Family and Medical Leave

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Table: Sources of Law – Family and Medical Leave Laws

Federal Statute	29 U.S.C. § 2601 *et seq.*
Federal Regulations	29 C.F.R. § 825.100 *et seq.*
D.C. Statute	D.C. Code § 32-501 *et seq.*
D.C. Regulations	4 DCMR §§ 1600-1699
Federal Employees	5 U.S.C. §§ 6381-6387 *et seq.*; 5 C.F.R. §§ 630.1201 *et seq.*
D.C. Employees	D.C. Code § 32-502 *et seq.*
West Key© System	Civil Rights, Disability (78k173)

Table: Statutes of Limitation

Federal FMLA: either administrative complaint with DOL Office of Wage and Hour or private suit:	2 years, or 3 years if willful violation (29 U.S.C. § 2617(c))
D.C. FMLA: administrative complaint with D.C. Office of Human Rights (OHR)	1 year (D.C. Code § 32-509(a))
D.C. FMLA: private civil suit	1 year (D.C. Code § 32-510)
D.C. Safe and Sick Leave	60 days (D.C. Code §§ 32-3216.1)
D.C. Parental Leave: administrative complaint with OHR or private suit	1 year (D.C. Code §§ 32-1204 –1205)

FMLA – Federal & D.C. Laws

Basic Summary of the Laws

Federal Law

The federal FMLA requires employers with **50 or more employees** within a 75-mile radius to provide up to **12 weeks of unpaid, job-guaranteed leave every 12 months** to qualified employees in the following instances:

(1) The birth of a child and to care for the newborn child within 12 months of the birth;
(2) The placement of a child for adoption or foster care and to care for the adopted or foster child within 12 months of the child entering the employee's home;
(3) To recover from the employee's own serious health condition that makes the employee unable to perform the functions of his or her job[49];
(4) To care for a child, spouse, or parent suffering from a serious health condition;
(5) A qualified exigency arising out of a spouse, child, or parent who is a military member on active duty; and/or
(6) To care for a spouse, child, parent, or next of kin service member with a serious injury or illness.[50]

See 29 U.S.C. §§ 2612(a)(1)-(3).

Job-guaranteed leave means that the employer, in most circumstances, must return the employee to the **same or equivalent job** after leave, even if the employee has been replaced in the interim. *See* 29 U.S.C. § 2614(a). An equivalent job is one that has comparable pay, benefits, responsibilities, and hours of work. *Id.* at § 2614(a).

Taking leave does not result in the loss of any employment benefits that had accrued prior to the date on which an employee commences leave. However, an employee who returns to work after FMLA leave is not entitled to accrue any seniority or employment benefits during the

[49] A state employee cannot sue the state entity that employs him for violating the FMLA's "self-care" provision, which requires employers to provide leave for recovery from the employee's own serious health condition. *See Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327, 1338 (2012) (holding that the self-care provision of the FMLA is "not a valid abrogation of the States' immunity from suit," and that state sovereign immunity barred an employee of the Court of Appeals of the State of Maryland from bringing suit for money damages when his employer failed to provide him with sick leave for his own health condition as required by the FMLA).

The holding in *Coleman* does not prevent a state employee from bringing suit for money damages against a state employer under the FMLA's "family care" provisions, which require employers to provide leave for the care of a child, spouse, or parent suffering from a serious health condition and for the birth of a child or the care of an adopted or foster child. *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730 (2003).

[50] Where the leave is to care for a spouse, parent, child, or next of kin service member with a serious injury or illness, qualified employees may take up to 26 weeks of leave.

period of leave, including accrued vacation time during the leave. *See* 29 U.S.C. §§ 2614(a)(2)-(3).

An employee may not take leave intermittently or on a reduced-leave schedule to care for the birth of a child or for the placement of an adopted child *unless* the employee and the employer agree otherwise. *See* 29 U.S.C. § 2612(b)(1). An employee may take leave intermittently or on a reduced-leave schedule when medically necessary, either for the employee's own serious health condition or for the serious health condition of the employee's spouse, son, daughter, or parent. *See id.* An employee may also take leave intermittently or on a reduced-leave schedule to take care of a service member if the employee is the spouse, son, daughter, or parent of a covered service member. *See id.*

The employer may require an employee to transfer temporarily during the period of reduced-schedule leave to an available alternative position with equivalent pay and benefits that better accommodates recurring periods of leave. *See* 29 U.S.C. § 2612(b)(2).

D.C. Law

One provision within the D.C. FMLA requires employers with **20 or more employees** in the District of Columbia to provide eligible employees with **up to 16 weeks of unpaid, job-guaranteed leave every 24 months** to qualified employees for **family leave.** Events that trigger the applicability of the section include:

(1) The birth of a child of the employee;
(2) The placement of a child with the employee for adoption or foster care;
(3) The placement of a child with the employee for whom the employee permanently assumes and discharges parental responsibility; and/or
(4) The care of a family member of the employee who has a serious health condition.

See D.C. Code § 32-502(a) (1)-(4).

A separate provision within the D.C. FMLA requires employers with 20 or more employees in the District of Columbia to provide eligible employees with up to 16 weeks of unpaid, job-guaranteed leave every 24 months to qualified employees for **medical leave**, defined as the serious health condition of the employee if the condition prevents the employee from performing his or her job responsibilities. *See* D.C. Code § 32-503(a).

Because of the way the D.C. FMLA is written, it appears that an eligible employee can use as many as 32 weeks of leave in a given 24-month period – 16 weeks for family leave and another 16 weeks for medical leave. The D.C. Municipal Regulations provide that the entitlement to 16 weeks of family leave during a 24-month period "shall be separate from and in addition to the entitlement to 16 weeks of medical leave during any 24-month period. This means that an eligible employee may take both as many as 16 weeks of medical leave and as many as 16 weeks of family leave during the same 24-month period, notwithstanding 29 C.F.R. § 825.701(a)(1)." D.C.M.R. § 4-1607. There is no case law on this point.

Definitions

Covered Employers

Private Sector

The federal FMLA covers private employers with more than **50 employees** at the employee's worksite or 50 employees within 75 miles of the worksite, *see* 29 U.S.C. § 2611(2)(B)(ii), where the employer employs those 50 employees for each working day during each of 20 or more calendar workweeks in either the current or preceding year. *See* 29 U.S.C. § 2611(4)(A)(i). Determination of the number of employees for purposes of FMLA leave occurs at the time the employee gives notice of leave. 29 C.F.R. § 825.110(e).

The D.C. FMLA covers private employers with more than **20 employees in the District of Columbia.** *See* D.C. Code § 32-516(2).

Public Sector

D.C. Government Employees

District of Columbia government employees are covered by both the D.C. and federal FMLA. *See* D.C. Code § 32-501(2); 29 U.S.C. § 101(4)(A)(iii) & (B).

Federal Government Employees

Federal employees are covered by a law that, while virtually identical to the federal FMLA, has limited enforcement mechanisms. *See* 5 U.S.C. §§ 6381-6387.

Other Public Agency Employees

Generally, the employees of public agencies are subject to the federal FMLA regardless of the number of employees employed. 29 U.S.C. § 2611(4)(A)(iii).[51]

Special Rules for School Employees

The **federal FMLA** has more restrictive FMLA rules for the instructional employees of public and private elementary and secondary schools, and public school boards. *See* 29 C.F.R. § 825.600(a). If such an employee needs a reduced schedule or intermittent leave that results in the employee being out "more than 20 percent of the total number of working days over the period the leave would extend," then the employer can require the employee to choose either to:

(1) Take leave for a period of a particular duration. This means that the employer can

[51] A public agency is defined according to section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). *See* 29 C.F.R. §825.108(a).

require uninterrupted leave, but cannot make it last longer than the time between the first and last days of the leave request.

(2) Transfer the employee temporarily to an alternative position, which, although comparable in pay and benefits, is better suited to periods of intermittent leave than the employee's regular position.

Id. at §825.601(1)(i)-(ii).

The federal FMLA also has rules pertaining to leave taken near the end of an academic term. If an instructional employee takes leave for at least three weeks beginning **before the five final weeks of the term**, the employer can require the employee to stay out until the end of the term if: (1) the leave will last more than three weeks; and (2) the employee would have returned during the term's final three weeks. *Id.* at § 825.602(a)(1).

