

### UPDATED FAMILY AND MEDICAL LEAVE ACT



### TABLE OF CONTENTS

#### FMLA

١.	Introduction	- 1
II.	What makes an Employee Eligible?	- 1
III.	Entitlement to FMLA	- 2
IV.	How much Leave is an Employee Entitled to Take?	- 2
V.	What are the Obligations of Employees and Employers	- 3
VI.	Certification/APWU Forms	- 8
VII.	Definitions	11
VIII.	Return to Duty	14
IX.	Remedies for Violation of the FMLA	15
Х.	Miscellaneous	16
XI.	Grievance and Arbitration/Arbitration Awards	16
XII.	Privacy Issues concerning FMLA Documentation	24

#### APPENDICES

WH Publication 1420 - Your Rights Under the FMLA	27
Joint APWU & USPS FMLA Q&A	28
Publication 71	
Form 3971	
DOL FMLA Fact Sheet	
DOL Form WH-380	
DOL Form WH-381	
ELM Section 515	
DOL Letter to Burrus/Light Duty	
DOL Opinion Letter/Substitution of Paid Leave	
DOL Opinion Letter/Designation of Leave	67
Cagnoli Letter to Burrus, 2/7/94, No Layoff Protection	68
Burrus Letter to Cagnoli with Q & A Response	69
Cagnoli Letter to Burrus with Q & A Response	73
Cagnoli to Burrus Letter Leave Sharing Program	81
Burrus Letter to Vegliante on Restricted Medical Information	82
Vegliante Response to Burrus Letter on Medical Information	84
DOL letter concerning Benefits	87
Burrus Letter to Rodriguez on Documentation for Birth of a Child	88
Rodriguez Response to Burrus Letter on Documentation for Birth of a Child	89
Burrus Letter to Vegliante on Steward time	90
Vegliante Response to Burrus Letter on Steward time	92
Vegliante Letter to Burrus on Use of Dependent Care MOU and FMLA	93
Vegliante Letter to Burrus Clarifying Issues of LWOP and Related Issues	95
Vegliante Letter to Burrus on Medical File Maintenance	98
Burrus Letter to Vegliante Dated August 31, 2001 Requesting	
Position on a number of Issues	99
Tulino Response to Burrus August 31, 2001 Letter	
APWU Paper Union Business and 1250 Requirement	103
APWU position paper on 21 day absences and return to duty	105
APWU Appeal to Arbitration / Publication 71	
Return to Duty/Within one day	109
MOU on Use of Paid Leave and LWOP	

Burrus Letter to Vegliante concerning APWU Forms	- 112
Baker Letter Responding to Burrus Letter on APWU Forms	- 113
Burrus Letter to Tulino concerning the 1250 hour requirement	- 114
Tulino Letter to Burrus concerning the 1250 hour requirement	- 115
Burrus Letter to Vegliante on Donated Leave and LWOP	- 116
Sgro Letter to Burrus on Donated Leave and LWOP	- 117
Sgro Letter to Burrus on Recertification	- 118
Sgro Letter to Burrus on Contact with Physicians	- 119
Step 4 Sign-off on Back Pay after Arbitrator's Award	- 121
Burrus Letter to Vegliante on Contact with Physician	- 125
Step 4 Settlement on Union's Right to Medical Documentation	- 127
Burrus Letter to Rodriguez on 2 <sup>nd</sup> and 3 <sup>rd</sup> Opinions	- 129
Tulino Response to Burrus on 2 <sup>nd</sup> and 3 <sup>rd</sup> Opinions	- 130
Burrus letter to Tulino on FFD on Return to Duty	- 131
Tulino Response to Burrus Letter on FFD and Return to Duty	- 132
USPS Memo to Field on Return to Work Protocol	- 134
USPS Memo to Field on 1250 Hour Eligibility Requirement	- 136
DOL Opinion Letter on 1250 Hour Eligibility Requirement	- 138
Burrus Letter to Vegliante on Joint Employment	- 143
Tulino Letter to Burrus on Joint Employment	- 146
APWU Forms Accepted by USPS	- 147
APWU Forms 6 and 7- USPS Verification of Veteran's Treatment	
and Management Request for Clarification of Medical Certification	
Filled out Example APWU Forms	
Reid Letter to USPS Field Managers on Return to Duty Protocal	- 179

#### FAMILY AND MEDICAL LEAVE ACT

#### I. INTRODUCTION

In January 1997 Industrial Relations put out a CBR (Issue No, (97-01) on the Family and Medical Leave Act. At that time the Act was still young and we did not have much guidance as to how courts would be ruling on various issues. With an additional five years of court decisions, DOL opinion rulings and a better understanding with the Postal Service as to application of the Act, we are better able to present a new revised FMLA CBR. Our intent with this CBR is to make it more of a working tool for union representatives in advising members of their FMLA rights and protecting those rights granted under law. The first part of this issue of the CBR will give an overview of the law, case law along with DOL regulations and opinions. We shall also attempt to discuss the areas where the APWU and USPS presently have disagreements including any National Disputes and court cases that have been filed dealing with FMLA related issues.

NOTE -- This CBR should be used in conjunction with the Family and Medical Leave Act (29 USC 2602 et seq.) and the regulations issued by the Department of Labor (29 CFR 825 et seq.). Due to the length of the above documents we are unable to publish them in this CBR; however, the law and regulations are available in any Law Library and are also available on the DOL web cite at www.dol.gov under the Wage and Hour Division.

# II. What makes an employee eligible for FMLA protection?

Any employee who has been employed by the Postal Service for at least twelve months and has worked a minimum of 1250 hours during the 12 month period immediately preceding the date the leave is to begin is eligible for FMLA protection. (TEs are included if they have worked over a year. However, it should be noted that the fact that a Transitional employee may be on Family Medical Leave does not effect the terms of the appointment.) In order to determine whether an employee meets the specified hours of service, the FMLA applies the legal principles established for determining hours worked for payment of overtime under the Fair Labor Standards Act (herinafter "FLSA"), 29 USC 201 et seq. There is no difference between overtime and non-overtime hours when calculating the 1250 hour requirement. The Postal Service has agreed that Union steward duty time does count toward the 1250 hour calculation. (See p. 92) however currently we have a disagreement with the Postal Service as to whether Union Business Time counts toward the 1250 hour work requirement. (See Position Paper page 106) Also other types of leave; annual, sick, LWOP and court leave, are not included in the 1250 hours. (See Robbins v. Bureau of National Affairs, 869 F.Supp. 18 (D.D.C. 1995)). OWCP time and military leave do not count toward the 1250 hours of service since they are not considered time worked under the FLSA. The comments section 825.110 of the FMLA regulations provide that "hours worked" does not include time

paid but time "worked." The comments cite the FLSA regulations 29 CFR 785 as the controlling regulations. The APWU and the Postal Service have agreed that in a case where an employee who has been either terminated or on a long term suspension and who has been reinstated with full back pay and benefits will have this time counted as work hours for the 1250 workhour eligibility requirement. (See Appendix, p. 120, Valenti-Burrus sign-off dated January 23, 2001, case # J94C1JC 97069215, Carol Stream, IL)

Another issue concerning the 1250 hour requirement is whether an employee who has a chronic condition must meet the 1250 hour requirement each time he/she is absent because of the condition. The APWU has taken the position that once an employee has submitted all the proper documentation and the Postal Service has accepted the condition as an FMLA-covered condition the employee should not be subjected to meeting the 1250 hour requirement each time he/she is absent for that condition during the leave year. There has been one district court decision in Barron v. Runyon 205 F.3d 1332 (4th Cir., Feb. 28, 2000) that has agreed with this position. Recently, the Postal Service has agreed that this is a proper interpretation. Once an employee meets

NOTE -- Example: If an employee certifies his/her condition in January and at that point meets the 1250 hour requirement any subsequent absences related to that condition during the leave year will be protected even if the employee falls below the 1250 requirement, for that same condition. the 1250 hour eligibility requirement in a leave year, then the employee will not be required to meet the 1250 hour requirement for subsequent absences during that leave year. However, if the employee suffers from multiple conditions then the employee will have to meet the 1250 hour requirement for each condition. (See Appendix, page 136 USPS Memo to Managers, Human Resources, dated Nov. 14, 2000)

#### **III. Entitlement to FMLA**

An employee is allowed FMLA protection for the birth of the employee's son or daughter, and to care for the newborn child. The FMLA also covers placement with the employee of a son or daughter for adoption or foster care, and leave to care for the newly placed child. Entitlement expires one year from the birth or placement. (See 29 CFR 825.201) In case of birth or placement of a child, intermittent leave or leave on a reduced schedule may be taken only if the employer agrees. (See 29 CFR 825.203(b)) In addition, an employee is permitted FMLA protection to care for the employee's spouse, son or daughter, or parent with a serious health condition. Moreover, the FMLA covers a serious health condition that makes the employee unable to perform one or more of the essential functions of the job. (See 29 CFR 825.200)

## IV. How much leave is an employee entitled to take?

An employee is entitled to a total of 12 weeks of leave or up to 480 hours within a leave year. Part time employees with schedules of less than 40 hours are entitled to 12 times the hours normally scheduled in their workweek (average it out). (See 29 CFR 825.205(b)). If an employee takes leave on a reduced or intermittent basis, only the amount of leave actually

NOTE -- The employer is permitted to select from various methods for determining the 12 month period in which the 12 weeks of leave entitlement occurs. The Postal Service has chosen the leave year (See 29 CFR 825.200(b))

used can be counted toward the 12 weeks of leave to which the employee is entitled. (See 29 CFR 825.205a) Once the 12 weeks are exhausted, additional absences would be subject to the normal leave policies established by the Postal Service. See Cehrs v. Northeast Ohio Alzheimer Research Center, 959 F.Supp. 414 (N.D. Ohio, March 7, 1997) aff'd No. 97-3388 (6<sup>th</sup> Cir., 1998).

The FMLA specifically addresses the issue of spouses who work for the same employer. The regulations allow up to twelve weeks for use by both parents combined for the birth of a child. (See 825.201(c)) However, the Postal Service allows both parents to be able to take twelve weeks each. The law and regulations allow for up to 12 weeks of unpaid leave.

Contractually, sick or annual leave may be used in conjunction with LWOP or an employee may choose leave without pay at their option. (See memo dated April 20,1999, p.110) Under the 1998-2000 Collective Bargaining

Agreement, the APWU and USPS agreed that an employee may also use up to 80 hours of sick leave to care for a family member with a serious health condition or for any condition that the employee himself/herself would be able to use sick leave for. (See Collective **Bargaining Agreement Dependent** Care Memo). There has been some confusion as to whether FMLA protection is given to time covered under the Dependent Care Memo. The answer to this is that it depends. If a employee is needed to care for a spouse or a child with a serious health condition they will be able to use up to 80 hours of sick leave under the terms of the MOU. This leave will also be protected under the FMLA. If the condition is not a serious health condition, then the sick leave absence will fall under the normal leave policies and will not be protected under the FMLA. For instance if a child is sick with a cold and the parent is absent due to this condition, the parent can use sick leave; that leave however, will not be protected under the FMLA.

