OFFICIAL FAMILY AND MEDICAL LEAVE ACT COMPLAINT OF AND AGAINST WOOD & LAMPING, LLP FILED WITH THE UNITED STATES DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION WAGE AND HOUR DIVISION – CINCINNATI AREA OFFICE ON JANUARY 16, 2009[1]

COMES NOW Denise Newsome ("Newsome"), an African-American female, and files this her Official Complaint with the *Secretary of Labor* through the United States Department of Labor – Employment Standards Administration Wage and Hour Division, in its Cincinnati, Ohio Area Office of and against Wood & Lamping, LLP and/or its representatives under the Family Medical Leave Act of 1993 ("FMLA"), and any/all applicable statutes/laws under which the jurisdiction of the *Secretary of Labor* is applicable. In support of this Complaint Newsome states the following:

JURISDICTION

The jurisdiction of the *Secretary of Labor* is invoked under the Family and Medical Leave Act ("FMLA") pursuant to 29 USC § 2654, 29 CFR 825.400 and the **Equal** *Protection* Clause of the Fourteen Amendment of the United States Constitution (Art. XIV, U.S. Constitution) and any/all applicable laws governing said matters.

> 29 CFR 825.400
> Subpart D_What Enforcement Mechanisms Does FMLA Provide?
>
> Sec. 825.400 What can employees do who believe that their rights under FMLA have been violated?
>
> (a) The employee has the choice of:

[1] Newsome relied upon legal resources (i.e. such as United States Code Annotated, American Jurisprudence Pleading and Practice Forms, Internet, etc. in the preparation of this Complaint. Boldface, underline, italics added for emphasis.

(1) Filing, or having another person file on his or her behalf, a complaint with the ***Secretary of Labor***, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages for the employee. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equalling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

This instant Complaint is timely filed pursuant to 29 CFR 825.401 which states:

Subpart D_What Enforcement Mechanisms Does FMLA Provide?

Sec. 825.401 Where may an employee file a complaint of FMLA violations with the Federal government?

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour

Division; the address and telephone number of local offices may be found in telephone directories.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) ***No particular form*** **of complaint** is required, except that a **complaint must be reduced to writing** and should **include a full statement of the acts and/or omissions, with pertinent dates,** which are believed to constitute the violation.

Employees believing they have been denied their FMLA rights may assert a cause of action for FMLA interference. Family and Medical Leave Act of 1993, § 105(a)(1), 29 U.S.C.A. § 2615(a)(1). - *Novak v. MetroHealth Medical Center,* 503 F.3d 572 (C.A.6.**Ohio**,2007)

PARTIES TO THIS COMPLAINT

Complainant/Employee:

Denise Newsome
Post Office Box 14731
Cincinnati, Ohio 45250
Phone: (513) 680-2922
Job Title: Secretary/Legal Assistant

Respondent/Employer:

Wood & Lamping, LLP and/or Representatives
c/o Andrea Griffith (Human Resources)
600 Vine Street – Suite 2500
Cincinnati, Ohio 45202
Phone: (513) 852-6006

FACTS OF THIS COMPLAINT

VIOLATION OF STATUTE:

1. Wood & Lamping, LLP ("W&L"), Newsome's former employer, is a private sector employer who employs approximately 50 or more employees for at least 20 work weeks in the current or preceding calendar year and is engaged in an activity affecting commerce.

2. Andrea Griffith (Human Resources Manager/Representative) and C. J. Schmidt (Attorney and Managing Partner) at Wood & Lamping, LLP are people who act, directly, in the interest of their employer (Wood & Lamping, LLP) to the employees of said employer.

3. Newsome worked for a covered employer (W&L). Newsome's hire date being effective September 11, 2006. Newsome was employed as *Estate Planning Coordinator*.

4. Newsome worked for covered employer (W&L) for at least 12 months.

5. Newsome has worked at least 1250 hours over the prior 12 months.

6. Newsome worked for a covered employer (W&L) where at least 50 employees are employed by W&L within 75 miles.

7. Newsome is entitled to take reasonable leave, not to exceed a total of 12 workweeks of leave during any 12 month period, to attend to medical (due to serious health condition) need that may arise.

8. W&L and/or its representatives ***interfered*** with Newsome's exercise of her right to take reasonable leave to seek medical attention for the condition it was timely, properly and adequately notified of. Newsome was entitled to the medical leave sought. The FMLA clearly prohibits interference with protected rights under said Act - **Interference Claim** – 29 USC § 2615(a)(1)

> For an eligible employee to establish liability under Family and Medical Leave Act (FMLA), employee must establish entitlement to leave and that entitlement to leave was interfered with by employer. *McClain v. Southwest Steel Co., Inc.*, 940 F.Supp. 295.

Even under Ohio law, such interference is prohibited: *Davison v. Roadway Exp., Inc.*, 562 F.Supp.2d 971 (N.D.**Ohio.**W.Div.,2008) - To prevail on an Family and Medical Leave Act (FMLA) interference claim, a plaintiff must establish that (1) he is an eligible employee, (2) the defendant is an employer, (3) the employee was entitled to leave under the FMLA, (4) the employee gave the employer notice of his intention to take leave, and (5) the employer denied the employee FMLA benefits to which he was entitled. Family and Medical Leave Act of 1993, §§ 101(2, 4), 102(a)(1), (e)(1), 29 U.S.C.A. §§ 2611(2, 4), 2612(a)(1) . *Novak v. MetroHealth Medical Center,* 503 F.3d 572 (C.A.6.**Ohio,**2007) - To prevail on an FMLA interference claim, an employee must establish that (1) she was an eligible employee as defined under the FMLA, (2) her employer was a covered employer as defined under the FMLA, (3) she was entitled to leave under the FMLA, (4) she gave the employer notice of her intention to take FMLA leave, and (5) her employer denied FMLA benefits to which she was entitled. Family and Medical Leave Act of 1993, § 105(a)(1), 29 U.S.C.A. § 2615(a)(1).

> Newsome was an eligible employee. W&L is an employer as defined under FMLA. Newsome was entitled to leave under the

> FMLA. Newsome was entitled to leave under the FMLA and gave both verbal notice in December 2008 and written notice on January 8, 2009. W&L denied Newsome FMLA benefits to which she is entitled and terminated her employment with it.

Federal courts recognize two distinct theories of recovery that arise under the FMLA statute, "entitlement," also called interference, and "retaliation," also called discrimination. Family and Medical Leave Act of 1993, § 105(a)(1, 2), 29 U.S.C.A. § 2615(a)(1, 2) - *Cox v. True North Energy, LLC,* 524 F.Supp.2d 927 (N.D.**Ohio**.E.Div.,2007)

9. In **December 2008 (well over 30 days)**, Newsome first *verbally* notified W&L through its representative Andrea Griffith ("Griffith"), Human Resource Manager/Representative, of her request for leave to have a medical procedure performed. Newsome advised Griffith of this to determine how W&L handles such medical requests and was advised that she would be okay under the FMLA. Moreover, that W&L would provide a percentage of her salary during the time taken. Newsome advised Griffith of the approximate date (January 29, 2009) on which she was to begin the procedure. Griffith advised Newsome she could use either her sick time, vacation time and/or both, but would wait to see how much time would be required. Thus supporting W&L's knowledge of Newsome being availed FMLA protection.

> When requesting unpaid leave, employee need not mention Family and Medical Leave Act (FMLA) and can be completely ignorant of benefits conferred by Act, and **notice is sufficient if employee provides employer with enough information to put employer on notice that FMLA-qualifying leave is needed.** *Stoops v. One Call Communications, Inc.*, 141 F.3d 309 (7th Cir.).

10. On **January 8, 2009**, Newsome submitted her Request for Medical Leave on January 29, 2009. (See attached hereto as **EXHIBIT "A"** and incorporated herein by reference as if set forth in full). Newsome's Request for this leave was approved by the attorneys (Sharon S. Parsley and Thomas J. Breed) she assisted and then submitted to Griffith for handling. Newsome following the procedures of W&L to obtain this leave.

11. On **January 9, 2009,** Newsome was taken by ***surprise*** when Griffith approached her and asked see her. Newsome followed Griffith to her office where C. J. Schmidt was awaiting their arrival. During this meeting Newsome was advised that her employment with W&L is being terminated in that her position was being eliminated. Newsome was advised that she would be compensated for that week and given two additional weeks of pay. Newsome was advised that her medical insurance would lapse at the end of January 2009 (approximately two days after beginning of the medical process Newsome advised Griffith of in December 2008) and that any additional medical coverage could be maintained through COBRA if she desired. Thus supporting W&L's termination of Newsome was illegally motivated and to deprive her protection under the FMLA; moreover to deprive her benefits afforded to other employees similarly situated.