In addition, if the school employee requests leave for a reason other than his or her own serious health condition **during the five-week period at the end of the term**, different rules apply. If such an employee requests more than two weeks of leave during the five final weeks of the term and the employee would return to work during the term's final two weeks, then the employer can require the worker to continue taking leave until the end of the term. *Id.* at § 825.602(a)(2). If the employee requests leave for more than five days **during the period three weeks before the end of the term**, then the employer can require the worker to continue taking leave until the end of the term. *Id.* at § 825.602(a)(3).

Under **D.C. law**, school employees' family and medical leave is also more restricted. *See* D.C. Code § 32-506. A worker who is principally employed in an instructional capacity at a public or private elementary or secondary school, and who has a planned medical issue or would be out for more than 20 percent of the total number of working days, and complies with either the family leave provisions of D.C. Code § 32-502(g)[52] or the medical leave provisions of D.C. Code § 32-503(c),[53] may be required to:

1) Only take family and medical leave for the specific time required for the medical treatment; or
2) Temporarily transfer to another position that has the same benefits and pay, and fits the worker's need for time off.

Id. at § 32-506(a).

In addition, if a school employee takes family and medical leave five weeks before the

[52] The **family leave** was foreseeable based upon planned medical treatment, the worker informed the employer in advance of the need for medical treatment and made reasonable efforts to schedule the medical treatment so as not to disrupt unduly the operations of the school.

[53] The **medical leave** was foreseeable based upon planned medical treatment, the worker informed the employer in advance of the need to undergo medical treatment and made reasonable efforts to schedule the medical treatment so as not to disrupt unduly the operations of the school.

end of the term, the school may require the worker to continue leave until the end of the term so long as the requested leave is for a minimum of three weeks and the worker would return to work during the three-week period prior to the end of the term. *Id.* at § 32-506(c). If during the last three to five weeks before the end of the term, the employee takes leave for at least two weeks and would return during the two-week period before the end of the term, or if the school employee requests family and medical leave for more than five days during the last three weeks of the term, the employer can require the worker to continue taking leave until the end of the term. *Id*.

Eligible Employees

Federal Law

Under the federal FMLA, the worker must have been employed by the same employer from whom the leave is requested for at least **12 months** before the request for leave, *and* the employee must have worked at least 1,250 hours during the 12 months prior to the request for leave (average of 24 hours per week). *See* 29 U.S.C. § 2611(2)(A). The 12 months an employee must have been employed need not be consecutive months, but the 12 total months of previous employment must have occurred within seven years preceding the leave. *See* 29 C.F.R. §825.110(b). If, however, the leave is occasioned by military service obligations to the National Guard or Reserves, employment prior to the break in service must be counted toward the 12-month and 1,250-hour requirements even if it is more than seven years prior to leave, as must the time that the employee would have worked for the employer but for mandatory military service. 29 C.F.R. § 825.110(b)(2)(i). There is also an exception from the seven-year cap if an employer has executed a written agreement to rehire the employee after the break in service. 29 C.F.R. § 825.110(b)(2)(ii).

A "key employee" – one who is salaried and among the highest-paid 10 percent of all the employees employed by the employer within a 75-mile radius of the worksite – is not necessarily eligible to take leave with guaranteed job restoration. *See* 29 C.F.R. § 825.217. The employer may deny job restoration to such an employee if restoration would result in "substantial and grievous economic injury to the operations of the employer." *See* 29 C.F.R. § 825.216(b).

D.C. Law

Under D.C. law, to be eligible for family or medical leave, a worker must be employed by the employer for **one year, without a break in service**, and have worked for at least 1,000 hours (average of 19 hours per week) during the 12-month period immediately preceding the request for the family or medical leave. *See* D.C. Code § 32-501(1).

Permissible Reasons for Taking FMLA Leave

Birth, Adoption & Foster Care

Leave Allowed under both D.C. & Federal Law

Under D.C. and federal law, an eligible employee working for a covered employer who is a parent – mother *or* father – can take family and medical leave to bond with a newborn, newly adopted child, or newly-placed foster child. The leave must be taken within 12 months of the birth or placement of the baby or child. *See* D.C. Code §§ 32-502(a), (b); 29 U.S.C. §§ 2612(a)(1)(a), (b). Under the federal FMLA, such leaves because of the placement of an adopted child may include time to "travel to another country to complete an adoption." 29 C.F.R. § 825.121(a)(1). Under the D.C. law, a qualified employee working for a covered employer may also take family and medical leave for the placement of a child with the employee for whom the employee permanently assumes parental responsibility even where there is not a formal adoption or foster process. *See* D.C. Code § 32-502(a).

To Heal from One's Own "Serious Health Condition"

Under both D.C. and federal law, an eligible employee working for a covered employer can take family and medical leave to heal from his or her own serious health condition.[54] *See* D.C. Code § 32-503; 29 U.S.C. § 2612(a)(1)(D). D.C. law and federal law, however, differ in their definitions of what constitutes a "serious health condition."

To Care for A Family Member with a "Serious Health Condition"

Federal Law

Under the federal FMLA, an eligible employee working for a covered employer can take family and medical leave to care for a **parent, spouse, son or daughter** who has a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(C).

A parent means "a biological parent, adoptive, step or foster father or mother, or any other individual who stood in *loco parentis* to an employee when the employee was a son or daughter." 29 C.F.R. § 825.122(b). The definition of parent specifically does not include parents-in-law. *See id.*

A spouse means "husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common-law marriage in States where it is recognized." 29 C.F.R. § 825.122(a).

A son or daughter is "a biological, adopted or foster child, a stepchild, a legal ward, or a

[54] A state employee cannot sue the state entity that employs him for violating the FMLA's "self-care" provision, *see supra* note 1.

child of a person standing in *loco parentis*, when the child is under 18 years of age, or age 18 or older and 'incapable of self-care because of a mental or physical disability.' " 29 C.F.R. § 825.122(c).

D.C. Law

Under D.C. law, an eligible employee working for a covered employer can take family and medical leave to care for a family member who has a serious health condition. *See* D.C. Code § 32-502(a)(4).

A **family member** includes a person related by "blood, legal custody or marriage." D.C. Code § 32-501(4)(A). A child is a "family member" for purposes of the D.C. FMLA if the worker "assumes and discharges parental responsibility" for the child and the child lives with her. *Id.* at § 32-501(4)(B). Finally, any person with whom the worker has "shared a mutual residence" within the last year, and with whom the worker "maintains a committed relationship," is also considered a family member. *Id.* at § 32-501(4)(C). This includes same-sex and common-law spouses. *See also* D.C. Code §§ 32-701 – 32-710 (domestic partnership registration and health-care benefit expansion).

The definition of **parent** is much broader under D.C. law than under the federal FMLA. Under D.C. law, a parent is defined as:

(1) The natural mother or father of a child;
(2) The person who has legal custody of a child;
(3) The person who acts as a guardian of a child regardless of whether he or she has been appointed legally as such;
(4) An aunt, uncle, or grandparent of a child; or
(5) A person who is married to a person listed here.

See D.C. Code § 32-1201(2).

To Care for a Covered Service Member with a Serious Injury or Illness

Federal Law

Under the federal FMLA, an eligible employee working for a covered employer can take up to 26 workweeks of leave to care for a covered service member with a serious injury or illness if the employee is the spouse, parent, son or daughter, or next of kin of the service member. *See* 29 U.S.C. § 2612(a)(3).

The 26 workweeks of leave to care for a covered service member with a serious injury or illness must be taken during a single 12-month period. 29 C.F.R. § 825.127(c). The "single 12-month period" begins on the first day the eligible employee takes FMLA leave to care for a covered service member and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-

qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered service member during this "single 12-month period," the remaining part of his or her 26 workweeks of leave entitlement to care for the covered service member is forfeited. 29 C.F.R. § 825.127(c)(1).

An eligible employee is entitled to a *total* of 26 weeks of leave in a 12-month period, even if taking leave under both this provision and for one of the other qualifying reasons. 29 U.S.C. § 2612 (a)(4). For example, an employee may take 12 weeks of leave for the birth of a child, as well as 14 weeks of leave to care for a qualified seriously injured or ill service member, for a total of 26 weeks. This provision does not expand entitlement for more leave under any of the other permissible reasons, so even if an employee takes only 10 weeks of leave to care for a service member, the employee would be eligible for a maximum additional 12 weeks for the birth of a child or to care for the serious health condition of self or family member. 29 C.F.R. § 825.127(c)(3)

A spouse means "husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common-law marriage in States where it is recognized." 29 C.F.R. § 825.800. A next of kin of a covered service member is "the nearest blood relative other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member's only next of kin." 29 C.F.R. § 825.127(b)(3).

