Agency
Department of Labor

Subject
The Family and Medical Leave Act

Inclusive Sections
§§ 31-51qq-1—31-51qq-48

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The Family and Medical Leave Act

Sec. 31-51qq-1. Definitions (See 29 CFR § 825.800)
(See 29 CFR § 825.800)

For purposes of sections 31-51qq-1 to 31-51qq-48, inclusive, of the Regulations of Connecticut State Agencies:

(a) "Act" or "FMLA" means Sections 31-51kk to 31-51qq, inclusive, of the Connecticut General Statutes.

(b) "ADA" means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq*.).

(c) "Commissioner" means the Labor Commissioner of the State of Connecticut, whose mailing address is 200 Folly Brook Boulevard, Wethersfield, Connecticut, 06109, or his designee.

(d) "Continuing treatment" means a serious health condition involving continuing treatment by a health care provider which includes any one or more of the following:

(1) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(2) Any period of incapacity due to pregnancy, or for prenatal care.

(3) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(4) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either 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 three consecutive calendar days in the absence of medical intervention or treatment,

such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(e) "Department" means the Connecticut Labor Department.

(f) "Eligible employee" means an employee who:

(1) has been employed for a total of at least 12 months by the employer on the date on which any family or medical leave is to commence; and

(2) on the date on which any family or medical leave is to commence, has been employed for at least 1,000 hours of service with such employer during the previous 12-month period.

(g) "Employ" means to allow or permit to work.

(h) "Employee" means any person engaged in service to an employer in the business of the employer.

(i) "Employer" means a person engaged in any activity, enterprise or business who employs 75 or more employees. The term "employer" includes:

(1) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(2) any successor in interest of the employer.

The term "employer" does not include the state, a municipality, a local or regional board of education, or a private or parochial elementary or secondary school. For purposes of sections 31-51qq-1 through 31-51qq-48 of the Regulations of Connecticut State Agencies, inclusive, the number of employees of an employer shall be determined on October first annually.

(j) "Employment benefits" means:

(1) all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits and pensions, regardless of whether such benefits are provided by practice or written policy of an employer or through an "employee benefit plan" as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(2) The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage.

(k) "FLSA" means the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

(l) "Health care provider" means:

(1) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices;

(2) a podiatrist, dentist, psychologist, optometrist or chiropractor authorized to practice by the state in which such person practices and performing within the scope of the authorized practice;

(3) an advanced practice registered nurse, nurse practitioner, nurse midwife or clinical social worker authorized to practice by the state in which such person practices and performing within the scope of the authorized practice;

(4) a Christian Science practitioner listed with the First Church of Christ, Scientist in Boston, Massachusetts;

(5) any health care provider from whom an employer or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits;

(6) a health care provider as defined in subdivisions (1) to (5), inclusive, of this subsection who practices in a country other than the United States and who is licensed to practice in accordance with the laws and regulations of that country; or

(7) such other health care provider as the Commissioner determines, performing within the scope of the authorized practice. The Commissioner may utilize any determinations made pursuant to Chapter 568 of the General Statutes.

(m) "In loco parentis" includes, but is not limited to, persons with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(n) "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in several of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(o) "Intermittent leave" means family or medical leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time. Intermittent leave may include periods from an hour or more to several weeks. Examples of intermittent leave include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

(p) "Labor department" means the State of Connecticut Labor Department.

(q) "Medical leave" means a leave of absence, which may be unpaid, due to a serious health condition of an eligible employee.

(r) "Person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or organized groups of persons.

(s) "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR Part 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., define these terms.

(t) "Reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(u) "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, nursing home or residential medical care facility; or continuing treatment, including outpatient treatment, by a health care provider. For the purposes of this section:

(1) an illness, injury, impairment, or physical or mental condition involves:

(A) Inpatient care (i.e., an overnight stay) in a hospital, as defined in Section 19a-490 of the General Statutes, hospice licensed pursuant to the public health code or certified as a hospice pursuant to 42 U.S.C. Section 1395x, nursing home licensed pursuant to Chapter 368v of the General Statutes, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(B) Continuing treatment by a health care provider, including outpatient treatment. A serious health condition involving continuing treatment by a health care provider includes:

(i) A period of incapacity (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(aa) Treatment two or more times, including outpatient treatment, by a health care provider or by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(bb) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider, including outpatient treatment.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(aa) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(bb) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(cc) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either 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 three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney

disease (dialysis).

(2) Treatment for purposes of subdivision (1) of this subsection includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under subdivision (1)(B)(i)(bb) of this subsection, a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(3) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of section 31-51qq-1(u) of the Regulations of Connecticut State Agencies are met.

(4) Substance abuse may be a serious health condition if the conditions of section 31-51qq-1(u) of the Regulations of Connecticut State Agencies are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for State FMLA leave.

(5) Absences attributable to incapacity under subdivisions (1)(B)(ii) or (iii) of this subsection qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

(v) "Son or daughter" means a biological, adopted or foster child, a stepchild or legal ward, or a child of a person standing in loco parentis, as defined in subsection (m) of this section, provided such child is under 18 years of age, or 18 years of age or older and incapable of self-care because of a mental or physical disability.

(w) "Spouse" means a husband or wife, as the case may be.

(Adopted effective March 9, 1999)

Sec. 31-51qq-2. What employers are covered by the act?
(See 29 CFR § 825.104)

(a) "Employer" is defined in section 31-51qq-1(i) of the Regulations of Connecticut State Agencies.

(b) Normally, the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or division.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the "joint employment" test discussed in section 31-51qq-3 of the Regulations of Connecticut State Agencies or the "integrated employer" test contained in subdivision (2) of this subsection.