> Employer ***may not use*** **reduction-in-force** (RIF), reorganization, or improved-efficiency rationale *as pretext* **to mask actual *discrimination* or *retaliation*** for employee's exercise of FMLA rights; the mere incantation of the mantra of "efficiency" is not a talisman insulating an employer from liability for invidious discrimination. *Hodgens v. General Dynamics Corp.,* 144 F.3d 151 (1998). Moreover, *Hodgens* goes on to find "an employer may not use its RIF/reorganization/improved-efficiency rationale as a **pretext** to *mask* **actual** *discrimination* or *retaliation*; the mere incantation of the mantra of "efficiency" is not a talisman insulating an employer from liability for invidious discrimination. See *McDonnell Douglas,* 411 U.S. at 804, 93 S.Ct. 1817 (employer may not use an ostensibly legitimate reason for an adverse action as a pretext for discrimination that is prohibited by statute); 29 U.S.C. § 2615(a); 29 C.F.R. § 825.220; cf. *INS v. Chadha,* 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983): "Convenience and efficiency are not the primary objectives-or the hallmarks-of democratic government." Nor are they the objectives of public policy underlying statutes like the FMLA or the ADA."

Ohio law is clear that an employer may not retaliate against an employee who exercises rights under the FMLA:

> *Campbell v. Washington County Public Library,* 241 Fed.Appx. 271 (C.A.6.**Ohio,**2007) - County public library employee established prima facie case that her discharge was discriminatory in violation of FMLA; employee faced adverse employment action shortly after taking FMLA leave and filing a complaint to Department of Labor, and there was evidence that library director was upset about employee's complaint. Family and Medical Leave Act of 1993, § 2 et seq., 29 U.S.C.A. § 2601 et seq.
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> *Nocella v. Basement Experts of America,* 499 F.Supp.2d 935 (N.D.**Ohio.**W.Div.,2007) - There was sufficient evidence to establish a prima facie case of retaliation under the Family and Medical Leave Act (FMLA) in connection with the termination of an employee approximately one week after she returned from her leave; the time lapse from the beginning of her leave until the elimination of her position was nine weeks at most, only about five weeks elapsed between the elimination of her position and her permanent firing, and there were attempts to keep her from returning to work. Family and Medical Leave Act of 1993, § 105(a)(2), (b), 29 U.S.C.A. § 2615(a)(2), (b).
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> *Chester v. Quadco Rehabilitation Center,* 484 F.Supp.2d 735 (N.D.**Ohio**.W.Div.,2007) - There was sufficient temporal

> proximity between employee's FMLA leave request and his termination to establish the causal connection needed for prima facie case of retaliation under FMLA, where employee was terminated less than one month after he made his FMLA request. Family and Medical Leave Act of 1993, § 105(a)(2), 29 U.S.C.A. § 2615(a)(2).

12. W&L, through its duly authorized agents and employees, who acted on behalf of W&L within the scope of their employment, intentionally discriminated against Newsome based on her request for medical leave and may also be based on her race; and/or for her insistence on the exercise of rights secured/protected under the FMLA and/or her engagement in other protected rights made known to W&L during the course of Newsome's employment.

13. As a direct and proximate result of the intentional discriminatory acts and practices of W&L, its agents and employees, including the taking away of Newsome's duties as *Estate Planning Coordinator* to give to other employees (white) to provide them with job security,[2] and terminating Newsome's employment **AFTER** she requested medical leave, she has suffered and continues to suffer injury, including past and future loss of income and other employment benefits, severe emotional pain and suffering, mental anguish, humiliation, loss of enjoyment of life, costs associated with obtaining reemployment, embarrassment, damage to her reputation, and other past and future pecuniary losses.

14. W&L acts described above and/or in this instant Complaint were intentional, willful, and performed with malice or reckless indifference to Newsome's federally protected rights, within the meaning of the FMLA (29 USC § 2654, 29 CFR 825.401) and/or the applicable statutes/laws governing such matters.

15. The termination of Newsome's employment by W&L constituted a wrongful discharge and violated public policy of the State of Ohio, as articulated in the Ohio Human Rights Act.

16. As a direct and proximate result of the acts and practices of W&L, its agents and employees, in the wrongful discharge of Newsome from employment, Newsome has suffered and continues to suffer injury/harm, including loss of employment, past and future loss of income and other employment benefits, severe emotional pain and suffering, mental anguish, humiliation, loss of enjoyment of life, costs associated with obtaining reemployment, embarrassment, damage to her reputation and other past and future pecuniary losses.

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[2] See **EXHIBIT "B"** *Wood & Lamping, LLP The Employer's Guide to Employment Law in Ohio, Kentucky, and Indiana* at p. 25 – **Reduction in Force:** Sometimes it becomes necessary for a company to reduce its work force to cope with economic conditions. Care should be taken to be sure that the determination of which employees are to be laid off is done in a nondiscriminatory way. Appropriate factors to consider include the need for a particular job function, seniority, and objectively determined by job performance. . . . **Final Paycheck and Paperwork:** Pay, including any benefits and unused vacation, **should be delivered at the termination meeting**. This is not only good policy, frequently it's the law. . . . In addition, the employee should be given the termination paperwork while still on the premises, and sign a receipt form. If the employee refuses to sign, the fact should be noted on the paperwork in the employee's presence.

17. **IT IS IMPORTANT TO NOTE** that **W&L specializes in *employment* law**; therefore, it knew and/or should have known that its acts rendered Newsome was discriminatory and unlawful/illegal. In fact, in its *Wood & Lamping, LLP The Employer's Guide to Employment Law in Ohio, Kentucky, and Indiana* at p. 24 – **Informing the Employee**, it states: *Obtain Legal Advice. Every situation is different; therefore employers should consult with their attorney before disciplining or discharging an employee. Wood & Lamping regularly consults with clients regarding problems with employees and/or the discharge of employees, advising them as to the best way to handle a particular situation in order to avoid potential litigation.* (See **EXHIBIT "B"** attached hereto and incorporated herein by reference as if set forth in full). Moreover, a reasonable mind may conclude W&L and/or its representative's taking of Newsome's Employee Handbook was clear and convincing knowledge they were aware civil wrongs were being committed. Furthermore, that such acts were done to shield/mask an illegal animus.

ADDITIONAL FACTS PERTINENT TO THIS COMPLAINT:

18. On **January 9, 2009**, W&L waited until the end of the day and had Griffith approach Newsome, taking Newsome by ***surprise***,[3] and asked Newsome to come to her office where C.J. Schmidt (attorney and Managing Partner of W&L) was waiting both of them to return. It was at this time, that Newsome was advised that her employment with W&L was being terminated due to the need to eliminate her position. Newsome was taken by surprise with this news in that she was not aware or given notice of W&L's intent to do so. Newsome was advised that she would be receiving pay for that week as well as two weeks pay and that she would have medical coverage through the end of the month (January 2009); however, any other medical coverage she desired, would have to be obtained through COBRA which would kick in immediately and would have to be paid by her.

Newsome believe the actions by W&L and/or its representatives were willful, malicious and wanton and done to deprive Newsome rights secured/guaranteed under the FMLA, and/or the applicable statutes/laws governing said matters. Newsome believe such acts by W&L and/or its representatives are discriminatory and may be based on race as well as retaliatory for her complaining of violations and discriminatory treatment during her employment. In support thereof, Newsome states:

a) During Newsome's employment white employees and/or those similarly situated provided notice of medical procedures that they would have done and were allowed to proceed with such medical procedures without losing their jobs; moreover, some had to obtain

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[3] See *Wood & Lamping, LLP The Employer's Guide to Employment Law in Ohio, Kentucky, and Indiana* at p. 22 – Employee Termination: **"A termination conversation should not occur suddenly or as a surprise."** . . . *Always treat employees equally and consistently under similar circumstances. You may create the appearance of unlawful discrimination if you allow some employees to engage in prohibited conduct and then claim good cause for firing others for the same reason.* See **EXHIBIT "B"** attached hereto and incorporated by reference as if set forth in full herein.

medical procedures on a last-minute basis which did not afford them the opportunity to notify W&L prior to seeking such attention, however, they were not terminated and they were allowed to return to their employment with W&L. When such employees did not have time for sick leave and/or medical leave W&L took extra steps to accommodate them with the time and allowed them to return to employment. Therefore, Newsome believe her termination with W&L may have been a direct and proximate result to deprive Newsome rights secured/guaranteed under the FMLA. Furthermore, in retaliation of Newsome's participation in protected activities known to W&L and/or its representatives.