A "serious injury or illness" means an injury or illness incurred by a covered service member while on active duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating. 29 C.F.R. § 825.127(a)(1).

Because of a Qualifying Exigency Arising From Covered Military Member on Active Duty

Under the federal FMLA, an eligible employee working for a covered employer can take family and medical leave for "any qualifying exigency . . . arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces." 29 U.S.C. § 2612(a)(1)(E). In other words, an employee may qualify for FMLA leave in a pressing or urgent situation arising from the deployment of a family member.

Qualifying exigencies include the following:

(1) Short-notice deployment: leave can be taken for a period of seven days, beginning on the date a covered military member is informed of impending call or order to active-duty status in support of contingency operation, to address any issues arising from an impending call or order to active-duty status occurring seven or fewer calendar days prior to date of deployment;

(2) Military events and related activities: to attend an official military ceremony or event, and to attend certain family support or assistance programs, related to the active duty or call to active duty of military member;

(3) Childcare and school activities: to arrange for alternate child care or provide child care on an urgent, immediate-need basis for child of covered military member; to enroll or transfer child to new school or daycare facility when necessitated by active duty or call to active duty of covered military member; to attend meetings with staff at school or day care related to child when such meetings are necessary due to circumstances arising from active duty or call to active duty of covered military member;

(4) Financial and legal arrangements: to make or update financial or legal arrangements for covered military member in member's absence and/or act as covered military member's representative before federal, state, or local agency for military service benefits while member is on active duty or call to active-duty status and for 90 days after termination of active-duty status;

(5) Counseling: to attend counseling for oneself, covered military member, or child provided the need arises from the active duty or call to active-duty status of covered military member;

(6) Rest and recuperation: to spend time, up to five days for each instance, with covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment;

(7) Post-deployment activities: to attend ceremonies, briefings, events sponsored by the military for a period of 90 days following the termination of covered military member's active-duty status; and

(8) Additional activities: for any other events that arise out of covered military member's active duty or call to active-duty status where employer and employee agree that such leave shall qualify as an exigency and agree to the timing and duration of the leave.

A "covered military member" is the employee's spouse, son, daughter, or parent on active duty or call to active-duty status. 29 C.F.R. § 825.126(b).

"Active duty or call to active-duty status" means duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active-duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all Reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation." 29 C.F.R. § 825.126(b)(2).

A military operation qualifies as a "contingency operation" when it:

(1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. 10 U.S.C. 101(a)(13). 29 C.F.R. § 825.126(b)(3).

Definition of "Serious Health Condition"

Federal Law

Under the federal FMLA, a **serious health condition** is defined as an "illness, injury, impairment or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility …;" or (B) "continuing treatment by a health-care provider." 29 C.F.R. § 825.114(a). The federal regulations clarify that a serious health condition involves, *inter alia*, a period of incapacity for more than **three consecutive calendar** days, **AND** involves continuing treatment by a health-care provider:

- **two** or more visits to a doctor (or a nurse or physician's assistant under a doctor's direct supervision), **OR**
- **one** visit that results in a "regimen of continuing treatment" under the supervision of a doctor. A course of prescription medication is a regimen of continuing treatment, but a course of treatment involving over-the-counter medication or home remedies such as rest or exercise are not enough in themselves to constitute a regimen of continuing treatment.

29 C.F.R. § 825.115(a)(2)(i).

Visits for terminal or chronic conditions are also covered by FMLA. *See* 29 C.F.R. § 825.115(c).

Moreover, *any* period of incapacity due to pregnancy, or for prenatal care, is a serious health condition for purposes of the FMLA, regardless of whether the woman has visited a health-care provider. *See* 29 C.F.R. §825.115(b).

Serious health condition under federal law

In-patient care	**OR**	More than three full consecutive days of incapacity (i.e. inability to work, attend school, perform other regular activities) + two in-person doctor visits (the first being within the first seven days after the onset of incapacity / leave and the second being within the first 30 days, barring extenuating circumstances) **OR** one visit with regimen of continuing treatment	**OR**	Incapacity due to terminal or chronic condition (requiring "periodic treatment" at least twice a year)	**OR**	Incapacity due to pregnancy or for prenatal care

The following conditions are not covered under FMLA: the common cold, minor ulcers, headaches, and routine dental or orthodontic procedures. *See* 29 C.F.R. § 825.114(b)-(d); *but see Miller v. AT&T*, 250 F.3d 820 (4th Cir. 2001) (though ordinarily flu does not meet the definition of a "serious health condition," FMLA coverage of an episode of the flu is not precluded when the regulatory definition of a serious health condition is satisfied, e.g. with a particularly severe flu).

D.C. Law

Under the D.C. FMLA, a **serious health condition** means "physical or mental illness, injury or impairment that involves (A) inpatient care in a hospital, hospice, or residential health-care facility; or (B) continuing treatment or supervision at home by a health-care provider or other competent individual." D.C. Code § 32-501(9).

Calculating the Number of Weeks of Leave: 12 Months v. 24 Months

Under both federal and D.C. leave laws, it is important to determine whether an employee has used all of his or her family and medical leave in the current 12-month or 24-month period. This can be complicated because of how the periods are calculated.

Federal Law

Under the federal FMLA, the 12-month period during which a qualified employee is entitled to leave can be:

(1) The calendar year;
(2) Any consecutive 12-month period, such as fiscal year, a year required by State law, or a year starting on the employee's anniversary date;
(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or
(4) (4) A rolling 12-month period measured backward from the date an employee uses any FMLA leave.

See 29 C.F.R. § 825.200(b).

At least one court has held that under 29 U.S.C. § 2612(a)(1), an employer must inform its employees which of the four methods it will use to calculate the 12 weeks of leave before it can use that calculation against an employee. *See Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001) (holding if employer does not notify employee about which formula will be used, then method most favorable to employee applies).

The U.S. Department of Labor regulations state that employers, not employees, are permitted to choose the method, provided that they apply it "consistently and uniformly to all employees." 29 C.F.R. § 825.200(d)(1). The regulations go on to state that an employer who wishes to change the method used in his or her workplace must give at least **60 days' notice** to all employees, and must implement the transition from one method to the next in such a way as to preserve for each employee their full entitlement to FMLA leave. *Id.*

Observance of a holiday during an employee's 12 weeks of leave does not affect the 12-week entitlement, and the weeks will still count as full weeks (e.g., leave during the week of Thanksgiving would still count as a full week of leave). If the leave is intermittent or partial weeks, however, the holiday does not count against the 12 weeks of leave unless the employee was scheduled and expected to work on the holiday. 29 C.F.R. § 825.200(h)

D.C. Law

The D.C. law offers little guidance on how to calculate the 24-month period. The statutory language states that an employee cannot take more than 16 weeks of leave during ***any*** 24-month period. *See* D.C. Code §§ 32-502(a); 32-503(a). As noted earlier, this repetition has

led many advocates to argue that employees are eligible for as many as 32 weeks of leave – 16 for medical and 16 for family – every 24 months. Because the law does not provide instructions regarding how to measure the 24-month period, the worker and/or his or her advocate should use the federal method that is most favorable to the employee.

Calculating Intermittent and Reduced-Schedule Leave

Employees do not have to take FMLA leave all at once. Both the D.C. and the federal FMLA laws permit certain employees to take intermittent leave and reduced-schedule leave. **Intermittent leave** is leave taken in specific blocks of time due to a single reason. **Reduced-schedule leave** is leave that reduces the number of hours that an employee works in a given work period. *See* D.C. Code §§ 32-502 (c), (d); 32-503(a); 29 CFR § 825.203(a). The amount of time taken off, either by intermittent leave or a reduced schedule, must still not exceed the total amount allowed by law.

Federal Law

Under the federal FMLA, an employer can only count the amount of leave that the employee actually takes. *See* 29 C.F.R. § 825.205(a). 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 that it is one hour or less." 29 C.F.R. § 825.203(d).

If an employee normally works a part-time schedule or a schedule that varies, the employer must calculate the leave taken by the employee on a "pro rata or proportional basis by comparing the new schedule with the employee's normal schedule." 29 C.F.R. § 825.205(b).

