide the employer 2 business days notice where feasible. Regarding an employee who wants to return to work earlier than anticipated, he/she shall be restored once such notice is given, or where such notice is not feasible.

4. In situations where an employee notifies the employer that he/she is not returning to work, the obligation to restore the employee to a position ends. Should the employee indicate he/she is unable to return to work but continues to want to return, restoration requirements remain in effect.

5. If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee.

## **XVI. Prohibition Against Interfering with Employee Rights**

The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. The FMLA's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. Employees cannot waive, nor may employers induce employees to waive, their prospective rights under the FMLA. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court.

## **XVII. Recordkeeping**

A. Records must be made, kept and preserved in accordance with the recordkeeping requirements of the Fair Labor Standards Act. The records must be kept for no less than 3 years and made available for inspection, copying and transcription by representatives of the Department of Labor upon request.

B. Required records:

1. Basic payroll and identifying employee data.
2. Dates FMLA leave was taken. The leave must be designated in records as FMLA leave.
3. The hours of leave taken, if less than in increments of a day.
4. Employee notices provided to the employer and notices given to employees as required by the FMLA.
5. Documents describing employee benefits or employer policies and practices regarding paid and unpaid leave.
6. Premium payments of employee benefits.
7. Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave.

C. Confidential records. Records and documents relating to certifications, recertifications or medical histories of the employee or their family members created for purposes of FMLA, shall be maintained as confidential medical records in separate files, separate from the usual personnel files. If the ADAAA is also applicable, such records shall be maintained in conformance with ADAAA confidentiality requirements.

## **XVIII. Impact of FMLA Leave on Health Insurance and Other Benefits**

A. Insurance Coverage

1. For the duration of FMLA leave, the employer is required to maintain an employee's health coverage under the State Group Insurance Plan under the same conditions coverage would have been provided if the employee had continued working. It is very important that the employer communicate approval of FMLA leave to the insurance preparer.
2. The same health benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family coverage is provided to an employee, family coverage must be maintained during the FMLA leave. Moreover, an employee temporarily working a reduced schedule (for purposes of this section, less than 30 hours per week) during a period of FMLA leave is entitled to maintain the same insurance coverages that were in effect prior to the FMLA leave period.

3. If an employer provides a new health plan or benefits, or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage.
4. Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.
5. The employer is responsible for advising the employee of his/her options to continue or discontinue insurance coverage(s) prior to the beginning of the leave period. If the employee elects to continue insurance coverage(s), the employer must provide the employee with written notice of the terms and conditions under which premiums must be paid.
6. If coverage is not to be continued, the employee must contact the insurance preparer prior to the beginning of the leave. When an employee returns from leave, the employee is entitled to be automatically reinstated on the same terms as prior to taking the leave, including family or dependent coverage, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc.
7. To ensure that an employee on unpaid FMLA leave is reinstated with the same benefits in effect prior to the leave period, the employer shall pay the employer as well as any employee portion of premiums which has not been remitted. Premiums paid on behalf of the employee will be deducted from the employee's paycheck following his/her return to work.
8. For purposes of determining insurance premium payment responsibilities, an employee is deemed to have returned to work if he/she has returned for 30 calendar days. An employee who retires immediately following FMLA leave or during the first 30 days after returning to work is also deemed to have returned to work. If the employee fails to return to work or does not stay 30 calendar days, the employer portion of the insurance premium paid during FMLA leave may be recovered except for the following reasons:
  - a. The continuation, recurrence or onset of a serious health condition which would entitle the employee to leave under FMLA; or,
  - b. Other circumstances beyond the employee's control, such as an unexpected transfer of the employee's spouse to a job location more than 75 miles from the employee's worksite or the lay-off of the employee while on leave.
9. If the employee fails to return to work due to a serious health condition, the employer may require medical certification of the employee's or the family member's serious health condition.

10. The employer portion of the health premium may not be recovered during workers' compensation leave designated as FMLA leave.

#### B. Longevity

An employee on FMLA leave, paid or unpaid, shall receive longevity in accordance with the provisions of TBR Guideline P-120 *Longevity Pay*. Note: The employer may not eliminate benefits which otherwise would not be provided to part-time employees. Therefore, an employee who has been temporarily transferred to a part-time position during a period of FMLA leave retains eligibility for longevity pay regardless of the percentage of employment.

#### C. Leave Accrual

Employees shall accrue leave in accordance with the annual and sick leave policies. Due to the fact that leave is based on the number of hours worked per week, the accrual rate may be proportionately reduced.