(2) Separate entities shall be deemed to be parts of a single employer for purposes of FMLA if they meet the "integrated employer" test. Where this test is met, the employees of all entities making up the integrated employer shall be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship shall be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(A) Common management;

(B) Interrelation between operations;

(C) Centralized control of labor relations; and

(D) Degree of common ownership/financial control.

(c) An "employer" includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of "employer" in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers "acting in the interest of an employer" are individually liable for any violations of the requirements of the FMLA.

(Adopted effective March 9, 1999)

Sec. 31-51qq-3. In determining whether an employer is covered by FMLA, what does it mean to employ 75 or more employees on October first annually?
(See 29 CFR § 825.105)

(a) Any employee whose name appears on the employer's payroll for the week including October first shall be considered employed for that week and shall be counted, whether or not any compensation is received for the week.

(b) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable

expectation that the employee shall later return to active employment. If there is no present employer/employee relationship (as when an employee is laid off, whether temporarily or permanently), such individual is not counted. Part-time employees, like full-time employees, are considered to be employed for the week including October first, as long as they are maintained on the payroll.

(c) Once an employer meets the 75 or more employee threshhold on October first, the employer remains covered until the number of employees is determined on the following October first.

(Adopted effective March 9, 1999)

Sec. 31-51qq-4. How is "joint employment" treated under FMLA?
(See 29 CFR § 825.106)

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally shall be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where an employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because an employer controls, is controlled by, or is under common control with the other employer.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment shall ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, and providing FMLA leave. Factors considered in determining which is the "primary" employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 20 workers from a leasing or temporary help agency and 60 permanent workers is covered by FMLA. An employee on leave who is working for a secondary employer is considered

employed by the secondary employer, and shall be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee shall return to employment with that employer.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA (see section 31-51qq-24 of the Regulations of Connecticut State Agencies). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer shall be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

(Adopted effective March 9, 1999)

Sec. 31-51qq-5. What is meant by "successor in interest"?
(See 29 CFR § 825.107)

(a) For purposes of FMLA, in determining whether an employer is covered because it is a "successor in interest" to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act shall be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;
(2) Use of the same plant;
(3) Continuity of the work force;
(4) Similarity of jobs and working conditions;
(5) Similarity of supervisory personnel;
(6) Similarity in machinery, equipment, and production methods;
(7) Similarity of products or services; and
(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a "successor in interest" exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a "successor in interest," employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, shall grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including job

restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria shall count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.

(Adopted effective March 9, 1999)

Sec. 31-51qq-6. Which employees are "eligible" to take a leave under FMLA? (See 29 CFR § 825.110)

(a) An "eligible employee" is defined in section 31-51qq-1(f) of the Regulations of Connecticut State Agencies.

(b) The 12 months an employee shall have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

(c) Whether an employee has worked the minimum of 1000 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in sections 31-60-14, 31-60-15 and 31-60-16 of the Regulations of Connecticut State Agencies), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden, the employee is deemed to have met this test. An employer shall be able to clearly demonstrate that such an employee did not work 1000 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

(d) The determination of whether an employee has worked for the employer for at least 1000 hours in the past 12 months and has been employed by the employer for a total of at least 12 months shall be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer shall either confirm the employee's eligibility based upon a projection that the employee shall be eligible on the date leave would commence or shall advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's

eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee shall have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise.

(Adopted effective March 9, 1999)

Sec. 31-51qq-7. Under what kinds of circumstances are employers required to grant family or medical leave?

(See 29 CFR § 825.112)

(a) Employers covered by the FMLA are required to grant leave to eligible employees for one or more of the following:

(1) Upon the birth of a son or daughter of the employee;

(2) Upon the placement of a son or daughter with the employee for adoption or foster care;

(3) In order to care for the spouse, or a son or daughter or parent of the employee or parent of the employee's spouse, if such spouse, son, daughter, parent or parent of the employee's spouse has a serious health condition; or

(4) Because of a serious health condition of the employee.

(b) The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or care of a child.

(c) Circumstances may require that the FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave pursuant to subdivision (4) of subsection (a) of this section before the birth of the child for prenatal care or if her condition makes her unable to work.

(d) Employers covered by FMLA are required to grant FMLA leave pursuant to subsection (a)(2) of this section before the actual placement or adoption of a child if absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to physical examination. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(e) Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family shall take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

(f) In situations where the employer/employee relationship has been interrupted, such

as an employee who has been on layoff, the employee shall be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

(g) FMLA leave is available for treatment for substance abuse provided the conditions of section 31-51qq-1(u) of the Regulations of Connecticut State Agencies are met. However, treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a nondiscriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

(Adopted effective March 9, 1999)

Sec. 31-51qq-8. For purposes of an employee qualifying to take FMLA leave for a spouse, parent of the employee, parent of the employee's spouse, son or daughter, what may an employer require to confirm a family relationship?

(See 29 CFR § 825.113)

For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

(Adopted effective March 9, 1999)

Sec. 31-51qq-9. What does it mean that an employee is "needed to care for" a family member?