D.C. Law

Under the D.C. law, an employee's 16 weeks of family leave (but not medical leave) may, with the agreement of employer and employee, be taken on a reduced schedule over a period of time, provided that the time does not exceed 24 consecutive weeks. *See* D.C. Code §32-502(d).

Both medical and family leave may be taken intermittently "when medically necessary." *Id.* at §§ 32-502(c); 32-503(a).

Notice Requirements

Employer Must Post Notice of Rights

Both the D.C. law and the FMLA require employers to post notices that inform workers about their leave rights, and employers must post these notices in a conspicuous area of their workplace. *See* D.C. Code § 32-511; 29 C.F.R. § 825.300. In D.C., a willful failure to do this can result in a $100 fine for each day that the notice is absent. *See* D.C. Code § 32-511(b).

Under federal law, a willful failure to post the notice can result in a civil penalty of no more than $100 for each offense, and the offending employer cannot penalize any employee who failed to provide advance notice of the need for FMLA leave. *See* 29 C.F.R. § 825.300(b). Federal law also requires that the public notice be in the language spoken by the majority of employees. *Id.* at § 825.300(c).

Employers Must Provide FMLA Information to Employee

The FMLA's regulations now set forth four types of notice about an employee's FMLA rights that an employer must provide to an employee, and how those types of notice must be provided. They are:

General notice

Every employer covered by the FMLA must post on its premises a general notice about FMLA rights, either in a poster or electronically. In addition, employers covered by the FMLA must apprise each new employee of his or her FMLA rights in writing, in an employee handbook, flier, email, or otherwise, "upon hiring." 29 CFR § 825.300(a).

Notice of Eligibility and Rights and Responsibilities

When an employee requests (for the first time) leave that may be FMLA-qualifying, the employer must notify the employee of his or her eligibility to take FMLA leave within five business days. If the employee is not eligible for FMLA leave, the employer notice must state at least one reason why the employee is ineligible (e.g., they have not worked for the employer for at least 12 months). 29 CFR § 825.300(b).

At the same time it provides the Eligibility notice, the employer must also provide a written description of the FMLA process, the employee's obligations during that FMLA process, and the consequences of the employee's failure to meet these obligations. Such notice must include: (1) an explanation that if FMLA leave is granted it will be deducted from the employee's 12-week allowance, (2) requirements for employees to submit medical certifications and the consequences for failing to do so, (3) any employer requirements regarding the substitution of paid leave such as sick time or vacation, (4) requirements for the employee to maintain health benefits during FMLA leave, including payment of premiums, (5) key employee status, if applicable, (6) employee rights to maintain benefits and to job restoration following leave, and (7) the employee's potential liability for unpaid health insurance premiums if the employee fails to return to work following leave. 29 CFR § 825.300(c). The "eligibility notice" and the "rights and responsibilities notice" are both on the same form, available online at http://www.dol.gov and http://wrmanual.dcejc.org/17.

Designation notice

Within five days of receiving sufficient information from the employee and his or her health-care provider, the employer must notify the employee in writing whether the requested

leave is FMLA-qualifying. 29 CFR § 825.300(d). The designation notice must also include any "fitness-for-duty" certification that the employer may later request. It must also inform the employee of the amount of leave that will be deducted from the 12-week FMLA allowance for the particular period of FMLA leave; if this calculation cannot be performed at the time the leave is granted (e.g., where the amount of leave is unforeseeable or sporadic), the employer must provide such information upon an employee's request, but not more often than every 30 days. *Id.* A "designation notice" form approved by the DOL is provided online at http://www.dol.gov/ and http://wrmanual.dcejc.org/18.

An employer may retroactively designate leave as FMLA leave, but only if the retroactive designation does not cause harm or injury to the employee. 29 C.F.R. § 825.300(e).

Employee Requests for Leave

Employee Need Not Mention FMLA

Neither the D.C. nor the federal FMLA law obligates employees to actually invoke or even mention the FMLA to qualify for taking FMLA leave. To trigger rights under the FMLA, employees must "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." 29 C.F.R. § 825.302(c). This means that, for example, an employee is covered if she mentions only that she needs to take time off to spend time with her newborn child. For leave pursuant to a qualified exigency, notice must be given of the reason for the exigency and that a covered military member is on active duty or called to active-duty status. *Id.* For leave to care for a family member or a service member with a serious health condition, notice must be given that the family member or service member is unable to perform daily activities or is seriously injured or ill, and the anticipated duration of the absence. *Id.*

The federal DOL regulations state that it is the employer's responsibility to inquire further if he or she needs more details to determine whether the FMLA is applicable. *See* 29 C.F.R. § 825.302(c). Numerous courts, however, have held that the employee must give the employer more information than just saying he or she is "sick." *See, e.g., Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001) (holding that as a matter of law telling an employer that one is "sick" represents insufficient notice of a request to take FMLA leave, as the descriptor "sick" does not allow an employer to determine whether the leave would qualify as a "serious health condition"). Moreover, "[w]hen an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave." 29 C.F.R. § 825.302(c).

Time for Making Request

Under both the D.C. and the federal FMLA, employees are generally required to request

FMLA leave 30 days before the leave is needed,[55] or as soon as practicable if the need is foreseeable but 30 days' notice is not practicable. *See* 29 C.F.R. § 825.302(a).[56] An employee who could not have reasonably foreseen the need for leave in advance, however, is required to notify the employer per the employer's "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." *See* 29 C.F.R. § 825.302(a), (d); 4 DCMR § 1608.1-2. For example, if an employer typically requires employees out on ordinary sick leave to call in at the beginning of the day to report their absence, an employee out on FMLA leave may be similarly required to abide by the employer's normal call-in procedures. Failure of an employee to properly notify an employer of an FMLA-related absence may cause delay or denial of FMLA protections, but an employer cannot deny FMLA leave on this ground if the employee has given at least verbal notice. 29 C.F.R. § 825.302(d).

The D.C. regulations further specify that an employee dealing with an emergency that prevents him or her from notifying the employer prior to the first day that he or she is out of work, shall request leave no later than 2 business days after his or her absence begins. *See* 4 DCMR § 1608.3.

Medical Certification

Under both the D.C. and federal FMLA, an employer may choose to require an employee to provide a written certification from a health-care provider of the serious health condition and the need for leave. *See* D.C. Code § 32-504; 29 U.S.C. § 2613. Exactly what information the employer may request is slightly different under D.C. and federal law.

D.C. Law

Under D.C. law, employers may require certification from a health-care provider, defined as "any person licensed under federal, state, or District law to provide health-care services." The notice should include:

(1) The date on which the serious health condition began;
(2) The probable duration of the condition;
(3) The "appropriate medical facts within the knowledge of the health-care provider" that would entitle the worker to take leave; AND
(4) If the worker is taking medical leave, a statement that the worker is unable to perform

[55] Notice of foreseeable leave pursuant to a qualified exigency must be given as soon as practicable, regardless of how far in advance the leave is foreseeable.

[56] " '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. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances." 29 C.F.R. §§ 825.302(b). When an employee gives fewer than 30 days' notice, the employee "must respond to a request from the employer to explain why it was not practicable to give 30 days' notice." 29 C.F.R. § 825.302(a).

the functions of his or her position.

(5) If the worker is taking family leave, an estimate of the amount of time that the employee is needed to care for the family member.

See D.C. Code § 32-504(b).

The employer may request **second and third opinions**, but the employer is required to pay for these additional opinions, and the third opinion is final and binding on both the employer and the employee. *See* D.C. Code § 32-504(d), (e). Recertification may be required on a "reasonable basis." D.C. Code § 32-504(f).

An employer must keep any medical information obtained from a certification request confidential. If the employer willfully violates this confidentiality provision, he or she can be assessed a civil penalty of $1,000 for each offense. *See* D.C. Code § 32-504(g).

Federal Law

The medical certification requirements under the federal FMLA are identical to D.C. law, explained above, except that in the case of a family member or covered service member[57] needing care, the certification must state that the worker is needed to care for that person, and contain an estimate of the amount of time needed to do so. *See* 29 U.S.C. § 2613(b), 29 C.F.R. § 825.310.