> Employer may not defend its interference with FMLA's substantive rights on the ground that it treats all employees equally poorly without discriminating; employer's subjective intent is not relevant, and the issue is simply whether the employer provided its employee the entitlements set forth in FMLA. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998).

b) Newsome was officially, hired on with W&L on September 11, 2006, after working briefly as a contract worker. It was made known by certain attorneys at W&L that they were pleased with Newsome's work and wanted to hire her on for a position with them. Newsome was contacted by a representative at an employment agency and advised of W&L's request for the employment of her services which Newsome accepted. Newsome was hired on as an *Estate Planning Coordinator*. ***During the course of her employment and at the termination of her employment the duties of an Estate Planning Coordinator was needed.*** To assure that other white employees had a job and/or employment W&L took the bulk of the duties of the *Estate Planning Coordinator* from Newsome and gave them to white employees to perform. Newsome shared her disappointment with Griffith about this change and/or decision of W&L in that she enjoyed what she was doing and the people she worked with. Nevertheless, W&L and/or its representatives had made a decision that Newsome would lose these duties and they would be given to someone else. While Newsome lost the bulk of these duties upon which she was hired to white employee(s), she continued to work during her course of employment with at least one attorney at all times in the *Estate Planning* group – at the beginning and during her employment she was assigned Jan M. Frankel (Partner) and during her employment W&L removed Frankel and provided her with Thomas J. Breed (Partner and **Department Head** *of the Estate Planning Group*). Newsome was working with Breed at the time of her termination. His job requests

requiring the duties Newsome performed as the Estate Planning Coordinator that were taken away from Newsome.

It is important to note whenever such changes were made, Newsome was advised it was because of her work ethics, ability to perform the duties being assigned and W&L needing to keep attorneys assigned to her happy, etc – thus, providing the confidence W&L and/or its representatives had in Newsome's ability to perform her duties and the tasks assigned her.

c) **IT IS IMPORTANT TO NOTE**, that upon Newsome's hiring it was brought to her attention that a Paralegal (contractor and white) was upset at Newsome being hired in that the Paralegal had been there before Newsome and wanted to be hired on as well. It was also brought to Newsome's attention that this Paralegal (married) was having a sexual relationship and/or affair with one of the attorneys (Brian P. Gillan – of counsel and white) which may have been exposed by the Paralegal's husband. The Paralegal was let go and of course Gillan denied having any such relationship with the Paralegal although there was evidence on the W&L's computer to this relationship, in that both spent time using W&L's e-mail to correspond with each other. **Gillan specializes in employment law; therefore, he knew and/or should have known of the liability such acts would cost W&L. Nevertheless, he was allowed to remain in the employment of W&L with W&L knowledge of such conduct.**

d) **IT IS IMPORTANT TO NOTE**, that during Newsome's employment, one of the first attorneys, Elizabeth Horwitz ("Horwitz"), assigned to Newsome was allowed by W&L to assist Newsome on a Landlord and Tenant matter she was involved in. From the feedback provided from Horwitz and information she would relate back to Newsome, Newsome had concerns that Horwitz in corresponding with the Landlord's attorney was attempting to get Newsome to give up her apartment in which Newsome wanted to keep and advised of her entitlement to live where she desired under the *Fair Housing Act*. Disappointed that Newsome would not give up her apartment and/or agree to leave – waive rights afforded her under the *Fair Housing Act*, Horwitz did not want to work with Newsome anymore and made it known to W&L. While Horwitz advised Newsome she had nothing to do with the change that had occurred, Horwitz indeed did. *W&L e-mails will evidence such.* Moreover, notes surrounding Horwitz request may be found in Griffith's notes used in preparation of performance reviews.

e) **IT IS IMPORTANT TO NOTE**, that upon Horwitz being removed from Newsome's desk, W&L decided to assign Newsome to Brian P.

Gillan ("Gillan"). Gillan being with W&L for only a ***few months*** however, having been assigned approximately two or three Secretaries/Legal Assistants prior to Newsome (with Newsome being the third or fourth) because of his inability to work with them. While Gillan *complimented* Newsome on her work (evidenced in e-mail) for some reason, he decided to begin to subject her to *harassment, hostile treatment and discriminatory practices* **to which she objected**. Gillan doing so via e-mail as well as verbal confrontations, over Newsome's objection. **Although Gillan was advised by Griffith to cease such behavior and correspondence via e-mail**; ***Gillan continued to do so***. Such unlawful/illegal actions by Gillan had become more hostile, brutal, unrelenting and unbearing that Newsome became emotionally affected by such and was witnessed by Griffith who called Newsome into her office to discuss the matter. In that Newsome had put in for Vacation Leave, Griffith advised Newsome to take her vacation and W&L would handle it in her absence and let her know when she returned. When Newsome returned from vacation, W&L had not done anything and advised Newsome that *Gillan wanted to continue to work with her*. Newsome voiced her objections and advised that she could not understand in that Gillan made it clear it was not working out (evidenced in e-mail). **Nevertheless, W&L required Newsome to continue to work with Gillan; however, did not require white employees assigned him prior to Newsome's employment to continue under such conditions**. Newsome again complained and advised that she would take the matter to the appropriate authorities as well as advise William Ellis (attorney/Partner at W&L) of what was going on. Ellis being a litigation attorney and advising Newsome during her employment that if there were any problems that she could come talk to him. Only after notifying of doing this, was Gillan pulled. Leaving Newsome to believe that W&L's refusal to remove Gillan, left the appearance and/or impression that certain ones at W&L may have agreed with Gillan and was behind his acts in that they knew how it was affecting Newsome (*emotionally and physically*). Moreover, that certain ones at W&L allowed Gillan to proceed in such a manner they knew were clearly in violation of Title VII; however, allowed him to proceed. An attorney who was known to be engaging in such acts that may present a liability to W&L; however, was allowed to continue in such a manner. *Again, an attorney who specializes in employment law; therefore, a reasonable mind may conclude he was aware of his conduct and the liability thereof. Moreover, W&L knew as well and supported such behavior and conduct of Gillan – as evidenced in its retaining his employment.*

f) **IT IS IMPORTANT TO NOTE**, that certain *Senior* Partners made it known as to their concerns regarding Brian Gillan; however, Gillan was allowed to remain on with W&L. Gillan being employed at the

time of Newsome's termination. Concerns being made known of Gillan's employment in that he does not bring in a great deal of business to the practice; moreover, during the time Newsome worked with him, the majority of his time was being billed to W&L. Not only that, during his employment, he received increases in the hourly rate he was charging for his services. No it appears objections over Gillan's behavior and employment came into question; however, as with Newsome's concerns, must have been ignored. Resulting in attorneys with a great amount of longevity and seniority leaving W&L. Some of these attorneys who questioned the employment and actions of Gillan.

A reasonable mind may conclude given the facts and evidence any argument that W&L may attempt to assert for the elimination of Newsome's position is pretext to shield/mask an illegal animus. Moreover, that the keeping of an attorney who an investigation may yield repeatedly violated the laws under Title VII, is W&L condoning of such unlawful/illegal discriminatory practices. *Therefore, any assertion that reduction in eliminating Newsome's position is merely pretext and an investigation into this matter may yield evidence to support that W&L provided Gillan as well as other employees with additional salary increases and promotions. Thus, supporting that any proffered reason by W&L is pretext to mask/shield an illegal animus – Newsome's complaining of employment violations and W&L's knowledge of Newsome's participation in protected activities.*

g) **IT IS IMPORTANT TO NOTE**, that during Newsome's employment W&L terminated another attorney (Peter K. Newman). From Newsome's understanding, Newman was painted as an attorney with behavior that was hostile, aggressive, harassing, etc.; however, W&L terminated his employment. Moreover, after the incident gave his assistant, Kathy Ritchie ("Ritchie") some time off after the ordeal. Nevertheless, W&L allowed Gillan to continue on knowing his history and reputation; moreover, liability to W&L.

h) **IT IS IMPORTANT TO NOTE**, that should W&L assert any such claim as to the need for Newsome's termination may have been for financial purposes, she believes a reasonable mind may conclude that she was making way less in salary than Gillan. Moreover, over the advice of seasoned lawyers, W&L elected to keep on Gillan who hardly brought in any business and paid him a substantial salary compared to that of Newsome. Moreover, during his employment provided him with rapid increase(s) in hourly rates with knowledge that a great deal of his hours were being billed to W&L. W&L made a willful, deliberate and conscious decision to keep Gillan employed and to pay him an extremely high salary at the expense of Newsome and

others who objected to his work ethics as well as employment violations.