(See 29 CFR § 825.116)

(a) The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse, parent of the employee or parent of the employee's spouse with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for

others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently - such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

(Adopted effective March 9, 1999)

Sec. 31-51qq-10. For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by the "medical necessity for" such leave? (See 29 CFR § 825.117)

(a) For intermittent leave or leave on a reduced leave schedule, there shall be a medical need for leave (as distinguished from voluntary treatments and procedures) and it shall be that such medical need can best be accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (see section 31-51qq-31 of the Regulations of Connecticut State Agencies) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Employees needing intermittent FMLA leave or leave on a reduced leave schedule shall attempt to schedule leave so as not to disrupt the employer's operation. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

(Adopted effective March 9, 1999)

Sec. 31-51qq-11. How much leave may an employee take? (See 29 CFR § 825.200)

(a) An eligible employee is limited to a total of 16 workweeks of leave during any 24-month period for any one or more of the following reasons:

(1) Upon the birth of a son or daughter of the employee;

(2) Upon the placement of a son or daughter with the employee for adoption or foster care;

(3) In order to care for the spouse, or a son or daughter or parent of the employee or parent of the employee's spouse, if such spouse, son, daughter, parent of the employee or parent of the employee's spouse has a serious health condition; or

(4) Because of a serious health condition of the employee.

(b) The 24-month period shall begin with the first day of leave taken for one or more of the reasons in subsection (a) of this section.

(c) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if for some reason the employer's business

activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.*, a Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 16 week leave entitlement are also described in section 31-51qq-16 of the Regulations of Connecticut State Agencies.

(Adopted effective March 9, 1999)

Sec. 31-51qq-12. If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?
(See 29 CFR § 825.201)

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement, unless the employer permits leave taken for a longer period. Any such FMLA leave shall be concluded within this one-year period.

(Adopted effective March 9, 1999)

Sec. 31-51qq-13. How much leave may a husband and wife take if they are employed by the same employer?
(See 29 CFR § 825.202)

(a) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 16 workweeks during any 24 month period if such leave is taken upon the birth or placement of a son or daughter for adoption or foster care or to care for a sick parent of the employee or sick parent of the employee's spouse.

(b) The limitation on the total weeks of leave applies to leave taken for the reasons specified in subsection (a) of this section as long as husband and wife are employed by the same employer.

(1) For example, it would apply even though the spouses are employed at two different worksites of an employer or by two different operating divisions of the same company.

(2) If one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 16 week entitlement.

(c) Where the husband and wife both use a portion of the total 16 week FMLA leave entitlement for one of the purposes specified in subsection (a) of this section, each would be entitled to the difference between the amount he or she has taken individually and 16 weeks for FMLA leave for a purpose other than those contained in subsection (a) of this section.

(1) For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 10 weeks due to his or her own serious health condition or to care for a child with a serious health condition. Any period of pregnancy disability would be considered FMLA for a serious health condition of the mother and would not be

subject to the combined limit.

(Adopted effective March 9, 1999)

Sec. 31-51qq-14. Does FMLA leave have to be taken all at once, or can it be taken in parts?

(See 29 CFR § 825.203)

(a) FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take a leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

(c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks.

(A) Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of several months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(B) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated.

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.

(1) For example, an employee might take two hours off for a medical appointment, or

might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave.

(Adopted effective March 9, 1999)

Sec. 31-51qq-15. May an employer transfer an employee to an "alternative position" in order to accommodate intermittent leave or reduced leave schedule? (See 29 CFR § 825.204)

(a) If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on the planned medical treatment for the employee or family member, including during a period of recovery from a serious health condition, or if the employer agrees to permit intermittent leave or reduced leave schedule for the birth of a child or the placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.

(b) The exercise of the authority to transfer an employee to an alternative position, taken pursuant to this section, shall not conflict with any provision of a collective bargaining agreement between such employer and a labor organization which is the collective bargaining representative of the unit of which the employee is a part. In addition transfer to an alternative position may require compliance with federal law (such as the Americans with Disabilities Act) or state law, including the Fair Employment Practices Act. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

(c) The alternative position shall have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary.

(1) For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) An employer may not transfer the employee to an alternative position to discourage the employee from taking a leave or otherwise work a hardship on the employee.

(1) For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an

employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer shall be deemed a prohibited act under the FMLA.

(e) When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position, no longer needs to continue on leave and is able to return to full-time work, the employee shall be placed in the same or equivalent job he or she left when the leave commenced.

(Adopted effective March 9, 1999)

Sec. 31-51qq-16. How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

(See 29 CFR § 825.205)

(a) If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 16 weeks of leave to which an employee is entitled.

(1) For example, if an employee who normally works five days a week takes off one day, the employee would use ⅕ of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use ½ week of FMLA leave each week.

(b) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule.

(1) For example, if an employee who normally works 30 hours per week, works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute 1/3 of a week of FMLA leave for each week the employee works the reduced leave schedule.

(c) If an employer has made a permanent or long-term change in the employee's schedule (for other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(d) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 16 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

(Adopted effective March 9, 1999)

Sec. 31-51qq-17. May an employer deduct hourly amounts from an employee's salary when providing unpaid leave under FMLA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee?

(See 29 CFR § 825.206)

Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from

minimum wage and overtime requirements under Chapter 558 of the general statutes as a salaried executive, administrative, or professional employee under sections 31-60-14, 31-60-15 and 31-60-16 of the Regulations of Connecticut State Agencies, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the exemption. This means that in sections 31-60-14, 31-60-15 and 31-60-16 of the Regulations of Connecticut State Agencies, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in Sections 31-60-14, 31-60-15 and 31-60-16 of the Regulations of Connecticut State Agencies, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, shall not be relevant to the determination whether an employee is exempt within the meaning of sections 31-60-14, 31-60-15 and 31-60-16 of the Regulations of Connecticut State Agencies and Chapter 558 of the Connecticut General Statutes.

(Adopted effective March 9, 1999)

Sec. 31-51qq-18. Is FMLA leave paid or unpaid?
(See 29 CFR § 825.207)

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If the employee does not choose to substitute accrued paid leave for FMLA leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child, parent of the employee or parent of the employee's spouse who has a serious health condition. The term "family leave" as used in FMLA refers to paid leave provided by the employer covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child, parent of the employee or parent of the employee's spouse with a serious health condition.