# V. What are the obligations of employees and employers?

#### A. Employee Obligations

In order to be protected under the FMLA an employee must request the leave (for placement or birth of a child, serious illness of the employee or a family member). The leave cannot be denied if it is for an absence for an FMLA-covered condition that is medically necessary. In order to request the leave, you should fill out a Form 3971. (See attached 3971, p. 45) If it is a foreseeable absence, the employee should give 30 days advance notice (a district court has stated that an employer can deny FMLA protection if the employee has not given advance notice for a forseeable absence). (29 CFR 825.302) If it is an unforeseeable absence, the employee should give notice as soon as both possible and practicable. (See 29 CFR 825.302(b))

When requesting the leave, the employee should state the reason for the absence; however, courts have held that there is no need to specifically request FMLA protection (Manuel v. Westlake Polymers Corp. 66 F. 3d 758 (5th Circuit, 1995)). However, it would be in the employee's interest to clearly tell the supervisor that the absence is due to a serious health condition. What is required by law and regulation is that the employee gives enough information so that the employer can make a determination as to whether to designate the leave as FMLA. If an employee only states that he or she is sick, there is not enough information for the employer to determine whether there is a FMLA covered condition. (See Carter v. Ford Motor Co., 121 F.3d 1146 (8th Circuit, July 28, 1997)) If an employer deems the information to be incomplete to make a determination for FMLA designation and it may request more information. The employee must provide the information within the time frame requested by the employer (which must allow at least 15 days after the employers request) or as soon as reasonably possible under the particular facts and circumstances. (825.311(b)) An employee can provide the relevant information on the APWU forms, WH-380 or any other documents as long as

he or she provides enough information for the employer to make a determination as to whether the absence is due to a covered condition. The Postal Service has accepted the APWU forms as long as they are properly and completely filled out. (See attached p.147) Unfortunately, this is

NOTE -- These example forms are for general information and should be used as a guide. They have not been approved by the Postal Service.

where there has been some disagreement with the Postal Service. In order to be properly submitted, the form must be completely filled out with all material facts. This does not mean giving medical information that includes a diagnosis and prognosis. Employees should remind doctors not to put diagnosis and prognosis information on these forms. Attached in the appendix are some examples of properly completed forms. (See page 163) When an employee brings in a completely filled out APWU form or DOL WH-380 form, a manager should not deny the FMLA protection. If a form is not completed fully, management can require the employee to go back to his or her physician to have the form completely filled out at the employee's expense.

The employee can give verbal notice over the phone of the absence due to a covered condition and at that point management has certain obligations; i.e. designate the leave as FMLA or not and give the employee proper written notification of his or her rights under the FMLA, i.e., Publication 71. If an employee does not initially give enough information for a FMLA qualifying absence, the employee can upon return to duty request the leave to be designated FMLA by giving enough information or documentation to management in order for them to designate the absence as FMLA.

#### **B.** Employer Obligations

#### 1. Designate the leave

The employer must designate the leave. If a request is made by phone or by someone other than the employee, the person or supervisor who receives the request initiates the PS 3971 and records the information provided. The supervisor then must indicate whether the request is: 1) approved; 2) approved, FMLA, pending the specified documentation; or 3) disapproved, with the reason for the disapproval. A copy of the form is signed by the supervisor and is returned to the employee. For requests approved as FMLA, even if approval is pending the specified documentation, a Publication 71 is given to the employee with the officially signed PS 3971. This must be done within two days and in writing by management. (See 825.110(d)) It

Note -- the APWU has filed a National Level Dispute concerning the new Publication 71 (see attached dispute p. 104) should be noted that if the Postal Service does not meet its posting and notice obligations within the required time frames, it can correct its omission at a later date. For example, if the Postal Service determines that an employee is eligible for FMLA protection and at a later date learns that the employee had not met the 1250 hour requirement, the Postal Service can correct its initial determination by issuing the employee a written notification that he or she is no longer considered on FMLA and may require the employee to return to work. Circuit courts were split on the issue of whether management's failure to inform the employee of his ineligibility automatically entitles the employee to the FMLA protection. The U.S. Supreme Court recently struck down a Department of Labor rule providing that if an employer does not designate leave as FMLA leave, the leave taken does not count against an employee's 12week FMLA entitlement. The majority decision was rendered by five out of nine justices, with four justices dissenting from the ruling.

The decision was issued in a case involving an employee who was discharged following her failure to return to work after 30 weeks due to cancer treatments. Though her employer provided her with seven months of unpaid sick leave, it did not notify the employee that 12 weeks of the absence would count as FMLA leave. The employee filed a suit in the U.S. District Court for the Eastern District of Arkansas and asserted that her employer violated DOL 's 110(d) regulation at 29 CFR 825(a) which provides that if an employer does not Note -- There is a disagreement at the National Level as to second opinions. The USPS believes that if the second opinion differs from the first, the employee must request a third opinion or the second opinion will control. The APWU believes that the third opinion is required and the second opinion cannot be unilaterally implemented.

designate leave as FMLA leave in a written notice, the leave taken does not count against an employee's FMLA entitlement. She argued that she thus was entitled to 12 more weeks of leave and sought reinstatement, back pay, and other relief. The federal district court granted a summary judgment in favor of the company on the basis that the DOL regulation conflicted with the FMLA statute and was invalid because it would require the employer to grant the employee more than 12 weeks of FMLA leave in one year. The Court of Appeals for the Eighth Circuit affirmed this decision. Thereafter, the employee requested that the U.S. Supreme Court review the decision.

The Court said that the Act's provision in 29 USC Section 2615 prohibits employers from interfering with, restraining, or denying an employee's exercise of his or her FMLA rights and Section 2617 provides that an employer is liable only for compensation and benefits lost by reason of the violation, for other monetary losses sustained as a direct result of the violation and for appropriate equitable relief.

Section 2617 therefore "provides no

relief unless the employee has been prejudiced" and "[t]he remedy is tailored to the harm suffered," according to the Court. The Supreme Court then stated that "[t]he challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice." Moreover, according to the Court majority, it "punishes an employer's failure to provide timely notice of the FMLA designation by denying it any credit for leave granted before the notice" and this "penalty is unconnected to any prejudice the employee might have suffered from the employer's lapse."

The Court further reasoned that "[t]o the extent the Secretary's penalty will have no substantial relation to the harm suffered by the employee in the run of cases, it also amends the FMLA's most fundamental substantive guarantee the employee's entitlement to `a total of 12 workweeks of leave during any 12-month period.'" (*Ragsdale v. Wolverine World Wide, Inc., U.S. Supreme Court, 122 S. Ct. 1155, 3/19/2002*)

Management's obligation with regard to notice to the employee of their FMLA rights and obligations attaches only when it is provided sufficient information that the employee's absence is due to a serious health condition. If an employee is absent due to a serious health condition, management can designate the leave even if the employee does not request the leave to be counted as Family Medical Leave and this time is counted against the 12 week allotment. (See Daniel Sweeney, opinion letter dated July 21, 1995, page 69)

If the health care provider's note or APWU form is incomplete, management can request the employee to provide the required information in which case it must put a notation on the 3971 as FMLA pending further documentation and specify what information is necessary in order for the certification to be complete. This will be at the employee's cost. If management does not accept the employee's physician's medical analysis, it has the right to request a second opinion at the employer's cost or with the employee's permission have a Postal Service physician contact the employee's physician for the purposes of clarification and authenticity of the medical certification. (29 CFR 825.307(a)). Management cannot request more information than what is requested for on the WH-380 or APWU Forms. If something is omitted that is required on these forms, management does have a right to request completed required information. (See attached example forms, see page 166)

Management must also approve or disapprove the employee's request for leave, whether the leave is sick leave, annual leave or LWOP, using the appropriate Postal Leave Policies and applicable Labor Agreements. Under the DOL Rules and Regulations, Section 825.207(a), an employer may require an employee to substitute accrued paid leave as FMLA leave. However, the APWU and Postal Service have agreed that an employee is entitled to use LWOP at his/her option or LWOP in conjunction with annual or sick leave. (See memo page 110)

It should be noted that step deferral and layoff protection could be affected by LWOP usage in conjunction with FMLA. An employee needs to understand that when his or her annual leave balance is insufficient to cover an absence, the above may be affected.

When an employee is on extended LWOP, the employer is not required to approve paid leave immediately before or after a holiday if the paid leave request is submitted for the sole purpose of qualifying the employee for holi day pay. Management may not deny the use of leave and LWOP if the employee's no layoff protection is in jeopardy. In cases where an employee's no layoff protection is affected it can be manually restored. (See page 71)

# 2. Notify the employee of FMLA rights

Management's second obligation is to notify the employee of his or her rights under the FMLA by providing a copy of Publication 71 and a signed Form 3971. Currently the Postal Service has revised its Publication 71. (See page 41). The APWU has challenged this at the national level as violating Article 19 of the Collective Bargaining Agreement and has also filed a lawsuit which addressess the return to duty aspects of the form. In brief, the USPS believes that its Handbooks and Manuals control return to duty, and the APWU contends that the requirements under the USPS Handbook and Manuals impose a more stringent standard than the requirements under law and therefore cannot be applied. (See also Position Paper on 21 Day Absence, p.108)

Additionally, the Postal Service has

the obligation to post and keep posted in conspicuous places on the premises of the employer, where notices are normally posted, a summary of the pertinent provisions of the Act. The DOL WH Publication 1420 should be posted and if it is not, the Postal Service could be fined \$100 a day for not posting. However, the fact that this notice is posted is not sufficient notice of FMLA rights when an employee requests FMLA leave. Management must, at a minimum, provide a Publication 71 and designate the leave on Form 3971 to an employee upon his or her request for FMLA leave.

#### 3. Denial or Delay of FMLA

The employer may deny or delay the designation of FMLA for a number of reasons: 1) Untimely advance notice for a foreseeable absence; 2) Failure to provide certification for the absence; 3) Failure to provide certification for return to work; 4) An employee who obtains or requests FMLA under fraudulent circumstances. (An example is a postmaster contacting an employee's physician without his or her consent and learning that the physician never filled out the documents. Technically a violation of the Act has occurred, however, the regulations also state that an employee will not benefit from any fraud). (29 CFR 825.307(g)). See also, Baultuskonis v. U.S. Airways, Inc., 60 F.Supp. 2d 445 (E.D. Pa 1999) (altered doctor's note)

#### VI. CERTIFICATION/APWU Forms

Medical certification must include mandatory information to be found

acceptable under the FMLA regulations (29 CFR 825.306):

- The certification must include a statement which indicates what part of the definition of "serious health condition" applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.
- 2. The certification should state the approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity. It should state whether it will be necessary for the employee to take leave on an intermittent or reduced work schedule basis. The regulations also state that if the condition is pregnancy or a chronic condition, it needs to be noted whether the patient is presently incapacitated and the likely duration and frequency of the episodes of incapacity.
- If additional treatments are necessary, there should be an estimate of the probable number of treatments. If there is a regimen of continuing treatment under the supervision of a health care provider, a general description of the regimen should be provided.
- If the leave is because of the employee's own health condition, the certification should include whether the employee is unable to perform work of any kind.

#### A. APWU Form #1 - Employee Certification of his/her own serious illness - FMLA

For leave taken because of the serious health condition of the employee, or a qualifying family member under some circumstances, an employee may self-certify on APWU Form 1 for a condition that is chronic and will need intermittent leave. If an employee has a chronic condition and has documented the condition with the Postal Service, the employee can self certify for absences of less than three days. This form should accompany Form 4 - Notice for need for intermittent leave or for a reduced work schedule. The employee needs to have APWU Form 2 or other sufficient documentation which was previously provided and is on record and supports the need for intermittent leave due to a serious health condition. The form should be filled out with the following information: 1) The day on which the condition commenced; 2) Probable duration of condition; 3) The appropriate medical facts (This does not mean diagnosis or prognosis); 4) That the employee is unable to perform the functions of his/her position; or 5) In the case of a need to care for a family member, a statement that the employee is needed to care for or to provide emotional support to a family member.

#### B. HEALTH CARE PROVIDER CERTIFICATION - APWU Forms 2 and 3

APWU Form 2 which is filled out by the physician must certify that the

employee is unable to perform one or more of the functions of the employee's job. For a family member's "serious health condition", the physician's statement should show that the family member has a serious health condition. (Form 3, See page 166) This would include physical and psychological care or comfort which is covered under this section. (29 CFR 825.116) For intermittent or a reduced leave schedule - there must be a medical necessity for such leave. If an employee has a chronic condition where flare ups could occur, the employee should get this on record. (APWU Form 4) Management should accept an employee's selfcertification for intermittent leave without requiring him or her to provide more medical documentation.