For leave pursuant to a qualifying exigency arising out of the active duty or call to active-duty status of a covered military member, an employer may require documentation to indicate active duty/active-duty status in support of a contingency operation in addition to the dates of service. Further, an employer may require the following information: a statement of facts regarding the exigency; the approximate date the exigency is likely to commence; the approximate dates of leave and frequency or duration of leave if the employee is seeking intermittent leave; and, if the exigency involves a meeting with a third party, the name and contact information of the individual and a brief description of the purpose of the meeting. 29 C.F.R. § 825.309.

If an employer intends to request medical certification, it should do so within five business days after the employee provides notice of the need for FMLA leave. 29 C.F.R. § 825.305(b). The employee must then provide the requested certification to the employer within the timeframe requested by the employer, which must allow at least 15 calendar days after the employer's request. *Id.* If "it is not practicable under the particular circumstances" for the employee to provide the requested certification "despite the employee's diligent, good faith efforts," however, then the normal 15-day deadline for providing the certification would not

[57] An employer may also request: the name of the covered service member; the relationship of the covered service member to the employee; the service member's military branch, rank, and unit assignment; the name of the military medical treatment facility, if assigned; whether the service member is on the temporary disability retired list; and a description of care to be provided to the service member and an estimated amount of leave. 29 C.F.R. § 825.310(c).

apply. *Id.* This may be the case, for example, if the employee has requested the certification from his health-care provider but the health-care provider has not yet returned it to him, due to no fault of the employee, or because the employee's medical condition has prevented him from communicating more promptly with his health-care provider.

If the employer feels that the certification provided by the employee fails to provide necessary information regarding the employee's FMLA leave request, it must notify the employee of this, in writing; the employee then has seven days to cure the deficiency. If the employee fails to provide the missing information, the employer may deny the request for leave. 29 C.F.R. § 825.305(c), (d).

Additionally, should the employer need clarification or authentication of information provided by the employee on the certification form, a representative of the employer (e.g., a human resources employee, leave administrator, or management official) may contact the employee's health-care provider directly to seek that information; the employee's direct supervisor is expressly forbidden from contacting the health-care provider. 29 CFR § 825.307(a). The employer may not ask the health-care provider for additional medical information beyond that required by the standard DOL FMLA certification form.[58] *Id.*

Medical Recertification

If an employee's medical condition is an ongoing one of indefinite duration, the employer can request that the employee's health-care provider recertify the condition every six months. 29 C.F.R. § 825.308(b). The employer may also request recertification during any new "leave year." 29 C.F.R. § 825.305(e). This is especially relevant in cases where the employee requires intermittent leave over an extended period to deal with chronic or ongoing qualifying conditions, e.g., asthma or diabetes.

If the leave requested for a serious health condition is limited and not ongoing, an employer may request recertification after the length of leave originally requested (e.g., after eight weeks if eight weeks was originally requested), or more quickly if the circumstances have changed significantly (e.g., if the nature or duration of the leave requested changes significantly, or if the employer receives new information that suggests that the FMLA leave may have been used improperly). 29 C.F.R. § 825.308(a), (b), and (c).

If neither of the above exceptions applies, the employer may request recertification as frequently as every 30 days, in connection with the employee's absence. *See* 29 C.F.R. § 825.308(a).

[58] The FMLA does not prevent an employer from properly following the information-gathering procedures authorized by another statute, and then using the information when determining eligibility for FMLA leave. For example, if the employee's serious health condition may also constitute a disability under the ADA, and if that employee has requested an accommodation under the ADA, the employer may consider information obtained through the ADA information-gathering process. 29 CFR § 825.306(d).

Fitness-for-Duty Certifications

Before allowing an employee on FMLA leave for the employee's own serious health condition to return to work, an employer may generally require the employee to obtain a fitness-for-duty certification from his or her health-care provider. The employee's obligation to provide complete certification in the fitness-for-duty context is the same as in the initial medical certification process. 29 C.F.R. § 825.312(a). Additionally, the employer may contact the employee's health-care provider directly for purposes of authenticating or clarifying the fitness-for-duty certification, in the same manner as it would for an initial medical certification. *Id.* The employer can require that the fitness-for-duty certification address the employee's ability to perform the essential job functions of the employee's job, provided that it provides the employee with a list of those functions no later than its deadline to provide notice that the leave will be designated as FMLA leave. 29 C.F.R. § 825.312(b).

If the employee is taking FMLA leave on an intermittent or reduced-leave schedule basis, the employer may request a fitness-for-duty certification as frequently as once every 30 days, but only if reasonable safety concerns exist regarding the employee's continuing ability to perform his or her duties based on the serious health condition for which the employee took such leave. 29 C.F.R. § 825.312(f).

The federal law also contains additional certification requirements for **intermittent and reduced-schedule leave**. *See* 29 U.S.C. § 2613(b)(5)-(7). As under D.C. law, **second and third opinions** may be required under federal law. *See* 29 U.S.C. § 2613(c)-(d).

There are sample certification forms in the DOL regulations that many employers and health-care providers have used as models and that are available online:

Certification for Serious Injury or Illness of Covered Service Member (WH-385): http://www.dol.gov/ and http://wrmanual.dcejc.org/19.

Certification of Health-Care Provider for Employee's Serious Health Condition (WH-380-E): http://www.dol.gov/ and http://wrmanual.dcejc.org/20 .

Certification of Health-Care Provider for Family Member's Serious Health Condition (WH-380-F):
http://www.dol.gov and http://wrmanual.dcejc.org/21 .

Certification of Qualifying Exigency For Military Family Leave (WH-384):
http://www.dol.gov/ [59]and http://wrmanual.dcejc.org/22 .

[59] If the above links do not yield the certification forms, then go to: http://webapps.dol.gov/libraryforms/ and select either "forms by title" or "forms by form number." If choosing by title, you will find the certification forms under their above-mentioned headings. If choosing by form number, the number of the certification forms are "WH 385," "WH 380-E," "WH 380-F," and "WH 384," respectively.

Use Paid Leave Concurrent with FMLA Leave

Under the FMLA, an employer's normal rules for requesting paid leave govern an employee's ability to cover a period of unpaid FMLA leave with paid leave. Under the federal FMLA, the employer may require use of paid leave before beginning unpaid leave. *See* 29 C.F.R. § 825.207(c). But under the D.C. FMLA, an employee *may* use paid leave but cannot be required to use the paid leave before beginning unpaid leave. *See* D.C. Code § 32-502(e)(2). The 12-week period begins when FMLA leave is taken, even if a portion of it is paid sick leave. Workers' compensation pay may similarly be counted against FMLA leave entitlement. In the case of public employees, accrued compensatory time may be substituted for FMLA leave in the same way as private employees may substitute sick leave time. 29 C.F.R. § 825.207. But federal employees cannot be required to substitute their paid leave for any part of their FMLA leave. *See* 5 C.F.R. § 630.1205(d).

Continuation of Health Benefits

Under both the D.C. and the federal FMLA, an employer must continue to pay for an employee's group health insurance benefits during the leave on the same terms that the employer paid for such benefits before the employee took leave. *See* D.C. Code § 32-505(b)(1); 29 U.S.C. § 2614(c)(1). The employee out on leave is still required to make any contribution to the group health plan that he or she would have made if the employee had not taken leave. *See* D.C. Code § 32-505(b)(2); 29 C.F.R. § 825.210(a).

FMLA enables an employer to recover from the employee the cost of continuing health benefits during leave if the employee does not return from leave, unless the reason for not returning is beyond the employee's control. *See* 29 U.S.C. § 2614(c)(2).