(1) For example, if the employer's leave plan allows use of family leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal or medical/sick leave may be made for any unpaid leave needed to care for a family member, or the employee's own serious health condition. Substitution of medical/sick leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of medical/sick leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid

FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have the right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

(d) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 16 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefits plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee shall meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

(e) A serious health condition may result from injury to the employee "on or off" the job. Either the employer or the employee may choose to have the employee's FMLA 16 week leave entitlement run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job". As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 16 week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. See also sections 31-51qq-25(d), 31-51qq-32(a) and 31-51qq-40 of the Regulations of Connecticut State Agencies regarding the relationship between workers' compensation absences and FMLA leave.

(f) Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off", may be substituted, at either the employee's or employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

(g) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee shall remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(h) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave shall not count against the 16 weeks of FMLA leave to which the employee

is entitled.

(1) For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 16 weeks of FMLA leave entitlement.

(i) When an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (e.g., notice or cancellation requirements), only the less stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. (See section 31-51qq-30 of the Regulations of Connecticut State Agencies regarding medical certification.)

(Adopted effective March 9, 1999)

Sec. 31-51qq-19. Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result count it against the employee's total FMLA leave entitlement?

(See 29 CFR § 825.208)

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision shall be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, *etc.*, may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer shall inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee may provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in section 31-51qq-27(c) of the Regulations of Connecticut State Agencies,

an employee giving notice of the need for unpaid 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. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave — consistent with the employer's established policy or practice — and the employer denies the employee's request, the employee shall provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (*i.e.*, that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 16-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose shall state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 16-week entitlement.

(b) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer shall promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and shall be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it shall be resolved through discussions between the employee and the employer. Such discussions and the decision shall be documented.

(1) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice shall be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision shall be made by the employer within two business days of the time the employee gives notice of the need for leave or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation shall be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with subsection (b) of this section), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full

protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 16-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualifies as FMLA leave.

(1) For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (*e.g.*, bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA leave, the employee shall notify the employer within two business days of returning to work that the leave was for an FMLA reason. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second medical opinion, the employer shall make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer shall withdraw the designation (with written notice to the employee).

(Adopted effective March 9, 1999)

Sec. 31-51qq-20. Is an employee entitled to benefits while using FMLA leave? (See 29 CFR § 825.209)

An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.*, holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid,

as appropriate).

(Adopted effective March 9, 1999)

Sec. 31-51qq-21. What are an employee's rights on returning to work from FMLA leave?

(See 29 CFR § 825.214)

(a) Except as provided in subsection (b) of this section, upon return from FMLA leave, an employee is entitled to be returned to the original position the employee held when leave commenced, or if the original position is not available, to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. (See also section 31-51qq-4(e) of the Regulations of Connecticut State Agencies for the obligations of joint employers.)

(b) If the employee is medically unable to perform the employee's original job upon the expiration of such leave, the employer shall transfer the employee to work suitable to such employee's physical condition if such work is available. In addition, the employer's obligations may also be governed by the Americans with Disabilities Act (ADA).

(Adopted effective March 9, 1999)

Sec. 31-51qq-22. When is the employer obligated to transfer an employee to work suitable to an employee's physical condition?

(a) In the case of a medical leave, if the employee is medically unable to perform the employee's original job at the expiration of the leave, but is still able to perform work of some type, the employer shall transfer such employee to work suitable to such employee's physical condition, if such work is available.

(b) Other work suitable to an employee's physical condition may include part time work, or other work at a lesser pay scale, even if the employee's original job was a full time position.

(c) An employer may request certification from the employee's health care provider that the employee is physically unable to resume work in the employee's original position, but may perform other work. The certification itself need only be a simple statement of an employee's inability to perform the original job and employee's present medical limitations with regard to other suitable work.

(d) Notwithstanding any obligations of the employer under the Americans with Disabilities Act (ADA), if after the expiration of the employee's full FMLA leave entitlement, the employee is unable to resume work in the employee's original job and is transferred to other suitable work, but at some later time is again able to perform the employee's original job, the employer is no longer obligated to reinstate the employee to his original job.

(Adopted effective March 9, 1999)

Sec. 31-51qq-23. What is an equivalent position?
(See 29 CFR § 825.215)

(a) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including the privileges, perquisites and status. It shall involve the same or substantially similar duties and responsibilities, which shall entail substantially equivalent skill, effort, responsibility, and authority.

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

(c) **Equivalent pay**.

(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on "leave without pay." In such case, any pay increase would be granted based on the employee's seniority, length of service, or work performed, excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Many employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. See sections 31-51qq-24(b) and (c) of the Regulations of Connecticut State Agencies. A monthly production bonus, on the other hand does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate).

(d) **Equivalent Benefits.** "Benefits" include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(e) **Equivalent Terms and Conditions of Employment.** An equivalent position shall

have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee shall be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee shall have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to *de minimis* or intangible, unmeasurable aspects of the job. However, restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(Adopted effective March 9, 1999)

Sec. 31-51qq-24. Are there any limitations on an employer's obligation to reinstate an employee?

(See 29 CFR § 825.216)

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer shall be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave and restore the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration.

However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. See section 31-51qq-5 of the Regulations of Connecticut State Agencies.

(c) In addition to the circumstances explained above, an employer may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in section 31-51qq-35 of the Regulations of Connecticut State Agencies.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 16 weeks of FMLA leave in a two year period, the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections.

(Adopted effective March 9, 1999)

Sec. 31-51qq-25. How are employees protected who request leave or otherwise assert FMLA rights?