i) **IT IS IMPORTANT TO NOTE**, that during Newsome's employment she was required to perform duties of that of paralegals; however, did not obtain the title or pay associated with it. However, whites similarly situated that were performing such duties were either promoted to such a title and obtained additional pay to compensate them for the additional duties obtained while Newsome (African-American) just obtained additional duties and was required to remain at her annual salary and only obtained the annual salary increase.

j) **IT IS IMPORTANT TO NOTE**, on October 9, 2008, Newsome was unlawfully/illegally evicted from my apartment (due to the ongoing landlord matter Horwitz was assigned to assist with). Such actions coming although there was a binding Injunction and Restraining Order issued by the Court and Newsome was required to pay rent into escrow which was current at the time of such actions. As a direct and proximate result, Newsome filed a Complaint of criminal charges with the Federal Bureau of Investigations ("FBI") – a matter that Newsome believes is still pending at the time of the filing of this instant charge. It is important to note that W&L was made aware of this situation as well as the fact that Newsome had filed a formal charge with the FBI. Said notification was made verbally and via e-mail. **IT IS IMPORTANT TO NOTE,** *that while W&L states in its Employee Handbook, that it will not discriminate against employees who engage in protected activities (lawsuits*), that Newsome's termination of January 9, 2009, may have been illegally motivated as well for her exercise of such rights secured to her under the Civil Rights Act, United States Constitution and/or the applicable statutes/laws governing said matters. **Moreover, W&L's representative's taking of Newsome's Employee Handbook prior to her termination may leave a reasonable mind to conclude the January 9, 2009 reasons provided for her termination was pretext to mask/shield an illegal animus. Moreover, to shield/mask the fact that their Employee Handbook clearly states it will not discriminate against employee who engages in protected activities (i.e filed lawsuit).**

While discussing the October 9, 2009 incident with Thomas Breed (attorney Newsome worked with), he asked whether or not she needed representation. Newsome advised Breed that she had sought W&L's assistant and was assigned Elizabeth Horwitz; however, Horwitz developed an attitude because Newsome did not accept her advice and refused to waive rights secured under the Fair Housing Act. Newsome advised she was in no hurry and that she had filed a complaint with the appropriate agency to investigate the matter.

k) **IT IS IMPORTANT TO NOTE**, Newsome kept a copy of the ***Employee*** *Handbook* in her desk. However, upon cleaning out her desk, Newsome noticed her Employee Handbook had been removed by a representative of W&L. Newsome believes the removal of the Employee Handbook was done with willful and malicious intent by W&L and/or its representatives to cover-up their employment violations. Moreover, supports W&L and/or its representatives having knowledge that they were acting in violation of FMLA, Title VII and/or any other applicable laws governing said matters. Furthermore, such acts may support ill motive and the actual/underlying reasons for Newsome's termination. W&L specializes in employment laws, so it knew and/or should have known that its actions were unlawful and/or illegal. Moreover, a reasonable mind may conclude that the taking Newsome's Employee Handbook from her desk may have been acts done by W&L to shield the fact they knew the Employee Handbook contained information pertaining to the handling of FMLA requests, termination, etc. that they knew and/or should have known they were violating on January 9, 2009, and they did not want Newsome to be able to use this information in any legal action she may bring. However, to their disappointment, Newsome had obtained a copy of the Employee Handbook in that it was brought to her attention that W&L's representatives were known to practice in such a manner. Thus making it difficult for the employee to bring legal action against them. *A reasonable mind may conclude this is why W&L uses the* ***surprise*** *approach that they advise against in their Employer's Guide in their termination of employees.*

19. The FMLA entitles the employee to take reasonable leave for medical reasons – 29 U.S.C. § 2601(b)(1) - and contains two distinct provisions and entitlements in its anti-discrimination clause – 29 U.S.C. § 2612, 2615 (*Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998)

20. **The FMLA allows for Intermittent leave to**: (a) attend appointments with a healthcare provider for necessary treatment of a serious health condition (29 USC § 2612(6), a claim can be asserted (1) the employer interfered with, restrained, or denied the exercise of or the attempt to exercise, any right provided under the FMLA, or (2) that the employer discharged or discriminated against the former employee for utilizing or availing himself/herself to the rights under FMLA. (*Williams v. Rubicon, Inc.*, 754 So. 2d 1081)

Family and Medical Leave Act (FMLA) contemplates intermittent leave. *Williams v. Shenango, Inc.*, 986 F.Supp. 309.

Newsome believes the evidence contained in this instant Complaint as well as an investigation into the said claims will support: (a) W&L and/or its representatives interfered with

Newsome's exercising rights secured/guaranteed under the FMLA; and (b) her employment was terminated as a direct and proximate result of exercising said right and/or its knowledge of Newsome's participation in protected activities secured to her under the Civil Rights Act, United States Constitution and/or applicable statutes/laws governing such matters in which she engaged.

21. Newsome believes an investigation into the claims of this instant Complaing will yield **PRIMA FACIE CASE under FMLA**: (a) he/she availed himself of a protective right under the FMLA; (b) he/she was adversely affected by an employment decision; and (c) a causal connection existed between the employees protected activity and the employer's adverse employment action. (*Hodgens,* 144 F3d at 160, 161; *Randlett v. Shalala,* 118 F.3d 857, 862 (1st Cir.); *Morgan,* 108 F.3d at 1324; *Hypes,* 134 F.3d 726). **Retaliation** – *Sherrod,* 132 F.3d 1122(A); *Long,* 88 F.3d at 3057. **Adverse Affect** – *Chafflin,* 179 F3d at 319; *King,* 166 F3d at 891; *Bocalbos,* 162 F3d at 383; *Hodgens,* 144 F3d at 161. The FMLA clearly prohibits retaliation against an employee who exercises rights under the Act.

Newsome believes that in investigation into the handling of this instant Charge will support: (a) she availed herself of a protective right under the FMLA. Moreover, rights secured under the United States Constitution, Civil Rights Act and any/all applicable statutes/laws governing said matters. (b) she was adversely affected by an employment decision by W&L and/or its representatives in terminating her employment as a direct and proximate result of engaging in protected activities; and (c) a causal connection exist between the Newsome's protected rights and W&L's and/or its representatives adverse employment action – moreover, W&L attempted to cover up such actions by taking information/documentation (i.e. Employee Manual) they felt Newsome may be able to use and/or would reveal their procedures and the violations rendered Newsome in their handling of termination as well as matters which occurred during her employment.

22. There are three (3) factors to determine causal link in prima facie case: (a) Plaintiff's past disciplinary record; (b) whether the employer followed its typical policy procedures in terminating the employee; and (c) temporal relationship between the employee's conduct and discharge. (*Nowlin v. RTC,* 33 F3d 498, 507-08 (5th Cir. 1994); *Jenkins v. Orkin Exterminating Company,* 646 F.Supp. 1274, 1277). The timing of the adverse employment action can be significant, although not a necessarily determinate factor. (*Mayberry v. Vought Aircraft Company,* 55 F3d at 1086, 1092 (5th Cir. 1995); *Hodgens,* 144 F3d 168, 170; *Grizzle,* 14 F.3d at 268).

Newsome believes that an investigation may yield there was a causal link with her engagement in protected activities and her termination; moreover, (a) Newsome had no past disciplinary record with W&L.

That Newsome complained of concerns of employment violations to W&L, and that Plaintiff would talk with Griffith regarding concerns and/or issues that arose that affected her and/or her ability to perform her duties; (b) that W&L did not follow its typical policy procedures and prior to terminating Newsome, knew that it was not in compliance with its policies and procedures and was in violation of the laws; therefore, in an effort to shield/mask such unlawful/illegal acts it removed the Employee Handbook Newsome kept at her desk in efforts of making it difficult to show such violations; and (c) that there is a connection with Newsome's engagement in protected activities and her termination – i.e. Newsome followed company policy and provided notification of the medical procedure and leave which was authorized by her attorneys (a method used for prior leave requests) and as direct result of such request, Newsome's employment was terminated. Moreover, an investigation may yield W&L's knowledge of Newsome's participation in protected activities in which it states in its Employee Handbook they would not discriminate based upon such information.

The **Seventh** Circuit Court of appeals finding in *King v. Preferred Technical Group,* 166 F.3d 887 (C.A.7.**Ind.**,1999) - Causal link between employee's protected activity and employer's adverse employment action, required for prima facie case of retaliatory discharge under FMLA, may be established by reference to temporal proximity between employee's taking of protected leave and employee's termination. Family and Medical Leave Act of 1993, § 105(a)(1, 2), 29 U.S.C.A. § 2615(a)(1, 2).