Attendance Bonuses

An employer may decline to provide a bonus award based upon "achievement of a specified goal such as hours worked, products sold, or perfect attendance" if an employee has not met the requisite threshold for the bonus due to FMLA leave. To do so, however, an employer must treat FMLA and similar non-FMLA leave the same. 29 C.F.R. § 825.215(c)(2)

Prohibited Employer Acts (including Retaliation)

Federal Law

FMLA prohibits interfering with, restraining, denying the exercise of, or denying attempts to exercise, any rights provided by the FMLA. 29 U.S.C. § 2615(a)(1), 29 C.F.R. §825.220(a)(1). FMLA also prohibits from discharging or discriminating against any person for opposing or complaining about any unlawful practice under the FMLA. 29 U.S.C. § 2615(a)(2), 29 C.F.R. § 825.220(a)(2). The language of the regulations makes clear that "interfering with" includes retaliating against an employee simply for exercising the right to take FMLA leave, not

only for opposing unlawful practices. *See* 29 C.F.R. 825.220(c) ("the Act's prohibition against 'interference' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempting to exercise FMLA rights"). However, some courts in some jurisdictions have claims for "retaliation" under the FMLA extend only to retaliation for opposing or complaining about unlawful practices, not for taking leave. *See e.g., Deloatch v. Harris Teeter, Inc*., 797 F. Supp. 2d 48, 68 (D.D.C. 2011) (granting summary judgment in employer's favor and holding that the FMLA's retaliation provision only makes it unlawful for an employer to discharge or discriminate against an individual for "opposing any practice made unlawful" under the statute, which does not include taking leave).[60]

D.C. Law

D.C. law prohibits an employer from discriminating against or discharging someone because he or she:

- "opposes any practice made unlawful" by the D.C. FMLA;
- files or attempts to file a charge based on the D.C. FMLA;
- institutes, tries to institute, or helps someone else to institute a legal proceeding based on the D.C FMLA; or
- gives any information or testimony in connection with an investigation or proceeding related to FMLA leave.

An employer is also prohibited from interfering with, restraining, or denying the exercise of or the attempted exercise of any right given by the D.C. FMLA. *See* D.C. Code § 32-507.

Pursuing FMLA Claims

Damages

Federal Law

The federal FMLA regulations state that an employee who files a case in federal district court may receive wages, employment benefits, and other compensation denied or lost to the employee as a result of the violation that are "justified by the facts of a particular case." 29 C.F.R. 825.400(c).

Additionally, for violations in which the employer has not denied the employee any tangible amount or benefit, such as when an employer illegally refuses to grant FMLA leave, the employee can receive payment for any actual monetary loss that he or she suffers as a result of the violation. This can include, for example, the cost of providing care for the family member the worker would have cared for had leave not been denied, up to an amount equal to 12 weeks

[60] Other D.C. district court opinions come to different conclusions. *See Hopkins v. Grant Thornton Internat'l*, 851 F. Supp.2d 146, 153 (D.D.C. 2012) (holding that there existed a *prima facie* case for retaliation where the plaintiff alleged he requested FMLA leave and was terminated because of his request).

of wages for the employee, plus interest.

A successful litigant may also be able to receive:

(1) liquidated damages, especially if the violation was willful;
(2) equitable relief, including reinstatement and/or promotion; and
(3) reasonable attorneys' fees and "other costs of the action from the employer in addition to the judgment awarded by the court."

29 C.F.R. § 825.400(c).

A state employee cannot sue the state entity that employs him for violating the FMLA's "self-care" provision, which requires employers to provide leave for recovery from the employee's own serious health condition. *See supra* note 1.

D.C. Law

If an employee successfully proves that his or her employer violated the D.C. FMLA, the employer is liable for any wages, salary, employment benefits, and other compensation denied or lost to the employee due to the violation, plus interest. *See* D.C. Code § 32-509(b)(6)(A). The employer may also be liable for consequential damages, which can be no larger than three times the amount paid in wages, salary, employment benefits, or other compensation denied or lost to the employee. *Id.* at § 32-509(b)(6)(B). Additional liabilities include medical expenses not covered by insurance, as well as reasonable attorneys' fees and court costs. *Id.* at § 32-509(b)(6)(B)(ii). If the fact-finder determines, however, that the employer's violation was made in good faith and the employer reasonably believed that he was not violating the law, damages can be reduced. *Id.* at § 32-509(b)(6)(C).

Enforcement Procedures

Federal Law

Under the FMLA, complaints may be made to the Wage & Hour Division, U.S. Department of Labor. *See* 29 U.S.C. § 2617(c)(1)-(2). In D.C. and parts of Maryland, the Wage and Hour Division of the DOL can be reached through the Baltimore District Office at (410) 962-6211. The Baltimore District Office address is Room 207, Appraisers Stores Building, 103 South Gay St., Baltimore, MD 21202. There is also a Hyattsville Area Office, 301-436-6767, 6525 Belcrest Road, Suite 250, Hyattsville, MD 20782. In Northern Virginia, complaints may be made to the Arlington Area Office, 703-235-1182, 2300 Clarendon Blvd., Suite 503, Arlington, VA 22201. Any office can be reached by calling 1-866-4-USWAGE (1-866-487-9243).

Workers also can file claims directly in federal district court, without any exhaustion requirement. However, if the worker has made a complaint to the DOL, the worker's right to sue terminates if the DOL files suit on the employee's behalf seeking either injunctive or monetary

relief. *See* 29 U.S.C. § 2617(a)

Statute of Limitations: Complaints must be filed **within two years** of the "last event constituting the alleged violation for which the action is brought," or within three years if the violation is willful. *See* 29 U.S.C. § 2617(c)(1)-(2). The statute of limitations is not tolled by filing with DOL.

D.C. Law

Under the D.C. law, complaints can be made to the D.C. Office of Human Rights, located at 441 4th St. NW, Suite 570 North (Metro: Judiciary Square) (202) 727-4559. The office is open Monday through Friday from 8:30 a.m. to 5 p.m. The Office may investigate, hold a hearing, and order the employer to pay the employee the damages described above in the Damages section. *See* D.C. Code § 32-509. The Office must complete its investigation and hearing within 150 days after the complaint is filed. *Id.* at § 32-509(e).

Employers also may be sued directly, by either the employee or the city, in a civil action in D.C. Superior Court, and attorneys' fees are available under the law. *See* D.C. Code § 32-509(b)(7). If a worker files a complaint with the D.C. Office of Human Rights and then decides to bring an independent civil action, the worker must withdraw the case from the D.C. Office of Human Rights prior to filing. A worker may do this if the Office of Human Rights fails to make a reasonable effort to comply with its 150-day deadline. *Id.* at § 32-509(e).

Statute of Limitations: Complaints must be filed **within one year of the violation or discovery of the violation**. *See* D.C. Code § 32-509(a); D.C. Code § 32-510.

Other Litigation Issues

Personal Liability of Employers

The federal FMLA defines employer to include individuals as employers. *See* 29 U.S.C. § 2611(4)(A); *see also* 29 C.F.R. § 825.104(d); *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002) (FMLA's language clearly allows for individual liability). Besides relying on the FMLA's language, courts have also interpreted its definition of "employer" by seeking guidance from the almost identically worded definition in the Fair Labor Standards Act, which provides for individual liability. *See Wascura v. Carver*, 169 F.3d 683, 685-87 (11th Cir. 1999) (guided by FLSA decisions; noting in dicta that individual, at least in the private sector, may be an employer within meaning of FMLA); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132 (2d Cir. 1999) (FLSA provides for personal liability; applying "economic reality" test).

A public officer sued in his individual capacity can also usually be an employer within the meaning of the FMLA. *See Darby*, 287 F.3d at 681 (holding there is no reason to distinguish employers in public sector from those in private sector."); *Lunder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001); *but see Wascura*, 169 F.3d at 686-87 (holding public officers sued in their individual capacities cannot be employers within meaning of FMLA).

Individuals are also liable as employers under the D.C. FMLA. Under the D.C. FMLA, "employer" is defined to include "any individual … who uses the services of another individual for pay in the District." D.C. Code §32-515(2).

Eleventh Amendment Immunity

States, as employers, may be sued under the FMLA **only for violations of the family-care leave provisions,** not for violations of the right to leave to care for one's own serious health condition. *See Nev. Dep't of Hum. Resources v. Hibbs*, 538 U.S. 721 (2003). The reason for the distinction is the Eleventh Amendment, which protects states' sovereign immunity from private lawsuits. Congress may abrogate that sovereign immunity if it unequivocally intends to do so and acts pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. After a number of Circuit Courts of Appeals found all or part of the FMLA's provision for private suits unconstitutional, **the Supreme Court clarified that the protections for family care are a valid exercise of Section 5 authority because they seek to remedy an extensive history of sex discrimination in states' leave policies**. Unlike the family-care provisions, however, the self-care provisions are not sufficiently related to the goals of the Fourteenth Amendment to justify abrogation of state sovereign immunity. *Id.*

This decision is unlikely to impact the rights of D.C. government employees because D.C. is not a state. *See Alden v. Maine,* 527 U.S. 706 (1999).