(See 29 CFR § 825.220)

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or causing to be discharged or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act or because such employee has exercised the rights afforded to such employee under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or causing to be discharged or in any other way discriminating against any person (whether or not an employee) because that person has:

(A) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to the Act;

(B) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the Act; or

(C) Testified, or is about to testify, in any inquiry or proceeding relating to a right under

the Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Keeping worksites below the 75-employee threshold for employee eligibility under the Act;

(2) Reducing hours available to work in order to avoid employee eligibility.

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits, the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see section 31-51qq-41(b) of the Regulations of Connecticut State Agencies). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 16 weeks have passed within the 2 year period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, file a complaint about) any practice which is unlawful under the act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or sections 31-51qq-1 to 31-51qq-48, inclusive of the Regulations of Connecticut State Agencies.

(Adopted effective March 9, 1999)

Sec. 31-51qq-26. What notices to employees are required of employers under the FMLA?

(See 29 CFR § 825.301)

(a) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA shall be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook shall incorporate

information on FMLA rights and responsibilities and the employer's policies regarding the FMLA.

(b) If such an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to subsection (c) of this section, and in accordance with the provisions of that subsection.

(c) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice shall be provided to the employee in a language in which the employee is literate. Such specific notice shall include, as appropriate:

(1) that the leave shall be counted against the employee's FMLA leave entitlement (see section 31-51qq-19 of the Regulations of Connecticut State Agencies);

(2) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see section 31-51qq-30 of the Regulations of Connecticut State Agencies);

(3) the employee's right to substitute paid leave and whether the employer shall require the substitution of paid leave, and the conditions relating to substitution.

(4) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see section 31-51qq-35 of the Regulations of Connecticut State Agencies).

(5) the employee's right to restoration to the same or an equivalent job upon return from leave (see section 31-51qq-21 of the Regulations of Connecticut State Agencies).

(d) The specific notice may include other information - *e.g.*, whether the employer shall require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice, DOL-FM2, which employers may adapt for their use to meet these specific notice requirements is attached to sections 31-51qq-1 to 31-51qq-48, inclusive of the Regulations of Connecticut State Agencies as Appendix B.

(e) Except as provided in this subsection, the written notice required by subsection (c) of this section (and by subsection (b) of this section where applicable) shall be provided to the employee no less often than the first time in each six month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee - within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(f) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subsection (c) which has changed.

(g) Except as required in subsection (h) of this section, if the employer is requiring medical certification or a fitness-for-duty report, written notice of the requirements shall be given with respect to each employee notice of a need for leave.

(h) Subsequent written notification shall **not** be required if the initial notice in the six-month period **and** the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (*e.g.*, by stating that certification would be required in all cases in which a leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation.) Where subsequent written notice is not required, at least oral notice shall be provided. (see section 31-51qq-30 of the Regulations of Connecticut State Agencies)

(i) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(j) Employers furnishing FMLA-required notices to sensory impaired individuals shall also comply with all applicable requirements under federal or State law.

(k) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provisions required to be set forth in the notice.

(Adopted effective March 9, 1999)

Sec. 31-51qq-27. What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?
(See 29 CFR § 825.302)

(a) An employee shall provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement of a son or daughter for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave shall be required to begin, a change in circumstances, or a medical emergency, such notice as is practicable must be given.

(1) For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall provide such notice as is practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) "Such notice as is practicable" means notice as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, "such notice as is practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.

(c) 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. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may state only that leave is needed for an expected birth or adoption for example. The employer shall inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave.

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave.

(1) For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures shall not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee shall consult with the employer and make reasonable effort so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employee's FMLA notice obligations or the employer's own internal rules on leave notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement or applicable leave plan allow less advance notice to the employer.

(1) For example, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave, and the employer's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice

requirements would apply to a period of unpaid FMLA leave, unless the employer imposes lesser notice requirements on employees taking leave without pay.

(Adopted effective March 9, 1999)

Sec. 31-51qq-28. What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?
(See 29 CFR § 825.303)

(a) When the approximate timing of the need for leave is not foreseeable, an employee shall give such notice to the employer of the need for FMLA leave as is practicable under the facts and circumstances of the particular case. It is expected that an employee shall give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances of the particular case where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile machine ("fax") or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer shall be expected to obtain any additional required information through informal means. The employee or spokesperson shall be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

(Adopted effective March 9, 1999)

Sec. 31-51qq-29. What recourse do employers have if employees fail to provide the required notice?
(See 29 CFR § 825.304)

(a) An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements.

(b) If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employer may delay the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave.

(c) In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it shall be clear that the employee had actual notice of the FMLA notice requirements. The need for leave and the approximate date leave would be taken shall have been clearly foreseeable to the employee 30 days in advance of the leave.

(1) For example, knowledge that an employee would receive a telephone call about the

availability of a child for adoption at some unknown point in the future would not be sufficient.

(Adopted effective March 9, 1999)

Sec. 31-51qq-30. When shall an employee provide medical certification to support FMLA leave?

(See 29 CFR § 825.305)

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, or daughter, as defined in section 31-51qq-1 of the Regulations of Connecticut State Agencies, or parent, or due to the employee's own serious health condition, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer shall give notice of a requirement for medical certification each time a certification is required; such notice shall be written notice whenever required by section 31-51qq-26 of the Regulations of Connecticut State Agencies. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee shall provide the medical certification before the leave begins. When this is not possible, the employee shall provide the requested certification to the employer within the time frame requested by the employer (which shall allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer shall request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer shall also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of this section and section 31-51qq-31 of the Regulations of Connecticut State Agencies, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized, only the employer's less stringent sick leave certification requirements may be imposed.