23. Newsome believes that in an investigation into this Complaint will yield she has proven **PRIMA FACIE CASE under the FMLA**: (a) that she/he is an eligible employee under the FMLA; (b) that Defendant is an employer as defined in FMLA; (c) that he/she was entitled to leave under the FMLA; (d) that he/she gave notice to the Defendant of her intention to take leave; and (e) he/she was denied benefits to which he/she was entitled under FMLA. (*Santos v. Knitgoods Workers' Union, Local 155* (No. 99 Civ. 1499, 1999 WL 397500 at *3); *Mayo v. Columbia University* (no. 01 Civ. 2002, 2003 WL 1824628, *8); *Parker v. Hanhemann University Hospital,* 234 F.Supp.2d 478, 489)). **Negative factor** – *Darby v. Bratch,* 287 F3d 673, 679 (8th Cir. 2002)

Newsome was an eligible employee under the FMLA. W&L is an employer as defined in FMLA and governed by the provisions of same. Newsome was entitled to leave under the FMLA and that W&L had afforded other employees similarly situated protection under the FMLA. Newsome provided W&L more than 30 days (December 2008) notice as well as later followed up with the written Medial Leave request required by W&L on January 8, 2009 for her leave on January 29, 2009 – said notice was in compliance with W&L's policies and procedures. However, W&L and/or its representatives denied Newsome benefits to which she

was entitled to under the FMLA and such benefits which it afforded to others similarly situated and/or are white.

24. Newsome believes that an investigation into the claims of this Complaint will support W&L and/or its representatives retaliated against her. In support thereof **RETALIATION PRIMA FACIE:** (a) Employee was protected under the FMLA; (b) Employee suffered an adverse employment decision; and (3a) he/she was treated less favorably than an employee who had not requested leave under the FMLA; or (3b) the adverse decision was made because of the employee's request for leave. (Bocalbos v. Nat'l Western Life Insurance Company, 162 F3d 379, 383 (5th Cir. 1998).

Newsome was protected under the FMLA. Newsome suffered an adverse employment decision wherein her employment with W&L was terminated. Newsome was treated less favorably than an employee who had not requested leave under the FMLA – moreover, was denied FMLA protection as that afforded to whites and/or those similarly situated that W&L granted to others and has allowed special provisions to aid whites and/or those similarly situated to seek medical attention requested; however, when Newsome approached them, her employment was terminated and she was advised that if she wanted to continue to have medical coverage, she would be required to carry her own under COBRA. Newsome believes the adverse decision by W&L to terminate her was due to her request for medical leave as well as its knowledge of Newsome's engagement in protected activities secured to her under the Civil Rights Act, United States Constitution and/or applicable statutes/laws.

IT IS IMPORTANT TO NOTE approximately a week prior to Newsome submitting her medical leave request, another white employee (Brian Knaur) had a medical emergency arise regarding his spouse in which it required Knaur to be absent from W&L – such request may have come with Knaur providing short notice due to an emergency that may have occurred; however, Newsome is not aware of this employee being terminated and at the time of her termination, and believe this employee was still employed. Furthermore, such short notices are also covered under the FMLA; however, Newsome was not afforded this right as that extended to white employees and/or those similarly situated.

Employee's telephone call to employer informing employer that she had been hospitalized and that she would be unable to return to work for some time due to her medical condition was sufficient notice under FMLA caselaw and regulations that employee was in the "serious health condition" category of employees eligible for FMLA leave. *Viereck v. City of Gloucester City,* 961 F.Supp. 703 (1997).

ADDITIONAL STATUTES/LAWS GOVERNING SAID MATTERS:

CODE OF FEDERAL REGULATIONS[4]
(See EXHIBIT "C" attached hereto and incorporated by reference)

Code: 29 CFR **Title / Description Excerpts**

Part 825.200: Subpart B_**What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?**

Sec. 825.200 ***How much leave may an employee take?***

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons: . . .

(4) Because of a serious health condition that makes the employee
unable to perform one or more of the essential functions of his or her job.

Part 825.203: Subpart B_**What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?**

Sec. 825.203 ***Does FMLA leave have to be taken all at once, or can it be taken in parts?***

(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.. . .

(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. . . .

(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. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months,. . .An example of an employee taking leave on a reduced leave schedule

[4] Information cut and pasted into this Complaint.

is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule...

(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. . . .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,. . .

Part 825.207: Subpart B_**What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?**

Sec. 825.207 ***Is FMLA leave paid or unpaid?***

(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 an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.. . .

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for . . . the employee's own serious health condition.

(e) 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 the employer's option, for any qualified 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.

Part 825.208: Subpart B_**What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?**

Sec. 825.208 ***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?***

(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.. . .

(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…

(2) As noted in Sec. 825.302(c), 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 will need to 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 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave.. . .

(2) 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 must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

Part 825.209: Subpart B_**What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?**

Sec. 825.209 ***Is an employee entitled to benefits while using FMLA leave?***

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue

> Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period.. . .
>
> (f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for ``key'' employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., **if the employee's position is eliminated as part of a nondiscriminatory reduction in force** and the employee would not have been transferred to another position)

IMPORTANT TO NOTE: During Newsome's meeting where she was advised of termination, Griffith advised that Newsome would have medical insurance coverage through the end of January (2009). Newsome's request for medical leave was for January 29, 2009. Griffith advised Newsome that if she was interested in continuing medical insurance coverage, she could do so under COBRA. Newsome is not aware of any other employee being terminated prior to the medical attention they advised Wood & Lamping they would be having and that such other employee was required to cover their medical expenses under COBRA. In Newsome's case, Wood & Lamping LLP terminated her employment and is terminating my medical insurance effective January 31, 2009, and thereafter, Newsome would be required to pay for any other medical expenses for the medical services she advised Griffith of in December 2008 directly out of pocket – extremely high premium under the COBRA option (Newsome would be requested to pay 100% of the premium cost) – to secure the medical attention Newsome sought and advised Wood & Lamping/Griffith of. Pursuant to the Wood & Lamping LLP Employer's Guide, it states:

> COBRA gives an employee covered by an employer's group health plan the right to stay covered when coverage is lost due to certain qualifying events, and the employee pays for 100% of the premium cost. COBRA coverage must be elected within 60 days after coverage would otherwise end or from the date the election form was sent, whichever is later. *The employer is required to continue the same coverage available to* ***similarly situated*** *employees.* The cost can be up to the entire cost of coverage, plus a small (2%) additional charge for administration , as decided by the employer. Employers must maintain records pertaining to compliance with COBRA.

(See **EXHIBIT "B"** at p. 26 of Wood & Lamping LLP's Employer's Guide attached hereto and incorporated by reference). Given such facts, Newsome believes a reasonable mind may

conclude that Wood & Lamping LLP and/or its representatives are in violation of COBRA. Moreover, acts may be willful, malicious and wanton. Acts knowingly and deliberately done to deprive me of medical services under the FMLA. Moreover, that the taking of Newsome's Employee Handbook were acts by W&L to shield an illegal animus. However, to their disappointment, Newsome had obtained a copy of the binders handed out at the seminar hosted by an attorney (Julie R. Pugh) she assisted and Heather Walsh. Newsome being advised during her employment of the corrupt practices of W&L also proceeded to make a copy of the Employee Handbook that W&L's representatives removed from her desk.

Part 825.220: Subpart B_**What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?**

Sec. 825.220 ***How are employees protected who request leave or otherwise assert FMLA rights?***

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

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

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

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

> (i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;
> (ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;
> (iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.. . .

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. ``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.. . .

(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 (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ``no fault'' attendance policies.. . .

(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 regulations.

Part 825.300: Subpart C_**How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?**

Sec. 825.300 ***What posting requirements does the Act place on employers?***

(a) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any ``eligible'' employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and Hour Division. The poster and the text must be large enough to be easily read and contain fully legible text.

(b) An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $100 for each separate offense. Furthermore, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

Part 825.301: Subpart C_**How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?**

Sec. 825.301 ***What other notices to employees are required of employers under the FMLA?***

(a)(1) 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 must 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 must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.. . .

(b)(1) 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 must be provided to the employee in a language in which the employee is literate (see Sec. 825.300(c)). Such specific notice must include, as appropriate:

> (i) that the leave will be counted against the employee's annual FMLA leave entitlement (see Sec. 825.208);
>
> (ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see Sec. 825.305);
>
> (iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;. . .

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

(f) 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 provision required to be set forth in the notice.

Part 825.302: Subpart C **How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?**

Sec. 825.302 ***What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?***

(a) An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based . . . or planned medical treatment for a serious health condition of the employee. . . If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.. .

(b) ``As soon as practicable'' means as soon as both possible and practical, taking into account all of the facts and circumstances in theindividual case. For foreseeable leave where it is not possible to give as much as 30 days notice, ``as soon as 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 only state that leave is needed . . .