Undocumented Workers

Undocumented workers can file claims under the D.C. and federal FMLA laws, but a developing line of cases may limit the **back pay** remedies available to them. In March 2002, the Supreme Court held that the National Labor Relations Board erred in awarding back pay for work not performed to an undocumented immigrant, arguing that it would force employers to violate Immigration law. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *but see Escobar v. Spartan Sec. Serv.*, 281 F.Supp.2d 895, 897 (S.D. Tex.2003) (holding that *Hoffman* "did not specifically foreclose all remedies for undocumented workers under either the National Labor Relations Act or other comparable federal labor statutes"); *Flores v. Albertsons, Inc.*, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (finding *Hoffman* inapplicable to an FLSA action); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464-65 (E.D.N.Y.2002) (holding that *Hoffman* does not bar back pay under the FLSA).

Workers, however, should not be afraid to bring these claims at the DOL. The DOL entered into a memorandum of understanding with the Immigration and Naturalization Service to encourage workers to report violations of employment laws. That agreement has been adopted by the Department of Homeland Security. *See* Memorandum of Understanding between the Immigration and Naturalization Service, Department of Justice and the Employment Standards Administration, Department of Labor (Nov. 23, 1998).

Welfare to Work

Given FMLA's fairly stringent length of service requirements, and welfare to work's emphasis on quick labor force attachment, FMLA situations are probably going to be rare in welfare-to-work scenarios. One argument to be made is that the hours and months spent getting unpaid work experience should count toward the length of service requirements if the work experience placement eventually hires the welfare recipient.

Release of FMLA Claims

The FMLA regulations state that "[e]mployees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA," i.e., they cannot be asked to waive potential future FMLA violations that have not yet occurred. 29 C.F.R. § 825.220(d). An employee may, however, waive past FMLA claims, e.g., as part of a settlement negotiation process. *Id*.

FMLA – Federal Employees

Federal employees are covered by provisions nearly identical to the federal FMLA (they also receive 12 weeks of leave in a 12-month period, for example). *See* 5 U.S.C. §§ 6381-6387; 5 C.F.R. §§ 630.1201 – 630.1211. There are, however, some minor differences. For instance:

- Federal employees may not be required to substitute their paid leave for any part of their FMLA leave. See 5 C.F.R. § 630.1205(d).
- The avenues of redress are more limited. Workers can file administrative grievances with their agencies or grievances under a collective-bargaining agreement. Workers may also raise an FMLA violation as a defense to a disciplinary or adverse action (e.g., separation). Employees, however, probably cannot bring lawsuits against the federal government for FMLA violations, as courts have not found that Congress ever explicitly waived the federal government's immunity from suit with regard to the FMLA. *See Mann v. Haigh*, 120 F.3d 34, 36 (4th Cir. 1997) (noting that while Title I of the FMLA, which covers the private sector and employees of state and local governments, creates a private right of action, Title II, which governs federal employees, "omits a similar provision creating a private right of action"); *Keen v. Brown*, 958 F. Supp. 70 (D. Conn. 1998).

Note: Federal employees are not covered by the D.C. law.

Additional Leave Provisions under D.C. Law

Accrued Safe and Sick Leave Act of 2008

In D.C., employers must provide a certain amount of paid safe and sick leave to employees for illnesses and to address issues arising from stalking, domestic violence, or sexual abuse. D.C. Code § 3200, *et seq*. The leave may be used for the illness or safety of the employee or a qualified family member. The definition of "family member" is identical to the definition under the D.C. FMLA, and an "employee"[61] must work the same requisite hours within a 12-month period to qualify. D.C. Code § 3299.

The amount of leave an employee is eligible for depends on the size of the employer:

(1) "100 or more employees: at least 1 hour of paid leave for each thirty-seven (37) hours worked, not to exceed 7 days of paid leave per calendar year." D.C. Code § 3201.2;
(2) "25–99 employees: at least 1 hour of paid leave for every 43 hours worked, not to exceed 5 days of paid leave per calendar year." D.C. Code § 3201.3;
(3) "1–24 employees: at least 1 hour paid leave for every 87 hours worked, not to exceed 3 days of paid leave per calendar year." D.C. Code § 3201.4.

Paid leave may be used for the following reasons:

(1) Absence resulting from physical or mental illness, injury or medical condition of the employee;
(2) Absence resulting from obtaining professional medical diagnosis or care or preventative medical care for the employee;
(3) Absence for the purpose of caring for a family member who has any of the conditions or needs for diagnosis or care described in (1) or (2);
(4) Absence resulting from employee or employee's family member being a victim of stalking, domestic violence, or sexual abuse and the absence is for the purposes of:

a. Seeking medical attention to treat or recover from physical or psychological injury or disability caused by the stalking, domestic violence, or sexual abuse;
b. Obtaining services from a victim services organization;
c. Obtaining psychological or other counseling services;
d. Temporary or permanent relocation;
e. Taking legal action; or
f. Taking other action that could reasonably be determined to enhance physical, psychological, or economic health or safety of employee, employee's family

[61] Independent contractors, students, and health-care workers who choose to participate in a premium pay program, and restaurant wait staff who work for a combination of wages and tips do not qualify as "employees" for the purposes of this Act.

member or the safety of those who work or associate with employee.

D.C. Code §§ 32-3203.1, 32-3203.2.

Paid leave guaranteed by the Accrued Safe and Sick Leave Act does carry over from year to year, but an employee is not entitled to cash out such leave at the termination of employment. D.C. Code §§ 32-3204.2, 32-3204.3.

Employees must give 10 days' advance notice in writing or, if employee becomes aware of need less than 10 days before the date needed, on the date that such a need becomes known. D.C. Code §§ 32-3206.1, 32-3206.2. An employer may require reasonable certification for granting paid leave for three or more consecutive days. D.C. Code §§ 32-3208.1-32-3208.3.

Complaints of violations of these provisions must be made to the Department of Employment Services, Office of Wage-Hour, within 60 days after the event. D.C. Code §§ 32-3216.1-3216.8

Earned Sick and Safe Leave Amendment Act

In December of 2013, the D.C. Council passed the Earned Sick and Safe Leave Amendment Act, which expanded the coverage and strengthened the protections of the Accrued Sick and Safe Leave Act of 2008. *See* D.C. Code §32-131.01 et seq. This Act was passed subject to appropriation and it is expected that it will go into effect on October 1, 2014.

The Act will extend paid sick days to tipped restaurant and bar workers at a rate of one hour of sick and safe leave earned for every 43 hours worked, up to five (5) days per year. All employees, regardless of industry, will be entitled to begin accruing sick and safe days from the first day of their employment and may begin to access paid leave after 90 days of service. The statute of limitations will be extended to three (3) years. Further, the statute of limitations will be tolled by the filing of an administrative complaint at the D.C. Office of Wage Hour.

Employers who violate this law "shall pay $500 in additional damages to the employee for each accrued day denied," and shall be subject to additional civil penalties. Attorneys' fees are available to the prevailing plaintiff. Finally, the Department of Employment Services may order employers to pay for the costs of enforcement of claims filed with its office.

Parental Leave

In D.C., employers must give up to 24 hours of unpaid parental leave within a 12-month period for "parents" to attend school-related events of their "children." D.C. Code § 32-1202. The event must include the child directly as a participant or subject, not merely as a spectator. *Id.* at § 32-1201(3).

The word "**parent**" includes natural parent, person who has legal custody, guardian, aunt, uncle or grandparent, or the spouse of any person who qualifies for parental leave as a parent.

See D.C. Code § 32-1201(2). The word "**child**" includes anyone younger 21, full-time college students younger than 23, and those who are disabled and dependent on the parent.

Workers must give 10 days' advance notice, unless such notice is impossible. *See* D.C. Code § 32-1202(d). The employer may deny the leave only if it would disrupt business and make the achievement of production or service delivery unusually difficult. *Id.* at § 32-1202(c).

The parental leave provision can be **enforced** either by filing administrative charges with the D.C. Office of Human Rights or by filing a civil action in D.C. Superior Court. In either case, the **statute of limitations is one year**. *See* D.C. Code §§ 32-1204; 32-1205. Both avenues make available the same remedies, which include pay and benefits lost due to the employer's violation, plus interest, and consequential damages not to exceed three times the amount of wages and benefits lost, medical expenses not covered while employee did not have health insurance, and attorneys' fees. *Id.* at § 32-1204(b)(6); *see also* D.C. Code § 32-1205(c). Regulations are published at 44 D.C. Register 5091-5099 (Sep. 17, 1997).