(Adopted effective March 9, 1999)

Sec. 31-51qq-31. How much information may be required in medical certification of a serious health condition?
(See 29 CFR § 825.306)

(a) For purposes of compliance with FMLA, the Department has developed Form DOL-FM1 for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge. A copy of the form is attached to sections 31-51qq-1 to 31-51qq-48, inclusive, of the Regulations of Connecticut State Agencies as Appendix A.

(b) Form DOL-FM1, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

(1) A certification as to which part of the definition of "serious health condition", if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

(2) The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

(3) Whether it shall be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (*i.e.*, part-time) as a result of the serious health condition, and if so, the probable duration of such schedule.

(4) If the condition is pregnancy or a chronic condition, whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(5) If additional treatments shall be required for the condition, an estimate of the probable number of such treatments. If the patient's incapacity shall be intermittent, or shall require a reduced leave schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.

(6) If any of the treatments referred to in subdivision (5) of this subsection shall be provided by another provider of health services (e.g., physical therapist), the nature of the treatments.

(7) If a regimen of continuing treatment by the patient is required under the supervision of the health care provider, a general description of the regimen.

(8) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee:

(A) is unable to perform work of any kind;

(B) shall be absent from work for treatment.

(9) If leave is required to care for a family member of the employee with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee shall indicate on the form the care he or she will provide and an estimate of the time period.

(10) If the employee's family member will need care only intermittently or on a reduced leave schedule basis (*i.e.*, part-time), the probable duration of the need.

(c) If the employer's sick or medical leave plan requires less information to be furnished in medical certifications than the certification requirements of this section, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized, only the employer's lesser sick leave certification requirements may be imposed.

(Adopted effective March 9, 1999)

Sec. 31-51qq-32. What may an employer do if it questions the adequacy of a medical certificate?

(See 29 CFR § 825.307)

(a) If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of *clarification* and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

(2) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. See also subsections (e) and (f) of this section.

(b) The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is

located in an area where access to health care is extremely limited (*e.g.*, a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider shall be designated or approved jointly by the employer and the employee. The employer and the employee shall each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer shall be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee shall be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

(d) The employer shall provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.

(e) If the employer requires the employee to obtain either a second or third opinion the employer shall reimburse an employee or family member for any reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

(Adopted effective March 9, 1999)

Sec. 31-51qq-33. Under what circumstances may an employer request subsequent recertifications of a medical condition?

(See 29 CFR § 825.308)

(a) The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis, provided the standards for determining what constitutes a reasonable basis for recertification may be governed by a collective bargaining agreement between such employer and a labor organization which is the collective bargaining representative of the unit of which the worker is a part if such a collective bargaining agreement is in effect. Unless otherwise required by the employee's health care provider, the employer may not require recertification more than once during a thirty-day period and, in any case, may not unreasonably require recertification.

(b) The employer shall pay for any recertification that is not covered by the employee's health insurance. No second or third opinion on recertification may be required.

(Adopted effective March 9, 1999)

Sec. 31-51qq-34. What notice may an employer require regarding an employee's intent to return to work?

(See 29 CFR § 825.309)

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and shall take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligation under FMLA to restore the employee ceases. However, this obligation continues if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

(Adopted effective March 9, 1999)

Sec. 31-51qq-35. Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a "fitness-for-duty" report)?

(See 29 CFR § 825.310)

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If other provisions of state or local law, or the terms of a collective bargaining agreement, govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself

need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) Any notice that employers are required to give to each employee giving notice of the need for FMLA leave regarding their FMLA rights and obligations shall advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook shall explain the employer's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification shall be required either at the time notice of the need for leave is given or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required.

(f) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notices required in subsection (e) of this section.

(g) An employer is not entitled to certification of fitness to return to duty when the employee takes intermittent leave. (See section 31-51qq-14 of the Regulations of Connecticut State Agencies.)

(Adopted effective March 9, 1999)

Sec. 31-51qq-36. What happens if an employee fails to satisfy the medical certification and/or recertification requirements?
(See 29 CFR § 825.311)

(a) In the case of foreseeable leave, an employer may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employer to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

(b) When the need for leave is **not** foreseeable, or in the case of recertification, an employee shall provide certification (or recertification) within the time frame requested by the employer (which shall allow at least 15 days after the employer's request) **or** as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a

reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

(c) When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee shall provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work if the employer has provided the required notice; the employer may delay restoration until the certification is provided. In this situation, 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.

(Adopted effective March 9, 1999)

Sec. 31-51qq-37. Under what circumstances may a covered employer refuse to provide FMLA leave or reinstatement to eligible employees?
(See 29 CFR § 825.312)

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employer may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employer of the need for FMLA leave. (See section 31-51qq-27 of the Regulations of Connecticut State Agencies.)

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may delay continuation of FMLA leave until an employee submits the certificate. (See sections 31-51qq-30 and 31-51qq-35 of the Regulations of Connecticut State Agencies.) If the employee never produces the certification, the leave is not FMLA leave.

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employer may delay restoration until the employee submits the certificate. (See sections 31-51qq-33 and 31-51qq-35 of the Regulations of Connecticut State Agencies.)

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Thus, an employee's rights to continued leave and restoration cease under FMLA if and when the employment relationship terminates (*e.g.*, layoff), unless that relationship continues, for example, by the employee remaining on paid FMLA leave. If the employee is recalled or otherwise re-employed, an eligible employee is immediately entitled to further FMLA leave for an FMLA-qualifying reason. An employer shall be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment. (See section 31-51qq-24 of the Regulations of Connecticut State Agencies.)