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. 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 will 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 must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee.. .

(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.. .

IMPORANT TO NOTE: Newsome believes Wood & Lamping LLP and/or its representative was timely, properly and adequately placed on notice of my intent to have a medical procedure done which would require absence from employment. Looking in the Wood & Lamping LLP "*The Employer's Guide to Employment Law in Ohio, Kentucky and Indiana*" that I obtained from the seminar that Julie Pugh and Heather Walsh conducted it states (boldface, underline, italics added for emphasis):

> If the condition for which leave is granted is **foreseeable**, employees **must** provide the employer with **30** ***days notice*** **to be entitled to the protection of the FMLA**. . .
>
> Upon return from leave granted under the FMLA, employees are entitled to reinstatement to the position of employment previously held, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment . . . Employer's **may not** interfere with any employee's attempt to exercise his/her rights under the FMLA. It is also **illegal** *for employers to* ***discriminate*** *against or discharge an employee because he/she has attempted to exercise his/her rights. . .granted by the FMLA.*

See **EXHIBIT "B"** at p. 32 of Wood & Lamping's Employer's Guide attached hereto and incorporated by reference as if set forth in full herein. Therefore a reasonable mind may conclude that W&L's and/or its representative's removal of Newsome's Employee Handbook was a willful and malicious act and pretext to shield its knowledge that it was about to commit legal wrongs against Newsome.

Part 825.400: Subpart D_**What Enforcement Mechanisms Does FMLA Provide?**

Sec. 825.400 ***What can employees do who believe that their rights under FMLA have been violated?***

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages for the employee. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equalling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

Part 825.401: Subpart D_**What Enforcement Mechanisms Does FMLA Provide?**

Sec. 825.401 ***Where may an employee file a complaint of FMLA violations with the Federal government?***

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

RELIEF SOUGHT

WHEREFORE, PREMISES CONSIDERED Newsome request the following relief:

a) Investigation into the allegations/claims addressed in this instant Complaint, the Secretary of Labor's findings, evidence and legal conclusions it relied upon to render its findings and/or conclusion;

b) That if violations are found, that the Secretary of Labor, bring the applicable actions of and against Wood & Lamping, LLP, its representatives and employees that engaged in such unlawful/illegal acts complained of herein;

c) Award Newsome damages against W&L in an amount equal to any wages, salary, employment benefits, and other compensation denied or lost to Newsome by reason of the violation of the statute;

d) Award Newsome interest in the amount of any wages, salary, employment benefits and other compensation denied or lost to Newsome by reason of the violation of the statute;

e) Award Newsome an additional amount as liquidated damages equal to the sum of the amount of any wages, salary, employment benefits, and other compensation denied or lost to Newsome and the interest on that amount;

f) *Newsome believes her termination would evidence that Wood & Lamping, LLP does not want her in its employment. Moreover, that during her employment she was subjected to discriminatory and retaliatory treatment for exercising rights secured/guaranteed to her under the applicable statutes/laws of the State of Ohio and/or United States. Newsome does not believe given the facts evidence and legal conclusions set forth herein and that to be determined through an investigation, that a reasonable mind may conclude that it would be in her best interest (mentally or physically) to return to the employment of Wood & Lamping, LLP.* Therefore, Newsome is to be awarded such equitable relief as may be appropriate; including salary of approximately **three (3) years** – in that Newsome

believes an investigation into this matter will yield the acts of W&L and/or its representatives and employees was done with malicious intent; moreover, was done in that it knew and/or should have known the difficulty Newsome would face based upon information they have obtained on Newsome; moreover, its acts being to interfere with Newsome's exercise of protected rights guaranteed and/or secured under the United States Constitution, Civil Rights Act and/or any and all applicable statutes laws governing the protected activities in which Newsome has engaged and/or participated in. Newsome request that W&L be required to provide her with the appropriate benefits (insurance coverage) afforded to her during her employment and/or other employees for a period of **three (3) years**. Moreover, be required maintain any COBRA benefits for a period of three (3) years if it does not want to cover the Plaintiff under its group health coverage and paying any and all over insurance premium coverage to which Newsome became accustomed during her employment with W&L;

g) As a direct and proximate result of Wood & Lamping, LLP's unlawful/illegal actions rendered Newsome she has suffered and continues to suffer injury, including past and future loss of income and other employment benefits, severe emotional pain and suffering, mental anguish, humiliation, loss of enjoyment of life, costs associated with obtaining reemployment, embarrassment, damage to her reputation, and other past and future pecuniary losses. Therefore, Newsome seeks the appropriate relief afforded by laws for such injury/harm and to deter Wood & Lamping, LLP from continuing to practice in such violation of laws.

h) Award Newsome reasonable costs associated with the bringing of this Complaint;

i) Grant Newsome such other and further relief – injunction, etc. – which the Secretary of Labor may deem appropriate to correct the injury/harm sustained by Newsome.

Respectfully Submitted this **16th** day of **January, 2009**.

Denise Newsome
Post Office Box 14731
Cincinnati, Ohio 45250
Phone: (513) 680-2922

WOOD & LAMPING LLP

SINCE 1927

VACATION REQUEST FORM

Associates and paralegals should coordinate this vacation request with the attorneys with whom they work, get the Department Head's approval, and give this form to the manager of Human Resources. Secretaries and support staff should get approval from the attorney(s)/manager with whom they work and then submit this form to the manager of Human Resources for approval. The original of this form is filed in your attendance record and a copy is returned to you.

NAME: Denise Newsome **DATE:** 01/08/09

DAY(S) OF REQUEST (Monday-Friday)	DATE(S) OF REQUEST (Month-Day-Year)	TYPE OF DAY (Vacation or Floating Holiday)	TEMP. NEEDED? (for secretary)
Thursday	1/29/09 (1/2 Day - Medical)		No

APPROVED BY: _____
(Attorneys)

APPROVED BY: _____
(Department Head/Manager)

APPROVED BY: _____
(Manager of Human Resources)

****

(To be completed by Human Resources)

Beginning balance of days: _____ Vacation days rolled over from last year

\+ _____ Vacation days earned during this year

\+ _____ Floating holiday

= _____ Total number of days

Less days already taken: -- _____

Less days already scheduled, but not yet taken (including above): -- _____

Number of days to schedule: _____ Vacation days

\+ _____ Floating holiday

= _____ Total number of days

****

Number of sick days available: _____

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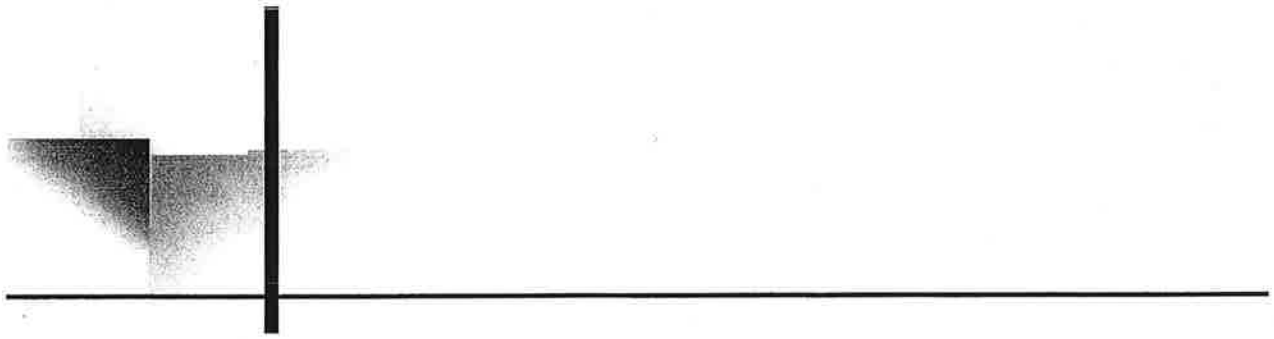

WOOD & LAMPING LLP

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THE EMPLOYER'S GUIDE

TO EMPLOYMENT LAW IN OHIO, KENTUCKY AND INDIANA

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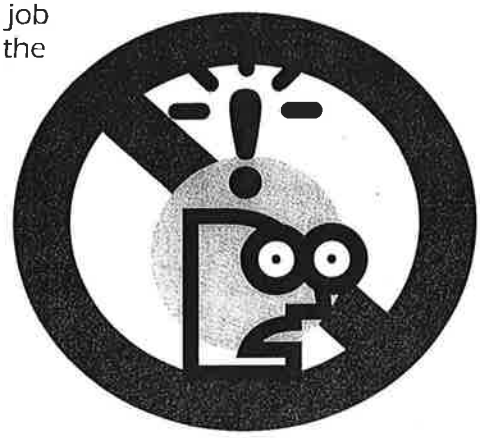
EMPLOYEE TERMINATION

Ideally, the employee in question has had some feedback on job performance and disciplinary steps have been taken prior to the termination. A termination conversation should not occur suddenly or as a surprise.