#### C. INTERMITTENT LEAVE

Employees are entitled to intermittent leave under certain conditions. It may be taken for the birth of a child and for the permanent placement of a child for adoption or foster care if the employee and employer agree to such a schedule. (29 CFR 825.203) There is no requirement that management grant this leave intermittently. However, leave cannot be denied intermittently or on a reduced schedule when "medically necessary" (29 CFR 825.203 and 825.117) for an employee's own serious health condition or family member's serious health condition.

An employer may request that an employee support an intermittent leave request with certification from the employee's health care provider or the employee's family member's health

care provider of the medical necessity of the intermittent leave and the expected duration. At one point, management contended that this intermittent leave would need to be supported for each absence. In a letter from the Postal Service to APWU, the Postal Service addressed the need to submit documentation for a chronic condition. (See page 79) The Service stated that "an employee is not required to submit medical documentation for each absence related to a chronic condition if (a) the original documentation gives an estimate of the probable number of and the interval between episodes of incapacity (b) the circumstances are unchanged, and (c) the supervisor does not have information that casts doubt upon the employee's stated reason for the absence." (If there is doubt, management should send the employee for a second opinion at management's cost.) It should also be noted that management should not request a clarification at this point in time. It should have requested it when the documentation was first submitted.

If an employee takes FMLA leave for the birth of a child beginning in October and carries it through to the end of the year, the employee will be eligible and cannot be denied twelve weeks of FMLA leave beginning January 1 as long as the employee does not return for any period of time. Once an employee returns the employee remains eligible for FMLA leave, but a request must be approved by management since this leave will now be considered intermittent leave.

#### Certification for Intermittent Leave: (FORM 4)

When requesting intermittent leave the employee should give management the following information: 1) dates of treatment, duration of treatments; 2) statement of medical necessity for the intermittent leave or reduced leave schedule; and 3) expected duration of intermittent leave or reduced leave schedule. When requesting intermittent leave or leave on a reduced schedule for care of a family member, a statement is needed from the health care provider that the employee's intermittent leave or reduced leave schedule is necessary for the care or assistance in the family member's recovery. Intermittent leave or leave on a reduced schedule may be denied if not medically necessary.

Management does have the right to request recertification or subsequent medical documentation connected to the original documentation in intervals of no more frequency than every 30 days, and only in connection with an absence related to the condition. The APWU and USPS have addressed the issue of certification in a Joint Q and A. In Question #34 the parties agreed that a blanket policy requiring recertification every 30 days was not appropriate. It was agreed that where requests for recertification would be required the requests must be reasonable. Whether an employee's demand for recertification is reasonable can only be determined on a case by case basis, considering for example if the employee's physician sets a longer time frame for recovery or until the next office visit.

However, under the following circumstances the employer has the right to request certification:

1. The employee requests an extension;

2. There is a significant change in circumstances;

 Questions exist that cast doubt on the validity of the certification; or
 There is a question as to the adequacy of the certification (the Postal Service can request a second and if needed, a third opinion).

#### **VII. DEFINITIONS**

#### A. Son, Daughter and Spouse

The FMLA allows an eligible employee to take leave "in order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition."

1. Parent can mean a biological parent or an individual who stands or stood "in loco parentis" to a child. An example of "in loco parentis" is the sister who has to care for her brother who cannot care for himself and the parents are deceased. If the sister is acting in loco parentis or has legal custody of her brother, then the FMLA will be applicable and could be used on an intermittent basis depending on the situation. There can be situations where an employee requests FMLA to care for an individual that raised him or her through his/her childhood and also at a later time for his or her biological parent. Theoretically an employee could have many parents. However, the law does not include "in-laws" as parents or allow for leave protection for grandparents. (See *Campbell v. Prichard Police Dept.* (S.D. Ala., Civ. No. 97-0496 AH-C, Nov. 19, 1997)

Parents of drug addicts who assume responsibility as primary caretakers for the addict's children is a form of foster care in which FMLA leave should be available to such parents. Normally, foster care would require some type of legal custody. However, the above is an example where the legal requirements need not be met.

2. "Son" or "daughter" can mean an adopted or foster child under age 18 or a dependent over age 18 and "incapable of self-care because of a mental or physical disability." The incapable of selfcare means that the individual requires active assistance or supervision to provide daily selfcare in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.. In a situation where a mother

wants to go to the aid of her daughter to help her in pre and post delivery of a baby, FMLA coverage would normally not apply. Normally, an employee will not be entitled to FMLA leave in the above situation unless three or more of the ADLs or IADLs can be shown. In this situation the condition may need to be shown as life threatening along with three of the above criteria. For FMLA to apply we believe that the condition for a son or daughter over the age of 18 may be temporary in nature. For example if the child is in a coma we believe that the test would be met. Recently the 1st Circuit Court of Appeals had an opportunity to address this issue in Navarro v. Pfizer, 261 F.3d 90, (1st Cir., 8/ 20/01) The court overturned a lower court decision and has given some guidance as to how these cases might be approached. It found that when a court is faced with a question of whether a child of over 18 years of age has an impairment that limits a major life activity the court should consider (1)(a) the nature and severity of the impairment (b) its expected duration (c) its anticipated long term impact and (d) other relative factors; (2) this assessment must be performed on a case by case basis, balancing all factors in light of FMLA's purpose, structure and provision for relief; (3) the requisite test is a balancing; apart from the severity of the impairment, no one factor is indispensable to finding that a

disability exists for FMLA purposes. The court went on and stated that the question in this case as to whether a pregnant daughter with high blood pressure substantially limited her major life activity of self care was one for a jury to decide.

3. In Willard v. Ingram Construction Company, Inc., 194 F.2d 1315 (6<sup>th</sup> Cir., Sept. 28, 1999) a Circuit court held that a district court erred in granting a summary judgment to the employer before it determined whether the employee, who took leave when his common law wife had his baby prematurely, was entitled to FMLA leave.

#### **B. Serious Health Condition**

The law and the regulations state that a serious health condition is "An illness, injury, impairment, or physical or mental condition that involves ... inpatient care in a hospital, hospice, or residential medical care facility; or ... continuing treatment by a health care provider." Although the regulations do not state with specificity what a serious health condition is, they do specifically state what is not a serious health condition: "unless complications arise, the common cold, the flu, (see Miller v. AT &T, 60 F. Supp. 2d 574 (S.D. W.Va., Aug. 9, 1999)) earaches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, and periodontal disease are not ordinarily serious health conditions." However, it must be noted that the Department of Labor and courts have stated that if such conditions meet

the regulatory criteria for a serious health condition, such as an incapacity of more than three days that also involves qualifying treatment, then the absence could be protected under the FMLA. (See *Carter v. Rental Uniform Service of Culpeper Inc.*, 977 F. Supp. 753, (W.D. Va. Sept. 16, 1997) Courts

Note -- See Palazzolo v. Galen Hospital of Texas, Inc., (ND Ga, No. 1:96-CV-2550-TWT, Nov. 25, 1997) (Routine doctor's appointment not medically necessary); See also Baung v. Entergy Corp.(ED La., Civil Action No. 98-1786, Section N, June 15, 1999).

have have given other examples of a "serious health condition:" a miscarriage, Murphy v. Cadillac Rubber & Plastics Inc., 946 F. Supp. 1108, (W.D. NY Nov. 21, 1996); a pregnant employee with chicken pox, Reich v. Midwest Plastics Engineering Inc., 943 F. Supp 266, (W.D. Mich. June 6, 1995), aff'd 113 F. 3d 1235 (6<sup>th</sup> Circuit 1997); multiple minor illnesses may trigger FMLA protection, Price v. Fort Wayne, (7th Cir., 117 F. 3d 1022, June 27, 1997); stomach ailments eventually diagnosed as hiatal hernia, Thorson v. Gemini, Inc.,998 F. Supp. 1034, (N.D. Iowa, March 9, 1998); migraines, Vargo-Adams v. U.S. Postal Service, , 992 F. Supp. 939, (N.D. Ohio, Jan. 9, 1998); morning sickness, Pendvaris v. Xerox Corp., 3 F. Supp. 2d 53, (D.D.C. May 5, 1998). Other courts have ruled conditions not to be "serious health conditions": child's ear infection, Seidle v. Provident Mutual Life Insurance Co., 871 F. Supp. 238, (E.D. Pa., Dec. 19, 1994); food

poisoning, Oswalt v. Sara Lee Corp., 889 F. Supp. 253 ((N.D. Miss., June 20, 1995); rectal bleeding, Bauer v. Varity Dayton-Walther Corp., (6th Cir., 118 F. 3d 1109, July 8, 1997); sinobronchitis, Hott v. VDO Yazaki Corp., 922 F. Supp. 1114 (W.D. Va., March 8, 1996); normal conditions of pregnancy, Gudenkauf v. Stauffer Communications 992 F. Supp. 465, (D. Kan. Feb 13, 1996), aff'd, 158 F.3d 1074 (10th Cir. 1998); In addition, the regulation specifically states that routine physicals, eye examinations and dental examinations are not considered treatment, although examinations to determine whether a serious health condition exists and evaluations of the condition are considered treatment.

#### **Continuing Treatment**

"Continuing treatment" includes any one or more of the following: (a) a period of incapacity of more than three calendar days and any subsequent treatment or period of incapacity relating to the same condition, that also involves: treatment two or more times by a health care provider or treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care provider; (b) any period of incapacity due to a pregnancy or for prenatal care; (c) any period of incapacity or treatment for such incapacity due to a chronic serious health condition; (d) a period of incapacity which is permanent or long term due to a condition for which treatment may not be effective (Alzheimer's, a severe stroke, or terminal stages of a disease).

A regimen of continuing treatment would include a course of prescription medicine such as antibiotics but would not include over the counter medicines. Also, other activities that could be done without visiting a doctor would not be considered treatment, i.e., exercise or drinking fluids.

#### **Unable to Perform Functions**

"Unable to perform the functions" of the employee's position means where the health care provider has found that the employee is either unable to work at all or unable to perform any of the essential functions of the position within the meaning of the ADA Americans with Disabilities Act. (See 29 CFR 825.115) (See *Reich v. Standard Register Co.* (No. 96-0284-R, W.D. Va.) February 17, 1997; See also *Martyszenko v. Safeway Inc.*, 120 F. 3d 120, (8<sup>th</sup> Cir., July 15, 1997)). An employee cannot be forced to take light duty in lieu of FMLA leave.

#### **VIII. RETURN TO DUTY**

Upon an employee's return to duty following an absence for a FMLA covered condition, the employee must provide medical certification that he/ she is fit for duty (when certification is required). The statute provides that the employee need only provide the employee need only provide the employee's health care provider to qualify to return to work (29 CFR 825.214). Thus, the Postal Service may not delay an employee's return after an FMLA absence once the medical certification is given. (See also Step 4 Settlement that holds Note -- The Postal Service applies this provision differently to bargaining unit employees and non-bargaining unit employees. (See Tulino letter, p. 135)

employee will be returned to duty withing 24 hours, page 109) The Postal Service may require a fitness for duty examination after returning to work, provided that such examination is jobrelated. However, this fitness for duty exam cannot delay the employee's return to work. Publication 71, Section VI Placement and Documentation on Return to Duty establishes criteria and lists examples of specific information that may be required upon return to duty in certain circumstances. As noted before the APWU believes that these

Note - 29 CFR 825.310(g) of the FMLA regulations may preclude the use of return to duty certifications in cases of intermittent absences relating to FMLAcovered conditions. This section states "An employer is not entitled to certification of fitness to return to duty when the employee takes intermittent leave as described in 825.203."

requirements violate the law and has challenged the issuance of this version of Publication 71 within the grievance procedure and in federal district court. (See Appeal to Arbitration pages 108) Current district court case law appears to support this position. We believe that the USPS violates 29 CFR 825.310 (c) when it requires employees to provide a detailed medical report in order to return to duty. This regulation entitles employees to return to work if they provide a medical certification constituting "a simple statement of an employee's ability to return to work."