(e) An employer may require an employee on FMLA leave to report periodically on the employee's status and intention to return to work. (See section 31-51qq-34 of the Regulations of Connecticut State Agencies.) If an employee unequivocally advises the

employer either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave and restoration ceases unless the employment relationship continues, for example, by the employee remaining on paid leave. An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employer two business days notice where feasible; the employer is required to restore the employee once such notice is given, or where such prior notice was not feasible.

(f) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration provision.

(g) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in subsection (f) of this section.

(Adopted effective March 9, 1999)

Sec. 31-51qq-38. How should records and documents relating to medical certifications, recertifications or medical histories be maintained?
(See 29 CFR § 825.500(g))

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of the Act, shall be maintained as medical records pursuant to chapter 563a of the general statutes, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR § 1630.14(c)(1)), except that (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; (2) first aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment; and (3) government officials investigating compliance with the Act or other pertinent law shall be provided relevant information upon request.

(Adopted effective March 9, 1999)

Sec. 31-51qq-39. What if an employer provides more generous benefits than required by FMLA?
(See 29 CFR § 825.700)

(a) An employer shall observe any employment benefit program or plan that provides greater family and medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a collective bargaining agreement (CBA) which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer

provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in the Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

(Adopted effective March 9, 1999)

Sec. 31-51qq-40. Do federal laws providing family and medical leave still apply? (See 29 CFR § 825.701)

Nothing in FMLA supersedes any provision of federal or local law that provides greater family or medical leave rights than those provided by FMLA. Employees are not required to designate whether the leave they are taking is State FMLA leave or federal FMLA leave, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for both State and federal FMLA leave, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and federal laws include:

Because State FMLA provides 16 weeks of leave entitlement over two years, an employee would be entitled to take 16 weeks one year under State law and 12 weeks the next year under federal FMLA. Health benefits maintenance under federal FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If an employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under federal FMLA (not 16 weeks).

(Adopted effective March 9, 1999)

Sec. 31-51qq-41. How does FMLA affect federal and State anti-discrimination laws? (See 29 CFR § 825.702)

(a) Nothing in FMLA modifies or affects federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, marital status, ancestry, present or past history of mental disorder, mental retardation, learning disability or physical disability, including but not limited to blindness, or sexual orientation (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act and § 46a-60 of the Connecticut General Statutes).

(b) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under the FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). The health care provider providing medical care pursuant to

the workers' compensation injury or illness may certify the employee is able to return to work in a "light duty" position. If the employer offers such a position, the employee is permitted but not required to accept the position. (See section 31-51qq-25 of the Regulations of Connecticut State Agencies.) As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 16-week FMLA leave entitlement is exhausted. (See section 31-51qq-18(d) of the Regulations of Connecticut State Agencies.) If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she shall have rights under the ADA.

(Adopted effective March 9, 1999)

Sec. 31-51qq-42. What employers are covered by the FMLA?

In order to determine which employers may have employed a sufficient number of employees as of October first of the previous year to be covered under the Act, the Commissioner may rely upon data contained in the Employee Quarterly Earnings Report required pursuant to Section 31-225a(j) of the General Statutes (Chapter 567-Unemployment Compensation) for the third quarter of the prior calendar year.

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Sec. 31-51qq-43. What can employees do who believe that their rights under FMLA have been violated?

(a) Any employee, or his authorized representative, may file a complaint with the Labor Department if he believes that:

(1) his employer has interfered with, restrained or denied the exercise of, or the attempt to exercise, any rights provided under the Act;

(2) his employer discharged or caused to be discharged, or in any manner discriminated against such employee for opposing any practice made unlawful by the Act or because such employee has exercised the rights afforded to such employee under the Act;

(3) his employer has violated any provision of the Act with respect to such employee; or

(4) he has been discharged or discriminated against in any manner by an employer who is subject to the Act because such individual:

(A) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to the Act;

(B) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under the Act; or

(C) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under the Act.

The Labor Department will inform any employee who files a complaint, pursuant to this section, that involves disability relating to pregnancy of her right to file a complaint with

the commission on human rights and opportunities as provided in section 46a-82 of the general statutes.

(b) Complaints shall be filed with the Labor Department on such form(s) as are prescribed and furnished by the Labor Department or by letter. The Labor Department may seek any additional information it deems necessary to initiate an investigation.

(c) In order to be considered timely filed, all complaints must be received by the Labor Department or postmarked within one hundred and eighty days of the employer action which prompted the complaint, described in subsection (a) of this section. Any complaint received or postmarked after such one hundred and eighty day period may be considered timely filed for good cause, as defined in subsection (d) of this section.

(d) "Good cause" means any circumstances which, in the opinion of the Commissioner, would prevent a reasonably prudent individual in the exercise of due diligence from timely filing his complaint.

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Sec. 31-51qq-44. What investigation mechanisms does FMLA provide?

(a) The Labor Department shall investigate complaints filed in accordance with Section 31-51qq-43 of these regulations as expeditiously as possible. The Labor Department may, at its discretion, investigate separate complaints in a consolidated manner.

(b) The Labor Department shall furnish to any employer, who is the subject of a complaint, timely notice that a complaint has been filed and that an investigation has been initiated. Such notice shall contain:

(1) A copy of the complaint;

(2) The right of either party to representation; and

(3) Instructions regarding the need to respond to the complaint.

Any employer furnished with a notice pursuant to this subsection may respond in writing to the Labor Department within twenty-one (21) calendar days of the mailing date of such notice. Such response may include any information, evidence or argument the employer deems relevant or necessary to the Labor Department's investigation. The continuation and completion of an investigation shall not be contingent upon such response.

(c) At any point during the pendency of an investigation, the Labor Department may effect an informal resolution of the complaint which is mutually acceptable to the complainant and the employer.