In an at-will employment circumstance, all reasons for terminating an employee are lawful subject to certain exceptions. These exceptions are statutorily defined, and include (but are not limited to):

- Discrimination
- Retaliation
- Public Policy
- Employment Contracts
- Disability
- Pregnancy

However, well-documented and supportable reasons for termination will reduce the likelihood of litigation. These reasons may include:

- poor performance
- refusal to follow instructions
- excessive absenteeism, abuse of sick leave, habitual tardiness (caution: FMLA may apply)
- violation of company policies
- endangering health and safety of self or others
- dishonesty
- engaging in criminal activity
- possessing a weapon at work
- behaving violently at work
- drug or alcohol use at work
- gambling at work
- disclosing confidential information to others
- poor relationships with co-workers

Always treat employees equally and consistently under similar circumstances.

Always treat employees equally and consistently under similar circumstances. You may create the appearance of unlawful discrimination if you allow some employees to engage in prohibited conduct and then claim good cause for firing others for the same reason.

INFORMING THE EMPLOYEE

Informing the Employee of the Termination

Never say, "I know what you're going through," even if you do.

- Reserve a private neutral meeting room where the conversation will not be overseen or overheard by other employees;
- Have a manager or other authority figure handle the discharge in person with a witness present, preferably a human resources representative;
- Take notes;
- Go into the meeting understanding that the conversation will not be comfortable,
- Watch your tone of voice. Choose your words carefully, but make sure you convey a tone of cordiality and sympathy. Be compassionate but firm, honest but guarded. Never say, "I know what you're going through," even if you do.
- State the actual reason for termination;
- Treat the employee with respect;
- Seek the employee's feedback. Although it's important to keep the meeting short, encourage the employee to voice his feelings after the news has been delivered. If he doesn't answer immediately, count to 20 before moving on. The last thing you want is a reputation for being heartless. If recriminations result, however, take charge and cut him off; remember that you're terminating his employment, not engaging in a dialogue.
- Collect keys, files and any company property;
- Arrange for the employee to remove personal property;
- Take no unnecessary action to draw attention to the discharge proceedings; and,
- Always end the meeting on a positive note. Offer words of encouragement and confidence in the employee's future career. Stand and extend your hand to indicate the meeting has ended. And of course, thank the employee for his service. But don't be surprised or hurt if the employee declines to thank you for firing him.

Obtain Legal Advice

Every situation is different; therefore, employers should consult with their attorney before disciplining or discharging an employee. Wood & Lamping regularly consults with clients regarding problems with employees and/or the discharge of employees, advising them as to the best way to handle a particular situation in order to avoid potential future litigation.

REDUCTIONS IN FORCE

Sometimes it becomes necessary for a company to reduce its work force to cope with economic conditions. Care should be taken to be sure that the determination of which employees are to be laid off is done in a nondiscriminatory way. Appropriate factors to consider include the need for a particular job function, seniority, and objectively determined job performance. Once layoff candidates are identified, it is a good idea to review the list with counsel in order to spot any potential problems. Severance pay is not required, but if given, should be awarded on an equitable basis.

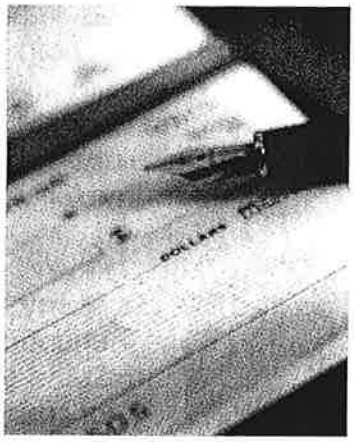
The ADEA has specific requirements in a Reduction in Force scenario to prevent disabled individuals from being adversely impacted by a Reduction in Force ("RIF"). Your legal counsel should be contacted to ensure adequate compliance with federal statutes.

If an entire facility or a substantial portion of the company's operations are being shut down, the federal Plant Closing Act (the "WARN" Act) may apply, which requires that employees and the public be given 60 days advance notice of the shutdown.

Final Paycheck and Paperwork

Pay, including any benefits and unused vacation, should be delivered at the termination meeting. This is not only good policy, frequently it's the law.

- Ohio – no special statute
- Indiana - Whenever any employer separates any employee from the payroll, the unpaid wages or compensation of such employee shall become due and payable at regular pay day for pay period in which separation occurred. IC 22-2-9-2.
- Kentucky - Employees who have been discharged shall not be paid any more than 14 days after termination, or any later than the next pay period, whichever event takes place last. KRS 337.055.



In addition, the employee should be given the termination paperwork while still on the premises, and sign a receipt form. If the employee refuses to sign, the fact should be noted on the paperwork in the employee's presence.

COBRA AND HIPAA

Consolidated Omnibus Budget Reconciliation Act ("COBRA")
COBRA gives an employee covered by an employer's group health plan the right to stay covered when coverage is lost due to certain qualifying events. This continuation of coverage lasts between 18 and 36 months, depending on the events, and the employee pays for 100% of the premium cost. COBRA coverage must be elected within 60 days after coverage would otherwise end or from the date the election form was sent, whichever is later. The employer is required to continue the same coverage available to similarly situated employees. The cost can be up to the entire cost of coverage, plus a small (2%) additional charge for administration, as decided by the employer. Employers must maintain records pertaining to compliance with COBRA. COBRA applies to most employer group health plans but not to all of them. For example, it does not apply to plans of employers with fewer than 20 employees or to church plans. Many plans of small employers, however, are subject to State laws similar to COBRA.

More information about COBRA can be obtained through the Department of Labor on the Internet at www.dol.gov/dol/topic/health-plans/cobra.htm.

State Codes with "mini COBRA" laws similar to the federal requirements:

- Ohio: The Ohio statute governing continued health insurance coverage requires that employees must be terminated from employment involuntarily, have had three months of prior continuous coverage, and be eligible for Unemployment Compensation. R.C § 3923.38,
- Indiana: If you were denied coverage, the law provides "Comprehensive Health Insurance" for State residents. IC 27-8-10.
- Kentucky: A participant in a plan with 2-19 employees can qualify for 18 months of state continuation coverage. KRS 304.17A-005.

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA")
HIPAA is a federal law that regulates employers of two or more individuals, and health insurance companies. HIPAA was enacted to provide for, among other things, improved portability and continuity of health insurance coverage in the group and individual insurance markets, and group health plan coverage provided in connection with employment. Employers must maintain records pertaining to compliance with HIPAA.

Some of the most significant of HIPAA's provisions include those that:

- limit exclusions for preexisting medical conditions;
- prohibit discrimination in enrollment and premiums against employees and their dependents based on health status; and,
- guarantee availability of health insurance coverage for small employers and renewability of health insurance coverage in both the small and large group markets.

For more information about HIPAA refer to the Internet address at www.hhs.gov/ocr/hipaa.

FMLA

If the condition for which leave is granted is foreseeable, employees must provide the employer with 30 days notice to be entitled to the protections of the FMLA. Employers can require that any request for leave is supported by a certification from a health care provider. In addition, where the requested leave is for the care of a child, parent or spouse with a serious health condition and is foreseeable, the employee must make a reasonable effort to schedule treatment so as not to disrupt the employer's business.

The FMLA only requires employers to grant unpaid leave. However, during any period in which an eligible employee takes leave, employers must maintain coverage under any group health plan for the duration of the leave, and may not change the coverage or conditions thereof. In limited circumstances, the employer may be able to recover any premiums it paid under a group health plan if the employee does not return to work.