Two district courts have ruled on this issue in cases involving the Postal Service. In *Albert v. Runyon*, 6 F. Supp 2d. 57 (D. Mass, May 5, 1998) the court held that certification from the employee's doctor was sufficient because the employer could not show a justifiable business concern to support its need for the medical examination. This case involved a non-bargaining unit employee.

In Routes v. Henderson, 58 F.Supp.2d 959 (SD Ind, May 21, 1999) the court found that the employer should have accepted the employee's return to duty certification. The court stated that the FMLA does not allow the employer to make an independent assessment of the employee's fitness for duty upon return "unless the employer would have been allowed such an assessment in the absence of the leave." The court found that the only reason for the fitness for duty exam was because the employee simply took the FMLA leave.

An employee must return to duty when the FMLA protection ends because the stated reason for the leave ceases to exist. In *Brown v. JC Penny*, 924 F. Supp. 1158 (SD Florida, 1996) a court held that an employee failed to return to work for a period of one month after his father passed away and was no longer protected under the FMLA. The stated reason for the absence was to care for his father and when his father passed away the employee was required to return. However, if the employee was able to get a medical certification that stated that his father's death caused him severe depression we believe that it could be argued that he was suffering from a serious health condition that would be protected under the FMLA.

#### IX. REMEDIES FOR VIOLATION OF THE FMLA

Employees may be entitled to any of the following for a violation of the FMLA rights:

1. Any monetary loss suffered including wages, benefits or other compensation denied or lost including the cost of providing care when the employee's request was denied. In other words, when an employee needs to care for a parent, spouse or child who has a serious health condition and the FMLA is denied the employer could be liable for the cost of providing a nurse or other person to care for the child, spouse or parent.

2. Interest on the above loss.

3. Liquidated damages equal to the loss. (In other words a match of what the employee lost in wages, benefits and other compensation)

4. Reinstatement, employment and promotion.

5. Any judgment awarded by the court. Punitive damages and mental distress damages are not recoverable under the FMLA. McAnally v. Wyn South Products Inc., 912 F. Supp. 512, (N.D. Ala., Jan. 30, 1996)

#### **Supervisor Liability**

In a Postal Service case involving supervisor liability Carter v. USPS, Civ. Action no. 3:99 CV-4-18 (WD Kentucky, Louisville Division, 8/21/01), the court ruled that since the FMLA's definition of "employer" is clear on its face, a court should not rely on analogies with Title VII to interpret the FMLA, particularly when the two statutes are different. A plain reading of the statute indicates that supervisory government employees may be considered employers under the FMLA and therefore potentially haled mandatory liable for violations of the Act. See also Postal Service case, Morrow v. Putnam, 142 F. Supp. 2d 1271 (D. Nev. 2001)

#### X. MISCELLANEOUS

Other issues that should be noted:

1. Employees who suffer from a serious health condition and who are eligible for FMLA coverage may participate in the Leave Sharing program. (See page 84)

2. The Postal Service has agreed that an employee retains their no-layoff protections when the FMLA interrupts the 20 pay periods worked per year requirement during the past six years. (See page 71)

3. If an employee is eligible for FMLA protection, the Postal Service may not require an employee to take a light or limited duty position. Nor can the Postal Service induce an employee to accept a different position against the employee's wishes. (29 CFR 825.204)

4. A disciplinary action against an employee may not include any absences protected under the FMLA.
(29 CFR 825.220.3.b and see page 71) It is the APWU's position that if a disciplinary action is issued, the notice containing a FMLA-covered absence is without just cause and in violation of the FMLA.

#### XI. GRIEVANCE AND ARBITRATION

The Family and Medical Leave Act allows for a private right of action for individuals to pursue violations of the Act. The grievance/arbitration process allows for enforcement of contractual rights that effect an individual or the union as a whole. FMLA issues that have been agreed to between the union and USPS can be grieved. (See Appendix) An FMLA-covered absence used in a disciplinary action can be raised as part of the "just cause" argument and management's failure to abide by FMLA requirements can be raised in the presentation for "just cause." Note: In Rogers v. New York (S.D. N.Y., 98 Civ. 2089, Sept. 10, 1999) the court ruled that unless a CBA contained a clear and unmistakable waiver of a employee's right to a judicial forum, a union cannot consent to arbitration in lieu of judicial enforcement of a statutory right. It should be noted that with respect to the arbitrator's authority to deal with external matters of law relative to contract issues presented, an arbitrator does have the authority to address such issues. See APWU v. USPS 789 F.2d 1 (D.C. Circuit, April 18, 1986). The court held "when construction of the contract

implicitly or directly requires application of external law, i.e., statutory or decisional law, the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it..." The following section will discuss some of the arbitration awards where FMLA issues were presented and ruled on by arbitrators.

#### ARBITRABILITY

Arbitrator Patricia Plant ruled that she had jurisdiction to decide FMLA grievances and therefore ruled that the case presented to her was arbitrable. (AIRS #25223 - USPS# H90C-1H-D 95036450, 1996) The arbitrator ruled that she needed to construe the intent of the parties when it came to FMLA issues. She held that the "parties are striving to act cooperatively and in good faith with regard to FMLA. And for whatever reasons have signaled their intent to be that of resolving FMLA contentions within the grievance/ arbitration process." Shortly after the arbitrator ruled on the arbitrability issue, local management by directive from the National Headquarters settled the case and returned the employee to work.

Another argument that can be raised for arbitrability is Article 19. The USPS changed Section 515 of the Employee and Labor Relations Manual to comply with the FMLA. (See page 60) By incorporating these changes into the ELM they became enforceable collective bargaining conditions of employment through Article 19. Also all the letters that are attached are to be considered agreements between the parties and such are grievable.

Most arbitrators have been willing to hear FMLA arguments. (See Arbitrator Kahn, AIRS #25994 - USPS# J90C-1J-D 96011867; Arbitrator Lurie, USPS# H90N-4H-D94068273; Arbitrator Baldovan, AIRS# 26039 - USPS# G94T-4G-D96024286). However, Arbitrator Gary Vause in AIRS #26060 -USPS# G90C-4G-D 96024670 and Phillip Parkinson in Caes # C98C-4C-C01042823 ruled that the FMLA raised legal issues that were outside the arbitrator's jurisdiction. We believe that the arbitrator's decision was wrong and can be countered by the above arguments.

#### **ARBITRATION AWARDS**

# Employer and Employee Notice Requirements

USPS No. J94C-4J-D 98105435 (Arbitrator Dileone Klein) Grievant was not discharged for just cause for AWOL. Management was clearly on notice of the exact nature of the illness. (Carol Stream, IL) 4/16/99;

USPS No. J98C1J-D 00010071 (Arbitrator McAllister) The arbitrator held that a LCA is not self-executing. The Postal Service must establish it had just cause to issue a removal. The Postal Service compounded the effects of silence by failing to apprize the Grievant that she had requalified for FMLA. (Royal Oak, MI) 12/15/2000

USPS No. C98C-1C-D 01080219 (Arbitrator Dileone Klein) No consideration was given to the employee's explanation of her absences and management had not discussed the possibility that Grievant's breathing problems and back problems might to FMLA qualifying conditions. No effort was made to provide the employee with FMLA forms. The arbitrator held that the Postal service failed to meet its obligations under the FMLA.

USPS No. C94C-1C-D 98006346 (Arbitrator Parkinson) Just cause existed for discharge of employee for failure to maintain a regular work schedule. Employee failed in his obligation to communicate to the Postal Service information that would indicate a possible FMLA situation. (Cleveland, OH) 12/7/98;

USPS No. K94C-4K-C 97039834 (Arbitrator Dileone Klein) Charging the grievant with AWOL was appropriate under the circumstances. Employee denied protection since it was clear that her need was foreseeable and she did not notify the employer in advance. (Gaithersburg, MD) 7/5/97;

USPS No. C90C-1C-D 95060064 (Arbitrator Graham) Removal of grievant for violation of LCA for poor attendance was not proper. The grievant communicated with her supervisor both verbally and in writing about her medical condition. Employee provided more than adequate notice that she was ill with a condition that required surgery. (Southeastern, PA) 4/3/ 97;

USPS No. E94C 4E-D 98087205 (Arbitrator Stallworth) Notice of proposed Removal was improper under the facts and circumstances. Condition affected the employee's ability to be regular in attendance and to provide medical documentation on a regular basis. (Arbitrator ordered a fitness for duty exam) (Vancouver,WA) 3/31/99;

USPS No. J94C-4J-D 98102724 (Arbitrator Goldstein) There was no just cause to remove the grievant. Employee had FMLA documentation on record that was ignored by management. However, the fact that employee ignored request for fitness for duty exam because she believed she was not required to submit due to her FMLA --covered condition did not mean she was not obligated to submit to the exam. The arbitrator found that the "obey now, grieve later" principle was applicable in this case. Therefore , he ordered her reinstated but without back pay. (Chicago, IL) 7/16/99;

USPS No. K90T-1K-C 99142827 (Arbitrator Rimmel) The employee was denied the right to return to work upon release by his attending physician. Management failed to provide timely and adequate notice to employee of rights and obligations. Additionally management failed to provide grievant "specific reason" why he had been scheduled for a FFD exam as called for under the ELM regulations. (Easton, MD) 7/15/2000

#### **Return to Duty**

USPS No. H98C-1H-C 00055962 (Arbitrator Hoffman) A request for another updated certification only five days before the Grievant's return to duty was redundant and caused a delay in grievant's return to work.

USPS No. C94C-4C-C 98040114 (Arbitrator Zobrak) Delay of over two weeks in retruning the grievant to duty because of USPS verfying medical certification was excessive and unjustified. USPS No. C94C-1C-C 98114094 (Arbitrator Dissen) Management could not condition the grievant's return to work from an eight day absence on the production of a certification of fitness for duty and a detailed medical report from grievant's physician. Management did not question the legitimacy of the absence, but had assumed that the absence related to a psychiatric condition. The grievant was to be reimbursed the cost of obtaining the private physician's certification of fitness for duty, to the extent that the same could be documented, including travel expenses, as well as travel expenses to the medical unit.

USPS No. H94C-1H-C 99251142 (Arbitrator Hoffman) Management's delay in returning the grievant to work after an extended illness by requiring information it already had was inappropriate. The grievant complied with the applicable Service rule and FMLA requirements. (West Palm Beach, FL) 1/19/01

USPS No. C98C-1C-C 98101846 (Arbitrator Newman) The Service improperly delayed the grievant's return to duty after an FMLA absence.