Emancipation Day

All workers in D.C. are entitled to a day off on District of Columbia's Emancipation Day, April 16, provided that they give their employers 10 days' notice. This leave is unpaid unless the employee opts to use his or her paid vacation time. *See* D.C. Code § 32-1202.

Funeral Leave for D.C. Government Employees

A District government employee is entitled to funeral leave or annual leave "to make arrangements for or attend a funeral or memorial service for a family member." D.C. Code § 32-705(c).

Leave Bank for D.C. Government Employees

A district government employee is entitled to donate and withdraw annual leave time from the D.C. government's annual leave bank. *See* D.C. Code § 1-612.05.

To withdraw leave, a government employee, or another employee acting on his or her behalf, if the employee wanting leave is incapable of requesting it, must submit a **written, notarized application to the employee's personnel authority**. *See* D.C. Code § 1-612.07. An employee wishing to donate leave must also submit a written request, and may, if he or she chooses, designate the employee who is to receive the leave. *Id.* at § 1-612.06. There are specific rules that govern how much leave each employee may donate. *Id.*

To be accepted, the application requesting leave should indicate that:

(1) A medical emergency has necessitated the leave request;
(2) The medical emergency will result in an absence of at least 10 workdays;

(3) The employee requesting leave has previously donated a minimum of four hours of annual leave to the annual leave bank that year; and

(4) The employee requesting leave does not have accrued paid leave sufficient to cover the expected period of absence from work.

See D.C. Code § 1-612.08.

FMLA – A Checklist For Federal And D.C. Law

The checklist below is a shorthand method for helping you to initially evaluate the most common eligibility issues under the D.C. and federal FMLA. Using this checklist should not substitute for a more thorough analysis under the statute and regulations before filing suit. *See* 29 U.S.C. § 2601 *et seq*., 29 C.F.R. § 825.100 *et seq*.; 5 U.S.C. § 6381, 29 C.F.R. § 630.100 (federal employees); D.C. Code § 32-501 *et seq*., 4 DCMR § 1600 (D.C. law).

1. Is the Employer Covered? (Any One)

Federal Law

_____ Public employer

_____ 50 or more employees per workday for 20 calendar weeks in current or preceding year at employee's worksite or within 75 mile radius of employee's worksite

_____ Secondary employer jointly employing FMLA-covered employees

D.C. Law

_____ D.C. government

_____ 20 or more employees within the District of Columbia

2. Is the Employee Eligible? (All Three Required)

Federal Law

_____ Employer employs 50 or more workers within 75 miles of worker's worksite

_____ Employee worked at least 12 months for the employer in question

_____ Employee worked at least 1,250 hours for the employer in the previous 12 months

D.C. Law

_____ Employer employs 20 or more people in the District of Columbia

_____ Employee worked at least 12 months for the employer

_____ Employee worked at least 1,000 hours for the employer in the previous 12 months

3. Is it FMLA-protected Leave? (Any One)

Federal Law

_____ New child (birth or adoption)

_____ Caring for the serious health condition of son, daughter, spouse or parent

_____ Healing from employee's own serious health condition renders him or her unable to perform functions of position

_____ Caring for serious injury or illness of service member who is a son, daughter, spouse,

parent, or next of kin

_____ Exigency related to call to active duty or active-duty status of covered military member who is a son, daughter, spouse or parent

D.C. Law

_____ New child (birth, adoption or foster care placement)

_____ Caring for the serious health condition of a person related by blood, legal custody or marriage, or person with whom the employee has shared a mutual residence in the last year and with whom the employee maintains a committed relationship

_____ Employee's own serious health condition renders him or her unable to perform functions of position

4. Is it a Serious Health Condition (Federal & D.C. Law)? (Any One)

Federal Law

_____ Inpatient care in hospital, hospice or residential medical facility

_____ More than three consecutive calendar days of incapacity and either treatment on at least two occasions by health-care provider or one occasion of treatment by health-care provider with continuing treatment under his or her supervision

_____ Incapacity for pregnancy or prenatal care

_____ Incapacity for serious chronic health condition (e.g. asthma, diabetes, epilepsy)

_____ Incapacity for long-term untreatable illness (e.g. Alzheimer's, severe stroke, terminal illness)

_____ Incapacity due to multiple treatments for condition that would require more than three days absence if left untreated (e.g. cancer treatments, restorative surgery after accident, dialysis)

_____ Substance abuse treatment

D.C. Law

Use above checklist, plus the following:

_____ Continuing treatment by health-care provider or other competent individual

5. Has the Employer Violated FMLA (Federal & D.C. Law)? (Possible Violations)

_____ Has employer wrongfully counted FMLA-qualified absences under progressive absenteeism policy?

_____ Has employer miscalculated eligibility for FMLA leave by:

____ Failing to designate a 12-month leave period?

____ Failing to give notice of applicability of Act within two business days?

_____ Has employer failed to post required FMLA notices?

_____ Has employer failed to maintain health benefits during leave?

_____ Has employer harassed an employee for requesting FMLA leave or taking FMLA leave?

_____ Has employer denied employee's request for FMLA-qualifying leave?

_____ Has employer fired employee while on FMLA leave or upon return from FMLA leave?

_____ Has employer fired or discriminated against employee for asserting her rights under FMLA, including for having opposed violations of the FMLA or participated in an investigation of FMLA violations?

_____ Has employer fired, harassed, or discriminated against an employee for taking or attempting to take FMLA leave?

The above checklist is adapted from a checklist prepared by Sharon Dietrich of Community Legal Services in Philadelphia, Pa. Do not use this checklist as a substitute for a more thorough analysis under the statute, regulations, and current case law.

FMLA – Maryland Law

Private Employers – Birth or Adoption

Employers who provide leave with pay to a worker following the birth of a worker's child must provide the same leave with pay to a worker when a child is placed with the worker for adoption. *See* Md. Code Ann. LAB. & EMPL. §§ 3-802(a)(2), (d) (effective June 1, 2002). For purposes of this section, an "employer" is a person engaged in a business, industry, profession, trade or other enterprise in Maryland, and includes those, such as employment agencies, who act directly or indirectly in the interest of another employer with an employee. *Id.* at § 3-802(a)(3).

State Employees

In 1993, Maryland began providing limited unpaid family and medical leave for state employees. *See* Md. Code Ann. STATE PERS. & PENS. § 9-1001 (2002) (calling for regulations to implement the federal FMLA for state employees). These regulations are scattered throughout the Code of Maryland Regulations in the sections covering various state agencies. *See, e.g.*, Md. Regs. Code, Title 11 § 02.13 (FMLA regulations for Maryland Department of Transportation employees); Md. Regs. Code, Title 17 § 04.11.24(I) ("[For employees of the Department of Budget and Management] Family and Medical leave may be used in accordance with the provisions of the Family and Medical Leave Act of 1993, the implementing federal regulations, and the regulations, policies, and guidelines promulgated by the Secretary.").

As of 1996, a Maryland public employee who is primarily responsible for the care and nurturing of a child may use, without certification of illness or disability, as many as 30 days of accrued sick leave to care for a child during the period immediately following the birth of the child or the placement of the child with the worker for adoption. *See* Md. Code Ann. STATE PERS. & PENS. § 9-505 (a) (1) & (2) (2002).

If the parents of the child are both Maryland public employees and both are responsible for the care and nurturing of their child, they may use together, without certification of illness or disability, as many as 40 days, not to exceed 30 days for one employee, of accrued sick leave to care for the child during the period immediately following the birth of the child or the placement of the child with the worker(s) for adoption. *Id.* at § 9-505 (b) (1) & (2) (2002).

State employees using accrued sick leave for the birth or adoption of a child under these provisions can receive payment for that leave only if they provide the information to their

supervisors that is required by the federal FMLA guidelines. *Id.* at § 9-505(c).

FMLA – Virginia Law

Public employees in Virginia (except those who opt out of participation in the Sickness and Disability Program) are entitled to paid family and personal leave for "absences due to a short-term incident, illness or death of a family member, or other personal need." VA. CODE ANN. §§ 51.1-1107 through -1108. The leave can be taken at the sole discretion of the employee, so long as he gives his supervisor reasonable notice and no "emergency or exigent circumstances" exist such that the absence would "materially impede" the agency's ability to perform a critical function. *Id.* at § 51.1-1108. The number of hours per year an employee may use depends on how long he or she has been employed. *Id.* at § 51.1-1107.