(d) Where the Labor Department, as the result of an investigation conducted pursuant to this section, has reason to believe that an employer has:

(1) interfered with, restrained or denied the exercise of, or the attempt to exercise, any rights provided under the Act;

(2) discharged or caused to be discharged, or in any manner discriminated against any individual for opposing any practice made unlawful by the Act or because such employee has exercised the rights afforded to such employee under the Act;

(3) violated any provision of the Act with respect to an eligible employee, or

(4) discharged, or caused to be discharged, or in any manner discriminated against an eligible employee because such individual:

(A) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to the Act;

(B) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under the Act; or

(C) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under the Act,

the Labor Department shall issue an agency complaint by certified mail to the employer, and a notice of a contested case hearing before the Commissioner, pursuant to Section 31-1-2 of the Regulations of Connecticut State Agencies. A copy of such complaint and notice shall be mailed to the complainant.

(e) Where the Labor Department, as the result of an investigation conducted pursuant to this section, finds that there is no reason to believe that an employer has:

(1) interfered with, restrained or denied the exercise of, or the attempt to exercise, any rights provided under the Act;

(2) discharged or caused to be discharged, or in any manner discriminated against any individual for opposing any practice made unlawful by the Act or because such employee has exercised the rights afforded to such employee under the Act;

(3) violated any provision of the Act with respect to an eligible employee, or

(4) discharged, or caused to be discharged, or in any manner discriminated against an eligible employee because such individual:

(A) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to the act;

(B) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under the act; or

(C) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under the Act,

the Labor Department shall inform the complainant of its finding in a written determination. Such written determination shall advise the complainant of his right to a hearing before the Commissioner, provided a written request for such hearing is received by the Labor Department or postmarked within twenty-one (21) calendar days of the mailing date of such written determination. A copy of such determination shall be mailed to the employer who was the subject of the complaint. The Labor Department shall issue a notice of a contested case hearing to the complainant and the employer in response to any request which is timely filed, pursuant to this subsection.

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Sec. 31-51qq-45. What are the provisions for resolution and reconsideration prior to a contested case hearing?

(a) From the issuance of a notice of hearing pursuant to subsection (d) or (e) of Section

31-51qq-44 of these regulations until the commencement of a contested case hearing, the Labor Department may effect resolution of any complaint by way of a settlement agreement between the parties, with the approval of the Commissioner. Any settlement agreement shall contain:

(1) The signatures of the complainant and the employer, or their authorized representatives, and the Commissioner;

(2) An express waiver of the right to seek judicial review or otherwise challenge or contest the validity of the agreement or any order contained therein:

(3) A statement that the agreement represents a final disposition of the complaint which shall have the same force and effect as an order entered after a formal hearing; and

(4) Any other provisions appropriate to the settlement.

Once a contested case hearing has commenced, any informal disposition shall be effected pursuant to Section 31-1-4 of the Regulations of Connecticut State Agencies.

(b) The Labor Department may, at its discretion, reconsider any agency complaint issued pursuant to subsection (d) of Section 31-51qq-44 of these regulations, or any written determination issued pursuant to subsection (e) of Section 31-51qq-44 in response to a written request by any party, or on its own initiative.

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Sec. 31-51qq-46. What procedures govern the contested case hearings?

The Rules of Procedure for Hearings in Contested Cases to be Conducted by the Labor Commissioner (Sections 31-1-1 to 31-1-9, inclusive, of the Regulations of Connecticut Agencies) shall apply to any hearing scheduled pursuant to Section 31-51qq-44 of these regulations.

In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.

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Sec. 31-51qq-47. What types of redress may the commissioner order?

Where, in his final decision, the Commissioner concludes that an employer has:

(1) interfered with, restrained or denied the exercise of, or the attempt to exercise, any rights provided under the Act;

(2) discharged or caused to be discharged, or in any manner discriminated against any individual for opposing any practice made unlawful by the Act or because such employee has exercised the rights afforded to such employee under the Act;

(3) violated any provision of the Act with respect to an eligible employee, or

(4) discharged, or caused to be discharged, or in any manner discriminated against an

eligible employee because such individual:

(A) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to the Act;

(B) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under the Act; or

(C) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under the Act,

the Commissioner may order the employer to comply with the applicable requirements of the Act and to provide such relief as the Commissioner determines will remedy the harm incurred by the complainant as a result of the employer's violation, discharge or discrimination. Such relief may include but is not limited to restoration of any rights, benefits, entitlements or protections afforded to the employee by the Act, reinstatement to employment, back pay and any other monetary compensation for any loss which was the direct result of the employer's violation, discharge or discrimination.

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Sec. 31-51qq-48. What are employers required to report to the labor department concerning their experience with the FMLA?

(a) The Labor Department shall furnish to employers who are subject to the Act a form for reporting their family and medical leave experience on an annual basis. Employers shall complete and return such report to the Labor Department by April first of the year following the calendar year which is the subject of the report.

(b) Employers shall report the following data for each calendar year for which they are subject to the Act:

(1) Employer's name;

(2) Number of employees;

(3) Number of family leaves approved for birth or adoption, and duration;

(4) Number of family leaves approved for family illness, and duration;

(5) Number of medical leaves approved, and duration;

(6) Any other information the Commissioner determines necessary to assess the current experience of employers with medical and family leaves of absence.

Any family or medical leave approved under the Act which includes less than five days unpaid leave need not be reported to the Labor Department.

(c) Any employer who believes that it is not subject to the FMLA in that it has less than 75 employees may so indicate on the report form referred to in subsection (a) and return the form to the address indicated along with a copy of its payroll for the week including October first of the previous calendar year.

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