USPS No. 194C-4I-C 97033793 (Arbitrator Goldstein) Once management allowed the grievant to return to work and accepted the initial FMLA certification without question, it was unreasonable to ask the grievant to obtain light duty forms 6 days later on her own time. (Topeka, KS) 4/30/99;

USPS No. C94C-1C-C 98114094 (Arbitrator Dissen) Arbitrator held that management could not condition the employee's return to duty from an 8 hour absence on the production of a certification of fitness for duty and a detailed medical report without first determining the cause of the absence or providing notice or inquiry to the employee of what was expected of him. Grievant was to be reimbursed the cost of obtaining the private physician's certification, to the extent that the same can be documented including travel expenses, as well as travel expenses to the medical unit. He also awarded the grievant all straight time wages and holiday pay lost as a consequence of his time off work for May 8 through June 1, 1998. (Warrendale, PA) 2/4/00;

USPS No. D94C-4D-C 98114980 (Arbitrator Wolf) Postal Service violated FMLA by asking for return to duty certification after a one day absence. The arbitrator ordered that the grievant be restored 8 hours of sick leave. (Charleston, WV) 4/27/99;

USPS No. A94C-1A-C 97115962 (Arbitrator Drucker) The actions of the medical officer in finding the grievant unfit for duty pending additional medical information regarding the grievant's anemia were, under the circumstances and rationales stated, reasonable and appropriately based upon medical judgement derived from the examination and generalized medical statements from the employee's personal physician. However, the Postal Service's delay in returning the grievant to work because of pending documentation request violated the FMLA. (Brooklyn, NY) 4/27/98; USPS No. H98C-1H-C 01150929 (Arbitrator Anderson) The Postal Service's delay in approving the grievant's return to work after a twentyone day illness was not reasonable. (St. Petersburg, FL)

USPS No. A94C-1A-C 98067485 (Arbitrator Kelly)The Postal Service violated the FMLA by sending the grievant to a fitness for duty exam prior to allowing the grievant to return. The grievant was to be made whole for lost pay and benefits from January 14 to February 7, 1998. (Brooklyn GMF) 4/20/99;

USPS No. A98C-1A-C 99068833 (Arbitrator Thomas) Postal Service violated the FMLA by insisting on the employee submitting to FFD exam prior to returning to duty from an FMLA approved absence. The grievant was to be made whole for all lost wages, including missed OT opportunities between November 12, 1998 and March 22, 1999. (New York, NY) 6/21/00;

USPS No. C94C-4C-C 980400114 (Arbitrator Zobrak)The Grievant's OWCP claim was denied and he was given an offer to return to work. The grievant obtained the necessary medical certification and hand carried the documentation to the Youngstown Post Office. Two week delay in returning the employee to duty was excessive and unjustified. The arbitrator ordered the grievant to be made whole for lost wages, shift differential, premium pay and holiday pay for the period between August 30, 1997 and the actual date of return to employment. (Youngstown, OH) 5/18/00;

USPS No. 194T-1J-C 96048218 (Arbitrator McAllister) Employee improperly denied return to duty after an absence of more than 21 days. There was no evidence showing that the employee was a threat to himself or others. The grievant was to be made whole for the period of February 10, 1996 to March 13, 1996. (Wichita, KS) 3/ 12/97

### Citing FMLA Protected Days in Discipline

USPS No. D98C-4D-D 01187603 (Arbitrator Roberts) The notice of removal was held to be improper in this case. The arbitrator found that the grievant should have been on FMLA and the discipline was therefore inappropriate. (Midlothian, VA)

USPS No. F94T-1F-D 99023424 (Arbitrator Davis) The record indicated that the majority of charged absences and tardiness were FML- related. Given the particular facts and circumstances, it was determined that the removal was unreasonable and also legally improper.

USPS No. C94C-1C-D 98035287 (Arbitrator Fullmer) The removal of the grievant for failing to maintain regular attendance and violation of a last chance settlement was not for just cause. One portion of cited absences was covered by claim for FMLA leave and therefore protected against use in discipline. (Phila. BMC) 11/18/98;

USPS No. A94C-1A-D 97035181 (Arbitrator Fritsch) Removal for continuously being absent and irregular in attendance was reduced to 30 day suspension. The reduction in penalty was due in part to the inclusion of sick leave that should have been covered by the FMLA. (Long Island, NY) 0/14/97; USPS Nol. G94T-4G-D 96024286 (Arbitrator Baldovin) The arbitrator held the grievant's absence from work from 11-2 thru 11-17-95 as certified by a health care provider was protected under the FMLA and therefore the absence could not be used in establishing just cause for removal. (Fort Smith, AK) 6/14/96;

USPS No. C90C-1C-D 960006928 (Arbitrator Fullmer) Grievant was removed for AWOL, failure to maintain regular attendance and violation of a last chance agreement. The grievant had been given 14 days of protected Family Medical leave. Thereafter the protection was refused either for lack of the employee meeting the 1250 eligibility requirement or lack of documentation and therefore the dates were counted on the AWOL. However, the arbitrator held that the employee was never given proper written notice of the refusal and basis for the denial of protection. Therefore the use of AWOL dates rendered the removal without just cause. (Cleveland, OH) 11/16/96;

USPS No. H98C-4H-D 00230235 (Arbitrator Duncan) The arbitrator held the grievant's absences were protected by FMLA and could not be used in a removal action as set forth in the parties Joint Q and A and section 825.220 of the FMLA. (Chattanooga, TN) 3/9/01

#### USPS No. F94C-1F-D 99028399

(Arbitrator Richman) Absences could not be used against the employee although unclear as to whether absence was covered. Yet arbitrator concluded that the absence to take a child to a doctor was covered in this case. The arbitrator found that if the absences for grievant's chronic condition, for his delivery of his daughter to the doctor, and the 8 hours AWOL which was stipulated to be stricken, the grievant would have had precisely 40 hours of unscheduled absence under the last chance agreement . However, the supervisor admitted that two other days were not used therefore the letter of removal would not have issued(Los Angeles, CA) 6/29/00;

USPS No. F94T-1F-D 99023424 (Arbitrator Davis) Majority of charged absences and tardies were FMLA protected. The arbitrator found the grievant's removal to be unreasonable and also legally improper. The grievant was to be reinstated and made whole.

USPS No. J94T-1J-D 98096850 (Arbitrator Kahn)The arbitrator held that the employer's failure to provide the grievant with a predisciplinary interview meant that just cause for the grievant's proposed notice of removal did not exist. The predisciplinary interview may have led to constructive medical efforts and without it there was not justification for action. The grievant was to be reinstated with full seniority and other employee rights and made whole for the period between his discharge and reinstatement. (Chicago O'Hare AMC) 6/29/99

#### 1250 Hour Eligibility Requirement

USPS No. H98C-4H-D 99290624 (Arbitrator Anderson)The arbitrator held that an employee who is eligible for Family and Medical leave at the time medical leave commences, but due to intermittent leaves for the same condition, falls below the 1250 hour minium requirement in the previous 12 month period, is nevertheless eligible for family medical leave protection (Tampa, FL) 3/31/00;

USPS No. J94T-1-D 96071950 (Arbitrator Roumell) Employee did not meet the 1250 hour eligibility requirement. Arbitrator also found that even if the employee was eligible the employee failed to verify the reasons for his absences. He also found that the employee's claim that he was never given any information concerning FMLA was not credible. (Chicago BMC) 2/ 13/97;

USPS No. J98V-4J-D 99191438 (Arbitrator Goldstein) Evidence failed to show that management properly notified the grievant of the lack of 1250 hours. Arbitrator also held that some of the employee's absences may have been FMLA protected. The Arbitrator found that even if the Postal Service was correct on the merits as to the proper calculations for the 1250 hour eligibility requirement there were serious procedural deficiencies. (Bedford Park, IL) 7/26/00

#### **Documentation Requirements**

USPS No. E98C-1E-C 01183509 (Arbitrator Winston) The Postal Service was directed to immediately cease and desist from asking the grievant for medical documentation for absences authorized under FMLA.

USPS No. C98C-1C-D 01102701 (Arbitrator Newman) The arbitrator found that the Postal service did not have just cause to remove the grievant. He held that at the very least the grievant in this case was confucsed about the state of her medical records and what additional documentation was necessary to receive FMLA coverage, that confusion should have been obvious to the Postal Service and the Postal Service should have assured that the grievant was properly notified of its expectations.

USPS No. C94C-1C-C 99031477 (Arbitrator Dissen) A request for recertification of medical conditions underlying FMLA leave requests may not be made solely on the basis that a current supervisor is not in possession of the original certification.

USPS No. J94C-1J-D 97103372 (Arbitrator Dileone Klein) The arbitrator found that the employee did not provide the requested supporting medical evidence to substantiate her need for leave under the FMLA or under the provisions of 513 of the ELM. Despite the grievant's failure to provide the documentation for the absence the arbitrator found that he could not ignore her twelve years of discipline free service. The arbitrator ruled that a long term suspension was sufficient to correct the deficiency. (Fort Wayne, Ind.) 2/12/98;

USPS No. H98T-1H-C 01152332 (Arbitrator Hoffman) The Postal Service was found to be within its rights in seeking an update or new FMLA certification. However, in these particular circumstances it violated the National Agreement, FMLA regulations and Postal regulations by requiring the grievant to incur the expenses of a clarification of this completed certification.

USPS No. C90C-4C-D 95056319 (Arbitrator Parkinson) The arbitrator found that removal of the grievant on the basis of her failure to maintain a regular work schedule during the course of her employment was justified. Employee failed to provide documentation when requested by management. (Chagrin Falls, OH) 4/12/96

#### Birth of a Child

USPS No. A94T-1A-C 98023599 (Arbitrator Thomas) Employee requested sick leave to care for his newborn child who was in intensive care. The employer argued that only 80 hours would be granted per the Dependent Care memo of the contract. However, the union pointed out that another employer had been granted 256 hours of sick leave for FMLA use. The arbitrator found that the employer cannot without at least some explanation, permit one employee to use sick leave under the FMLA and not permit another, meeting the FMLA qualifications to do the same. The arbitrator held that the employee will be charged sick leave for the 24 hours of charged LWOP. (San Juan, PR) 12/31/98

#### Care for a Family Member

USPS No. H94C-1H-D- 98013604 (Arbitrator Plant) The grievant in this case was charged with improper conduct. He requested the FMLA leave while working another job. He requested the leave to take care of his wife. The arbitrator ruled that the employee did not engage in deceitful or fraudulent conduct. Found that the grievant should be commended for upholding family values. The family values were not at the expense of the Postal Service. The grievant was to be made whole for any lost time he served. (Birmingham, AL) 8/30/98; USPS No. B98C-1B-D-00089750, (Arbitrator Jacobs) Employee kept employer fully informed of condition and additionally of outside employment. Management did not meet its burden of proof to show the grievant had falsified his actions. The Postal Service knew of his condition and no discipline was issued until the particular absence occurred. (Wallingford, CT) 7/3/00

#### Effect on Local Negotiations

USPS No. F94C-4F-I 96000557 (Arbitrator Angelo) The Postal Service proposed a provision that would have Family and Medical Leave automatically assigned to all unoccupied leave slots during the calendar year, thereby insuring minimal staffing levels in the event FMLA leave was actually needed. The arbitrator held that a leave proposal that anticipates FMLA leave does no more than recognize the need to address the operational impact of the law on daily operations (Diablo, CA). 9/6/97;

USPS No. G98C-4G-I 99212763, 769 (Arbitrator Baldovin) The arbitrator found there was no unreasonable burden due to enactment of FMLA and its effect on 15% choice vacation period (Little Rock, AK) 12/18/99

#### **Transitional Employees**

USPS No. A90C-1A-C -95053133 (Arbitrator Cannavo) Although TE did not have just cause protection it would be against public policy to terminate him because of management's error in not applying the requirements of the FMLA to his request for FMLA leave. (Monmouth, NJ) 12/13/96; USPS No. G90C-1ED 94048580 (Arbitrator Gold) The Arbitrator held that this case was arbitrable. She found that if the employee could show that the Postal Service reason for removing her were pretextual and that she would show that she was removed for having exercised her FMLA rights, she would prevail. She found that there was a suggestion that the that the Postal Service acted for other than appropriate reasons. (Amarillo, TX) 16/18/99

#### Recertification

USPS No. C94C-1C-C-99031477 (Arbitrator Dissen) Request for recertification of medical conditions underlying FMLA leave request may not be made solely on the basis that current supervisor is not in possession of original certification. The employee was to be reimbursed the cost of obtaining the FMLA re-certification, including travel expenses, to the extent that such costs can be documented. (Greensberg, PA) 3/13/00;

USPS No. A94T-1A-C98015781 (Arbitrator Cannavo) The arbitrator held that it was unreasonable to have the grievant provide documentation for recertification of FMLA for grievant's mother's health condition every thirty days. The arbitrator required that such information be provided once every six months. (Queens P & DC) 9/ 22/99

#### Miscellaneous

USPS No. H90T-1H-D 96009111 (Arbitrator Helburn) The grievant was removed for attending a union meeting while on FMLA approved unpaid sick leave. The arbitrator found no violation in grievant's attendance at a union meeting, no intent to submit an untruthful 3971, and management retaliation for earlier steward activities. The grievant was to be reinstated to his former position with full back pay, seniority and allowances. (West Palm Beach, FL) 7/22/ 96;

USPS No. F90C-4F-D 95024884 (Arbitrator Snow) The employee in this case was a transitional employee that requested FMLA protected leave for consultation with fertilization specialist. The arbitrator held that this request was covered by the FMLA. Therefore the Postal Service's removal of the grievant could not be considered retaliation for exercising a contractual right. (Chico, CA) 7/14/95

USPS No. H94C-4HC 98090590 (Arbitrator Hervey) The Postal Service erred when it failed to grant a Clerk's request to be reassigned to the Maintenance Crfat because of a poor attendance record. It neglected to consider the fact that all of the LWOPs were for the purpose of conducting Union business and that the vast majority of his other absences were covered by FMLA leave.