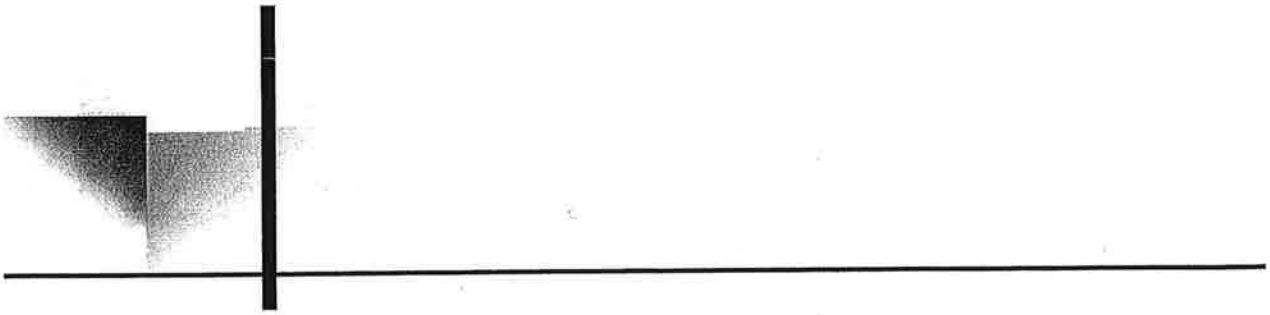
Upon return from leave granted under the FMLA, employees are entitled to reinstatement to the position of employment previously held, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. However, the Act does provide an exception for certain highly compensated employees. Employers should seek the advice of counsel as to whether the exception applies in a particular situation.

Employees are entitled to any benefits which had accrued prior to the date upon which leave commenced, but are not entitled to the accrual of seniority or any other employment benefits during any period of leave.

Employers may not interfere with any employee's attempt to exercise his/her rights under the FMLA. It is also illegal for employers to discriminate against or discharge an employee because he/she has attempted to exercise his/her rights, or has filed or testified in any cause of action related to the rights granted by the FMLA.

Obtain Legal Advice

There are many aspects of the FMLA that could not be covered here. Employers should consult with their attorney regarding the specifics of any situation involving the FMLA. Wood & Lamping's Employment Law attorneys regularly consult with clients regarding the Family Medical Leave Act and other laws that govern employers.



WOOD & LAMPING LLP

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The attorneys in Wood & Lamping's Employment / Labor Law Group primarily represent management in labor, employment, immigration and workers' compensation matters. We service clients of all sizes, from large companies with multiple locations to companies with a single office and few employees. Wood & Lamping offers a broad range of services to meet your labor and employment needs:

- Employment Litigation. We represent small and large employers in class actions and individual cases in state and federal courts, arbitrations and mediations. Our areas of litigation experience include wrongful termination, sexual and other harassment, age discrimination, race and national origin discrimination, retaliation matters, implied and express contracts, trade secret theft, and disability discrimination.
- Litigation Prevention. Wood & Lamping strives to assist its clients in preventing costly litigation by offering training, conflict resolution consulting, and personal attention. Our employment attorneys provide manager and employee sexual harassment training, human resources policy review, workplace violence prevention plans, equal employment opportunity guidance, and employee exit policies to help our clients make the best legal decisions possible.
- Client Counseling. Our attorneys regularly advise employers on their employment policies and practices, including employment handbooks, drug policies, employment contracts, independent contractor agreements, terminations, severance plans and releases, Family and Medical Leave Act (FMLA), wage hour compliance, return to work issues, affirmative action plans, immigration issues, workers' compensation programs, trade/business secrets, non-compete agreements, plant closing, reduction-in-force, technology matters, privacy issues, Federal and State investigations, and Occupational Safety and Health issues.

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[Code of Federal Regulations]
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[Revised as of July 1, 2006]
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[CITE: 29CFR825.200]

[Page 758-760]

TITLE 29--LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PART 825_THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents

Subpart B_What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?

Sec. 825.200 How much leave may an employee take?

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

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(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and,

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

(b) An employer is permitted to choose any one of the following methods for determining the ``12-month period'' in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month ``leave year,'' such as a fiscal year, a year required by State law, or a year starting on an employee's ``anniversary'' date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or,

(4) A ``rolling'' 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ``rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken

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eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1994, four weeks beginning June 1, 1994, and four weeks beginning December 1, 1994, the employee would not be entitled to any additional leave until February 1, 1995. However, beginning on February 1, 1995, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, etc.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine ``any 12 months'' for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.

(f) 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

[[Page 760]]

some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in Sec. 825.205.

[Code of Federal Regulations]
[Title 29, Volume 3]
[Revised as of July 1, 2006]
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TITLE 29--LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PART 825_THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents

Subpart C_How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

Sec. 825.300 What posting requirements does the Act place on employers?

(a) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any ``eligible'' employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and Hour Division. The poster and the text must be large enough to be easily read and contain fully legible text.

(b) An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $100 for each separate offense. Furthermore, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

(c) Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate.

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TITLE 29--LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PART 825_THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents

Subpart B_What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?

Sec. 825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?

(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 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

[[Page 761]]

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

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to

perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.

(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. 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, except as provided in Sec. Sec. 825.601 and 825.602.

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TITLE 29--LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PART 825_THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents

Subpart B_What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?

Sec. 825.207 Is FMLA leave paid or unpaid?

(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 an employee does not choose to substitute accrued paid 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 (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse,

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child or parent 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 or parent with a serious health condition. 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 (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical 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 a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

(d)(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 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 benefit 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 must 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.

(2) The Act provides that a serious health condition may result from injury to the employee ``on or off'' the job. If the employer designates the leave as FMLA leave in accordance with Sec. 825.208, the employee's FMLA 12-week leave entitlement may 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 12-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 Sec. Sec. 825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702(d) (1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) 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 the 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.

(f) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to

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all the paid leave which is earned or accrued under the terms of the employer's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) 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 certification 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 Sec. Sec. 825.302(g), 825.305(e) and 825.306(c).

(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). Compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employer permits the accrual to be used in compliance with regulations, 29 CFR 553.25, the absence which is paid from the employee's accrued compensatory time ``account'' may not be counted against the employee's FMLA leave entitlement.

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TITLE 29--LABOR

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PART 825_THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents

Subpart B_What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?

Sec. 825.208 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?

(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 must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should 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 a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will 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

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reasons or their plans for using their accrued leave.

(2) As noted in Sec. 825.302(c), 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 will need to 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 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will 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 should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) 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 must 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 must 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 must 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 paragraph (b)), 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 12-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 qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee

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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 reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. 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 or third medical opinion, the employer should 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 must withdraw the designation (with written notice to the employee).

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TITLE 29--LABOR

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Subpart B_What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?

Sec. 825.209 Is an employee entitled to benefits while using FMLA leave?

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of ``group health plan'' is set forth in Sec. 825.800. For purposes of FMLA, the term ``group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) no contributions are made by the employer;

(2) participation in the program is completely voluntary for employees;

(3) the sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) the employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is

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provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same

extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre- existing conditions, etc. See Sec. 825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for ``key'' employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a ``key employee'' (see Sec. 825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee does not desire restoration to employment at the end of the leave period, or FMLA leave entitlement is exhausted, or reinstatement is actually denied.

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

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Subpart B_What Leave Is an Employee Entitled To Take Under the Family and Medical Leave Act?

Sec. 825.220 How are employees protected who request leave or otherwise assert FMLA rights?

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

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

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

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

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

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

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

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

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) 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 (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary

actions; nor can FMLA leave be counted under ``no fault'' attendance policies.

(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

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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 Sec. 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month 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 regulations.

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TITLE 29--LABOR

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Subpart C_How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

Sec. 825.301 What other notices to employees are required of employers under the FMLA?

(a)(1) 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 must 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 must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.

(2) 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 paragraph (b), and in accordance with the provisions of that paragraph. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(b)(1) 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

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notice must be provided to the employee in a language in which the employee is literate (see Sec. 825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see Sec. 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see Sec. 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments

to maintain health benefits and the arrangements for making such payments (see Sec. 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see Sec. 825.310);

(vi) the employee's status as a ``key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see Sec. 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see Sec. Sec. 825.214 and 825.604); and,

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see Sec. 825.213).

(2) The specific notice may include other information--e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must 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.

(1) 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 subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a ``fitness-for-duty'' report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial notice in the six-months 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, by stating that certification would be required in all cases in which 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 Sec. 825.305(a).)

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(d) Employers are also expected to responsively answer questions

from employees concerning their rights and responsibilities under the FMLA.

(e) Employers furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(f) 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 provision required to be set forth in the notice.

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Subpart C_How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

Sec. 825.302 What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

(a) An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. 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 advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) ``As soon as practicable'' means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, ``as soon as 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 only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see Sec. 825.305).

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. 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 will 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 must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. 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

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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 employees' FMLA notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer. For example, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave (see Sec. 825.207), 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.

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TITLE 29--LABOR

CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PART 825_THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents

Subpart D_What Enforcement Mechanisms Does FMLA Provide?

Sec. 825.400 What can employees do who believe that their rights under FMLA have been violated?

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages for the employee. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equalling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

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Subpart D_What Enforcement Mechanisms Does FMLA Provide?

Sec. 825.401 Where may an employee file a complaint of FMLA violations with the Federal government?

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.