#### XIII. PRIVACY ISSUES CONCERNING FMLA DOCUMENTATION

#### A. APWU Forms

The APWU and the Postal Service have agreed that the APWU forms are acceptable as documentation for FMLA absences. The forms need contain only enough information sufficient to indicate that the employee was or will be unable to perform his/her duties during the period of time. For absences related to a serious health condition of a family member the employee needs to show that he/she is needed to care for the family member, which can mean to provide both physical and psychological care or comfort to the family member.

Medical information which includes a diagnosis and prognosis is not necessary to approve leave. (See Dr. Reid Letter p. 85) A diagnosis distinguishes one disease from another or the determination of the nature of a case of disease based on signs, symbols and laboratory findings. A prognosis is a forecast as to the probable outcome of an attack of disease or the prospect as to recovery from a disease as indicated by the nature and symptoms of the case. A supervisor may not request specific diagnosis or prognosis information. If the supervisor obtains such information it must be forwarded to the health unit or office of a contract physician and treated as a Restricted Medical Record as provided for under Section 214.3 of the EL-806 Handbook and the Privacy Act. It may also reside with an RMD Coordinator or FMLA Coordinator in a new system of records that has been established by the Privacy Act and incorporated into the ASM. Should a health care provider submit diagnosis and prognosis information on the APWU forms, a supervisor may review this restricted medical information in order for the supervisor to determine whether to designate the leave as FMLA protected. Bypassing the supervisor and forwarding this information directly to the Health Unit would not be appropriate. The comments section for Section 825.302 of the FMLA regulations states that the employee must provide notice of the need for leave to the person in the company the employee would normally contact for other types of leave. In

the Postal Service this would mean the employee's immediate supervisor or Attendance Control Supervisor or the recently created position of FMLA Coordinator. Once received, the supervisor will be required under the Privacy Act, ASM and EL-806 to forward this information to the proper system of records. Thus, the bottom line is that the employer may require the employees to submit FMLA medical documentation to the employee's immediate superrvisor, or other person that will be making the decision to designate the leave as FMLA.

A supervisor or postmaster is prohibited from contacting an employee's physician under all circumstances and medical personnel or contract physicians may not contact an employee's physician without an employee's specific consent.

# B. WHO IS ENTITLED TO INFORMATION

The Handbook EL-806 and the Administrative Support Manual restricts access to confidential medical records, including medical records containing diagnosis or prognosis, employee medical history and fitness for duty examinations to authorize personnel. (See EL-806 and Adminstrative Support Manual)

# APPENDICES

### Your Rights Under The Family and Medical Leave Act of 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons.

Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

#### **Reasons For Taking Leave:**

Unpaid leave must be granted for any of the following reasons:

- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's or employer's option, certain kinds of *paid* leave may be substituted for unpaid leave.

# Advance Notice and Medical Certification:

The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

#### Job Benefits and Protection:

• For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."

- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

#### **Unlawful Acts By Employers:**

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA:
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

#### Enforcement:

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

#### For Additional Information:

Contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

> WH Publication 1420 June 1993

U.S. Department of Labor Employment Standards Administration Wage and Hour Division Washington, D.C. 20210

U.S. GOVERNMENT PRINTING OFFICE: 1996 171-169



### JOINT APWU & USPS FAMILY & MEDICAL LEAVE ACT QUESTIONS & ANSWERS

The American Postal Workers Union (APWU) and the United States Postal Service (USPS) have worked jointly to produce answers to the most frequently asked Family and Medical Leave Act (FMLA) questions. The parties agree that referral to these questions and answers should eliminate disputes concerning basic FMLA issues. Our expectation is that proper interpretation of the FMLA will improve communication and increase the understanding between labor and management so that employees can fulfill the Postal Service's mission in a workplace climate that promotes fairness and concern for workers entitled to FMLA job-protected absences.

E. Potte

John E. Potter Vice President Labor Relations

William Burrus Executive Vice President American Postal Workers Union, AFL-CIO

Date: April 15, 1998

#### Foreword

The answers to these FMLA questions are based on the Department of Labor (DOL), Wage and Hour Division's final regulations issued as 29 CFR, Part 825, in the January 6, 1995 "Federal Register". Only questions pertaining to the most common situations are included and some of the requirements are paraphrased for brevity. There is no intent to change any requirement from the full DOL regulations or to change any Postal Service policy.

For Postal Service policy, see subchapter 510 of the Employee and Labor Relations Manual (ELM).





### JOINT APWU & USPS FAMILY & MEDICAL LEAVE ACT QUESTIONS & ANSWERS

#### SECTION 1 WHO IS COVERED

#### 1. Q. What is the Family and Medical Leave Act of 1993?

A. In general, the Act entitles eligible employees to be absent for up to 12 workweeks per year for the birth or adoption of a child; to care for a spouse, son, daughter, or parent with a serious health condition; or when unable to work because of a serious health condition without loss of their job or health benefits. The FMLA does not provide more annual or sick leave than that which is already provided to Postal Service employees.

Source: 29 CFR 825.100

#### 2. Q. Which employees are eligible?

A. Employees who have been employed by the Postal Service for at least one year and who have worked at least 1250 hours during the previous 12 months are eligible.

Source: 29 CFR 825.110, ELM 444.22

### 3. Q. I have been a transitional employee for nine months. Am I an eligible employee under the FMLA?

A. No, because you have not worked for the Postal Service for one year. Any employee, including a TE, who has worked for the Postal Service for an accumulated total of one year and has worked a total of 1250 workhours during the previous 12 months is an eligible employee under the FMLA.

Source: 29 CFR 825.110 (b)

1





4. Q. I am absent on protected leave under the Family and Medical Leave Act, and my transitional employee appointment term expires next week. How will that affect me?

A. The Family and Medical Leave Act does not affect the terms of your appointment.

Source: 29 CFR 825.216 (b)

### 5. Q. Do COP, OWCP, military leave and court leave count toward eligibility requirements under the FMLA?

A. COP, OWCP, court leave, and short periods of military leave count toward the 12-month eligibility requirement. However, none of the times mentioned count toward the 1250 hours worked eligibility requirement.

Source: 29 CFR 825.110, ELM 444.22

6. Q. If both spouses work for the Postal Service, does the USPS let both take up to 12 workweeks each of protected absences under FMLA each leave year?

A. Yes.

Source: ELM 515.43

7. Q. Can an employee who is separated or divorced take a protected absence under the FMLA to care for a spouse or ex-spouse with a serious health condition?

A. For an employee to take such leave, the couple must be legally married.

Source: 29 CFR 825.113

#### SECTION 2 WHAT IS COVERED

8. Q. My mother-in-law who lives with me is ill and requires my care. Does





#### management have to approve my leave as a covered condition?

A. No, the FMLA only provides protected absences for covered conditions of a spouse, parent, son or daughter. Leave taken to care for anyone else would require approval under normal leave policies.

Source: 29 CFR 825.112

# 9. Q. My knee problem was diagnosed during an appointment with a health care provider. He ordered three months of physical therapy treatments. Are the visits and the treatments protected by the FMLA?

A. Yes, where properly documented as a serious health condition, the absence would qualify for FMLA protection since it involves a continuing treatment under the supervision of a health care provider. The health care provider is stating that lack of treatment would likely result in a period of incapacity of more than three days. Employees needing intermittent FMLA leave or leave on a reduced leave schedule <u>must attempt</u> to schedule their leave so as not to disrupt the employer's operations.

Source: 29 CFR 825.114 (a)(2)(v), 29 CFR 825.117

# 10. Q. My wife's doctor said she needs almost total bed rest for the last two months of her pregnancy, and I need to stay home to care for our other children. Is this condition covered under the FMLA?

A. FMLA does not cover babysitting for the other children. However, where properly documented that the husband is needed to care for her, the wife's serious health condition would entitle the husband to a FMLA protected absence.

Source: 29 CFR 825.116

### 11. Q. If I use a midwife for both my prenatal care and the delivery of my child, would my pregnancy still be a condition covered under the FMLA?

A. Yes, pregnancy is a covered condition under the FMLA. Midwives are considered health care providers if they are authorized to practice under State law and are performing within the scope of their practice as defined under State law.





Source: 29 CFR 825.118 (b)(2), 29 CFR 825.118 (c)

12. Q. An employee had a baby and took 6 weeks of leave during a period when she was not eligible under the FMLA. Now she is eligible, and the baby is still less than a year old. Can she now take the 12 workweeks of protected absences under the FMLA?

A. Yes, only the time taken when eligible under the FMLA counts toward the 12 workweeks.

Source: 29 CFR 825.112

### 13. Q. Is an employee entitled to 12 workweeks of protected absences under the FMLA for placement or care of an adopted or foster child?

A. Yes.

Source: 29 CFR 825.112, 29 CFR 825.200, 29 CFR 825.201

14. Q. I took a week of protected leave under the FMLA to care for my baby who was born 2 months ago. Now I want to take the week of July 4th off to be with my baby. Since caring for my newborn is a condition covered under the FMLA, does my supervisor have to let me off for the week of July 4th?

A. Not necessarily. You are requesting time off for the birth and care of a child on an intermittent basis. Therefore, your request for the week of July 4th is subject to your supervisor's approval in accordance with current leave polices.

Source: 29 CFR 825.203

### 15. Q. Can an employee take protected leave under the FMLA to look for child care?

A. No. Of course, a supervisor can approve regular annual leave for such a purpose.

Source: 29 CFR 825.112

16. Q. An employee has a recurrent degenerative knee condition that qualifies as a serious health condition. The certification indicates his condition may "flare" up 1 to 2 days per month and render him incapacitated for duty. Consequently, the employee requests

4




## covered absences under the FMLA with little or no advance notice. Does this meet the criteria or intent of the intermittent leave entitlement under the FMLA?

A. Intermittent absences due to a chronic condition which incapacitates an employee are covered by the FMLA. See attached Documentation Example #4.

Source: 29 CFR 825.114, 29 CFR 825.117, 29 CFR 825.203, 29 CFR 825.204

#### 17. Q. Is treatment for substance abuse covered under the FMLA?

A. Yes, if certified by the health care provider as a serious health condition. Absence because of the employee's use of the substance, rather than for treatment, does not qualify as a covered condition under the FMLA.

Source: 29 CFR 825.114 (d), 29 CFR 825.112 (g)

#### 18. Q. Can the flu be considered a serious health condition under the FMLA?

A. Yes, if it complies with the definition of a serious health condition under the FMLA.

Source: 29 CFR 825.114 (c)

#### 19. Q. If my child is sick, can I now take sick leave to care for him?

A. Yes, under the National Agreement-Memorandum of Understanding on Sick Leave for Dependent Care, employees may use up to 80 hours of their earned sick leave to care for a spouse, parent, son or daughter. Sick leave for Dependent Care is only protected under the FMLA when the illness qualifies as a serious health condition under the FMLA.

Source: National Agreement-Memorandum of Understanding, ELM 515.2

### SECTION 3 HOW AN ABSENCE IS COVERED

#### 20. Q. How do I apply for leave under the FMLA?

5





A. Submit a form PS 3971, <u>Request for or Notification of Absence</u>, with the supporting documentation. Leave under the FMLA is not a separate category or type of leave. You may request annual leave, sick leave or LWOP for your absence under the FMLA. Just as in the past, in an emergency situation a phone call, telegram, etc. will suffice until it is possible for you to submit the necessary paperwork.

Source: 29 CFR 825.302, 29 CFR 825.303, ELM 510

## 21. Q. Do I have to mention the Family Medical Leave Act when I request time off for a covered condition?

A. No. However, an employee must explain the reasons for the absence and give enough information to allow the employer to determine that the leave qualifies for FMLA protection. If the employee fails to explain the reasons, the leave may not be protected under the FMLA.

Source: 29 CFR 825.208, 29 CFR 825.302, 29 CFR 825.303

## 22. Q. Do I have to use all of my annual leave balance before I can take LWOP for a condition covered under the FMLA?

A. No, you need not exhaust annual leave and/or sick leave before requesting leave without pay. The use of leave, paid or unpaid, is subject to management's approval consistent with the handbooks, manuals, the National Agreement and the FMLA.

Source: 29 CFR 825.207, ELM, NATIONAL AGREEMENT

#### 23. Q. Can I take more than 12 workweeks of leave during a Postal leave year?

A. Twelve workweeks is the maximum amount of protected leave which must be granted for the covered conditions under the FMLA. After being off for 12 workweeks, you may request leave under current leave policies, but that time would not be protected under the FMLA. Approval will be subject to the terms and conditions of current policies.

Source: 29 CFR 825.200, ELM 510

#### 24. Q. Do the 12 workweeks of FMLA protected leave have to be continuous?

A. No, the leave may be taken intermittently or on a reduced schedule basis as long as taking it in that manner is medically necessary. When leave is taken because of 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 supervisor agrees.

Source: 29 CFR 825.203, 29 CFR 825.204

## 25. Q. How will I know if the requested leave counts as part of the 12 workweek entitlement under the Family and Medical Leave Act?

A. The supervisor should provide you a copy of the Form 3971. If the leave is approved as one of the covered conditions, the approving official will check the "Approved, FMLA" block on the Form 3971.

Source: 29 CFR 825.301, ELM 515

# 26. Q. If the employee does not request FMLA protection for an absence that meets the definition of a covered condition under the FMLA, must the supervisor designate the absence as FMLA protected leave?

A. Yes, if the employee provides sufficient information for the supervisor to be able to designate it as FMLA protected leave.

Source: 29 CFR 825.208

## 27. Q. If an employee is absent on sick leave and, while absent is diagnosed as having a serious health condition, will his entire absence be protected under the FMLA?

A. Yes, if the employee provides the supervisor with the necessary information about the serious health condition within two days of returning to work.

Source: 29 CFR 825.208 (d) & (e)

# 28. Q. Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child or parent has a serious health condition?

A. The absence must be allowed provided proper medical certification and notice is provided. However, in foreseeable cases, the employee must attempt to schedule the absences so as not to disrupt the employer's operation. The employee may be assigned to an alternative position with equivalent pay and benefits that better accommodates the intermittent or reduced





leave schedule, in accordance with National Agreement.

Source: 29 CFR 825.203, 29 CFR 825.204

## 29. Q. If an employee requests leave for a condition covered under the FMLA, what information should the supervisor provide to the employee?

A. A supervisor should provide the following information:

- Whether the employee is eligible or when he will be eligible.
- Whether the leave will be designated as FMLA protected.
- A copy of PS Form 3971 stating the type of leave and whether the approval is pending documentation.
- Publication 71 where applicable. Publication 71 includes the consequences for not providing the requested documentation and what information must be provided for return to duty, if any.

Source: 29 CFR 825.301

# 30. Q. What certification is required for employees requesting leave protected under the FMLA because of the birth or placement of a son or daughter, and in order to care for such son or daughter after birth or placement?

A. That the employee is the parent and the date of birth or placement of this son or daughter. No medical certification is required.

Source: 29 CFR 825.113 (d)

## 31. Q. Is recertification required for each absence when a health care provider has certified that the employee is receiving continuing treatment?

A. Excluding pregnancy, chronic conditions, and permanent/long-term conditions, recertification is not required for the duration of treatment or period of incapacity specified by the health care provider, unless:

- a) the employee requests an extension of leave
- b) circumstances have changed significantly from the original request
- c) the employer receives information that casts doubt upon the continuing validity of





the certification

d) the absence is for a different condition or reason.

Source: 29 CFR 825.308

## 32. Q. What can an employer do if he or she questions the adequacy of medical certification that includes all the required information?

A. With the employee's permission, a health care provider representing the Postal Service may contact the employee's health care provider to clarify the medical certification. Also, the Postal Service may require the employee to obtain a second opinion at the employer's expense.

Source: 29 CFR 826.307

### 33. Q. Is advance notice required for employees' use of protected leave under FMLA?

A. An employee must provide the Postal Service at least 30 days advance notice if the need for the leave is foreseeable. When the need for leave is not foreseeable, an employee should give notice to the Postal Service as soon as practicable by telephone, fax or other electronic means.

Source: 29 CFR 825.302, 29 CFR 825.303

# 34. Q. Can a supervisor have a blanket policy that requires recertification every 30 days for all employees requesting FMLA protection for absences related to pregnancy, chronic conditions, and permanent/long-term conditions?

A. No. On a case by case basis, the supervisor may require recertification of such conditions on a reasonable basis, but not more often than every 30 days and only in connection with an absence related to the condition. The supervisor may require recertification in less than 30 days when:

- circumstances in the previous certification have changed.
- the supervisor receives information that casts doubt upon the employee's stated reason for the absence.

Source: 29 CFR 825.308 (a)





### SECTION 4 WORK RULES

## 35. Q. May an employee be removed, disciplined, or placed on restricted sick leave as a result of protected absences under the FMLA?

A. No.

Source: 29 CFR 825.220

## 36. Q. Some Local Memorandums of Understanding (LMOU's) allow for daily percentages off on leave, will that affect those who need protected leave under the FMLA?

A. No, leave percentages do not affect the rights of employees to be absent under the FMLA. LMOU language will determine whether FMLA absences count towards the percentages.

Source: AGREEMENT BETWEEN THE LOCAL PARTIES

#### 37. Q. Can an employee file an EEO complaint related to FMLA?

A. Yes, but only on the grounds that the FMLA was applied in a discriminatory manner.

Source: 29 CFR 825.702

#### 38. Q. Can a step increase be deferred as a result of LWOP used under the FMLA?

A. Yes, if an employee has used 13 weeks of LWOP during a step increase waiting period, then the step increase can be deferred. The Family and Medical Leave Act does not require accrual of any rights or benefits during the period of leave taken under the FMLA.

Source: 29 CFR 825.209 (h)

**39.** Q. My last chance agreement states that if I have more than 4 unscheduled absences within the next six months, I can be removed from the Postal Service. Will an absence protected under the FMLA count as an absence for the purposes of my last chance agreement?

10





A. No.

Source: 29 CFR 825.220

40. Q. While absences for conditions covered by the FMLA cannot be cited as a basis for discipline, can they be discussed in periodic absence reviews concerning the importance of regular attendance?

A. Yes.

## 41. Q. Can the employee be separated after he or she has exhausted leave protected under the FMLA but is still unable to return to work?

A. Once leave protected under the FMLA has been exhausted, the employee's failure to return to work should be treated as any other failure to return to work.

Source: 29 CFR 825.309, 29 CFR 825.312



### Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act

Under the Family and Medical Leave Act (FMLA), employees have certain obligations to provide notice and/or other information to their employers. Failure to provide such notice or documentation could result in denial of leave or other protections afforded under the Act.

### I. Qualifying Conditions

The FMLA provides that employees meeting the eligibility requirements must be allowed to take time off for up to 12 workweeks in a leave year for the following conditions:

- 1. Because of the birth of a son or daughter (including prenatal care), or in order to care for such son or daughter. Entitlement for this condition expires 1 year after the birth.
- 2. Because of the placement of a son or daughter with you for adoption or foster care. Entitlement for this condition expires 1 year after the placement.
- 3. In order to care for your spouse, son, daughter, or parent who has a serious health condition. Also, in order to care for those who have a serious health condition and who stand in the position of a son or daughter to you or who stood in the position of a parent to you when you were a child.
- 4. Because of a serious health condition that makes you unable to perform the functions of your position.

#### II. Eligibility

For an absence to be covered by FMLA, you must have been employed by the Postal Service for a total of at least 1 year and must have worked a minimum of 1,250 hours during the 12-month period before the date your absence begins. Once eligible for a given condition, if your work hours subsequently fall below 1,250 during the postal leave year, your eligibility for FMLA protected absences for that condition remains in effect for the duration of the leave year. However, if a second and unrelated condition arises in the leave year, you must meet the 1250 eligibility test anew in order to obtain FMLA protected leave for that (i.e., second) reason.

#### III. Type of Leave or Pay

Absences counted toward the 12 workweeks allowed for the qualifying conditions can be any one or a combination of the following:

- 1. Time off you take as annual leave, sick leave, and/or leave without pay (LWOP) in accordance with current leave policies and collective bargaining agreements.
- 2. In the case of job-related injuries or illnesses, time off during which you are receiving continuation of pay (COP) and/or time during which you are placed on the Office of Workers' Compensation Program (OWCP) payroll.

#### IV. Documentation on Request for Absence

Supporting documentation is required for your absence request to receive final approval. Documentation requirements may be waived in specific cases by your supervisor. However, failure to provide documentation could result in a denial of FMLA protected leave.

- 1. For qualifying condition (1) or (2) You must provide the birth or placement date.
- 2. For qualifying condition (3) or (4) You must provide documentation from the health care provider.
  - a. In both of these cases The medical report must include:
    - (1) The health care provider's name, address, phone number, and type of practice and the patient's name.
    - (2) A certification that the patient's condition meets the FMLA definition of *serious health condition*, supporting medical facts, and a brief statement as to how the medical facts meet the definition's criteria.
    - (3) The approximate date the serious health condition commenced, its probable duration, and the probable duration of the patient's present incapacity, if different.
    - (4) Whether it is a medical necessity that you be absent intermittently or work on a reduced schedule as a result of the serious health condition; and if so, the probable duration of such schedule, an estimate of the probable number of and the interval between treatments and/or episodes of incapacity, the period required for recovery, if any, and whether the medical need for absence is best accommodated through intermittent absence or a reduced work schedule.
  - b. For absence due to pregnancy or a chronic serious health condition The medical certification must include whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.
  - c. If additional or continuing treatments are required The medical certification must include the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and actual or estimated dates of the treatments, if known.
  - d. For absence due to your own serious health condition, including pregnancy, permanent/long term condition, or a chronic condition The medical certification must include whether you are unable to perform work of any kind, parts of the job you are unable to perform, and whether you must be absent for treatments.
  - e. For absence to care for a family member with a serious health condition The medical certification must include whether the patient requires assistance for basic medical or personal needs or safety or for transportation; or if not, whether your presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery, and the probable duration of the need for care on an intermittent or reduced work schedule basis. You must indicate on the form the care you will provide and an estimate of the time period.
- 3. If the serious health condition is a result of a job-related injury or illness The documentation requirements are provided separately.
- 4. If the time off requested is to care for someone other than a biological parent or child Appropriate explanation or evidence of the relationship may be required.

Supporting information that is not provided at the time of the request for absence must be provided within 15 days of receipt of notice, unless this is not practical under the circumstances. If the Postal Service questions the adequacy of a medical certification, a second opinion may be required. If the first and second opinions differ, a third and final

opinion may be required. These opinions are obtained off the clock. However, the Postal Service will pay for these opinions, plus reasonable out-of-pocket travel expenses incurred to obtain the opinions.

Employees may be required to provide re-certification periodically.

During your absence, you must keep your supervisor informed of your intentions to return to work and status changes that affect your ability to return.

#### V. Benefits

Health Insurance — To continue your health insurance during your absence, you must continue to pay the employee portion of the premiums. This payment continues to be withheld from your salary. If the salary for a pay period does not cover the full employee portion, you will be invoiced and are required to make the payment. Failure to make the required payments results in loss of coverage until you return to work.

Life Insurance — Your basic life insurance and any optional life insurance that you carry continue while you are in a pay status. In an LWOP status, these are continued at no cost to you for 1 year. After you are in a non-pay status for 1 year, this coverage is discontinued, but you have the option to convert the coverage to an individual policy within 31 days of the discontinuance in accordance with the Office of Personnel Management's (OPM's) current Federal Employee Group Life Insurance policy on conversion - see OPM's website - www.opm.gov/insure.

Flexible Spending Account (FSA) — If you participate in the FSA program, see your employee brochure for the terms and conditions of continuing coverage during leave without pay.

#### VI. Placement and Documentation on Return to Duty

At the end of your FMLA covered absence, you will be returned to the same position you held when the absence began (or to an equivalent position), provided you are able to perform the functions of the position and would have held that position at the time you returned had you not taken the time off. To return to work after an absence due to your own incapacitation, you must provide certification from your health care provider that you are able to return to work and to perform the essential functions of your position.

The certification should be provided as soon as your physician anticipates your return to work, and no later than one workday before the anticipated return-to-work date. Providing this certification as early as possible will facilitate the return-to-work process and help you avoid unnecessary delays due to incomplete medical information. The medical information requested is basic to the treatment provided by the physician, and should be readily available. There is no need for a diagnosis or other private information to be included.

If you are a nonbargaining unit employee and your absence was for your own serious health condition, the statement from your medical provider that you are able to return to work is all that you must provide.

If you are a bargaining unit employee and your absence was for your own serious health condition, you must also provide the medical certification noted below and be medically cleared before you return to work under any one of the following circumstances:

- 1. The absence exceeds 21 calendar days.
- 2. The absence is due to any of the causes specified below.
- 3. Overnight hospitalization is required during the absence.

The medical report provided must contain enough information to determine that you can return to work without risk of injury or illness to self or others. It must identify any restrictions that prevent you from performing your duties, and whether there is a need for a special

accommodation. It must include whether or not you will need to be absent intermittently or to work on a reduced schedule as a result of the condition, and if so, the probable duration of such schedule and an estimate of the probable number of and the interval between any expected treatments and/or episodes of incapacity.

Examples of specific information that may be necessary are:

- 1. For absence exceeding 21 calendar days Treatment dates, progress to date, and any side effects experienced due to medication that could affect job performance.
- 2. For absence due to exposure to a communicable or contagious disease The nature of the disease and certification that you can return to work without risk of transmission.
- 3. For absence due to mental or nervous condition Treatment dates, progress to date, certification of your compliance with medication, side effects experienced due to medication that could affect job performance, certification that adequate control has been established (including, where applicable, certification that you can accept supervision), and you are to able to work without risk of harm to self or to others.
- 4. For absence due to diabetes The conditions and/or symptoms related to diabetes that caused the incapacity to work, certification that the conditions and/or symptoms have resolved, progress to date, and certification that adequate control has been established and that you are able to return to work safely.
- 5. For absence due to cardiovascular disease involving high blood pressure Conditions and/or symptoms related to high blood pressure that caused the incapacity to work, certification that the conditions and/or symptoms have resolved, certification of your compliance with medication, side effects experienced due to medication that could affect job performance, and certification that adequate control has been established and that you are able to return to work safely.
- 6. For absence due to cardiovascular disease other than high blood pressure Conditions and/or symptoms that caused the incapacity to work, progress to date, certification of your compliance with medication, side effects experienced due to medication that could affect job performance and certification that you are able to return to work safely.
- 7. For absence due to epilepsy (seizure disorder) Conditions and/or symptoms related to seizure disorder that caused the incapacity to work, side effects experienced due to medication that could affect job performance, certification of your compliance with medication, and certification that adequate control has been established and that you are able to return to work safely.
- 8. For absence during which overnight hospitalization is required The nature of the hospitalization, the date of admission, the date of official discharge, progress to date, certification of your compliance with medication, side effects experienced due to medication that could affect job performance and certification that you are able to return to work safely.

A postal medical officer will evaluate the medical information and make the final determination of your suitability for return to work.

POSTAL SERVICE.				Regue	est for	or No	Request for or Notification of Absence	No	of A	<b>\bs</b>	ince
Employee's Name (Last, First, M.I.)	(1)	Social Security No.		Date Submitted	itted	No. of Hour	No. of Hours Requested	pəinbə eduled	-ur -ur	Year	}
Installation (For PM leave, show city, state, and	w city, state, and ZIP code)		N/S Day	Pay Loc. #	D/A Code	Pay Loc. # D/A Code From Date	Hour		Sat Day	i E N	Hours
Time of Call or Request	Scheduled Reporting Time	Employee Can Be Reached At (If needed)	Reached /	N (If needed	ed)	Thru Date	Hour		10 Sun	1	
Type of Absence	Documentation (For official use only)	e only) Ition reviewed)	Revisi	ed Scheduk	Revised Schedule for (Date)	Approved in Advance	Advance		Mon 103 10		
L Carrier 701 Rule LWOP (See reverse)	C For COP Leave (CA1 on file)	ile) (1221 on file)	Begin	Begin Work				$\pm$	Ved		
] Sick (See reverse)	For Military Leave (Orders reviewed)	reviewed)	Lunch-Out	ino				t	8 <sup>1</sup>	-	
J cop	C For Court Leave (Summons reviewed)	ns reviewed) i file)	Lunch-In	ui-				<u> </u> .	8 2 2	+	
Cother: Constant and content a	Cheme Training Testing, Qualitying (Memo on file)	ialilying (Memo on lile	End Work	Vork				1-	5 8		<u>_</u>
			Total	Total Hours						$\frac{1}{2}$	-
I understand that the annual leave authorize	leave authorized in excess of	od in excess of amount available to me during the leave year will be changed to LWOP.	to me duri	ng the leav	e year will	be changed	to LWOP.	t	Now		
Employee's Signature and Date	:	Signature of Person Recording Absence and Date Signature of Supervisor and Date Notified	ice and Ual	e Signatu	re of Super	isor and Da	le Nollited		10 11 11		
Official Action on Application ( <i>Heturn</i> Approved, FMLA* Approved, FMLA (See Publication 71)	9	copy of Signed Fequest to em Deproved FMLA, Pending Documentation Noted on Reverse.	else (o el ling on Revers	n ployee Signatu e.	ire of Supe	loyee) Signature of Supervisor and Date	)ate		Wed 12 Thur 13	<b>x</b> 3	
Disapproved (Give reason):	); ate elicithility date);				Conti	Continued on Reverse	erse	口	[문 주		$\left  - \right $
PS Form <b>3971</b> , April 2001 (Page 1 of 2)	1 (Page 1 of 2)		Warning:	The furnish than \$10,00	ing of talse	information (	Warning: The furnishing of false information on this form may result in a fine of not more than \$10,000 or imprisonment of not more than 5 years, or both. {18 U.S.C. 1001}	/ result ears, o	in a fir both.	e of noi (18 U.S	more .C. 1001

Duting 1111s Absence, I was incapacitated for Duty by:	led for Duty by:	Leave Types (Information Only)	n Only)	-		ЪР	Year	
L Sickness	Ontical Examination or Treatment	Leave Type	Time Card	PSDS	unber Un- Iuber			
	(Job related)	AL-FMLA	55/01	-		Day	lnit.	Hours
	Underonim Medical Dental or	SL-FMLA	56/02	33		Sat		
Pregnancy and Confinement	Optical Examination or Treatment	LWOP – FMLA – Part Day	59/05	8	4	5		
Exposed to a Contagious Disease	(Not job related)	LWOP - FMLA - Full Day	90/09	37		Sun		
•	•	LWOP - Lieu of Sick Leave	59/60	20		8		
During This Absence, I Was Unavailable for Duty Because:	e for Duty Because:	LWOP - Proffered	59/60	12		Mon		
Cirk Leave for Decembert Core		LWOP – Personal Reasons	59/60	8	4	8	T	
		LWOP - Part Day	59	ຊ		Tue		
J Birth of Child - Bonding	ion Auchtion of Foster Care	LWOP - Full Day	60	23	_	ŧ		
Additional Information Regarding Denial of Leave	I of Leave Protection Under FMLA:	LWOP - AWOL	29/60	24		Ved		
Conditions Not Elicities 1 and that		LWOP - IOD (Not FMLA) - OWCP	49	 52	_	3	1	
L ERRUNDER INUL ENGINE LESS MAIN 1250 HOUR	1250 Hours Worked.	LWOP - Maternity	59/60	26		Thur		
J Employee Not Eligible Not Employed with USPS 1 Year.	yed with USPS 1 Year.	LWOP - Suspension	29/60	1		8		
] Employee Has Exhausted FMLA Entitlement	ntitlement in Current Leave Year	LWOP - Union Official	8	i 83		Ē		
Abrence Not for a Council Condition		LWOP - Suspension Pending			+			
		Termination	59/60	53		Sat		
J Absence Not for a Covered Family Member.	Member.	Continuation of Pay - USPS	71	8	-+	8	T	
3 Requested Documentation Not Provided.	vided.	Continuation of Pay - USPS-FMLA		34		un Sun		
Deciminatelies Branided Branks		Continuation of Pay FMLA-IOD-OWCP	P 49/04	ж Т	┥	ß		
J DOCUMENTATION PROVIDED. DOES NOT MEET CAN	I Meet Criteria for FMLA Protection.	Court Duty	61	8		Mon		
Additional Documentation Required		Military Leave	67	8	_	2		
		Postmaster's Organization	68	8		Tue		
		Blood Donor Leave	69	8	+		T	
		Other Paid Leave	96	9		Ned		
		Convention Leave	<b>9</b> 9	_⊥ ≌	4	2	T	
		Acts of God	78	13		Ihur I		
vacy Act: The collection of this information	Privacy Act: The collection of this information is authorized by 39 USC 401, 1001, 1003, 1005; 5	Veteran's Funeral	86	<u>2</u>	_	2	T	
USC 8339; and Public Law 103-3. This information will be	lation will be used to grant or deny your request for	Relocation	80	15		E :		
cial leave from Postal Service duty. It may	official leave from Postal Service duty. It may be disclosed under the routine uses given in Privacy	Civil Defense	11	16	-	4	٦	
Act system notices USPS 050.020 and USPS 120.070 (s	3 120.070 (see appendix of Administrative Support	Civil Disorder	81	17				
nual or, it you wish to obtain a copy of thes his form is voluntary. If this information is n	manua ov, r you wish to obtain a copy of these notices contact your personnel office). Completion i of this form is voluntary. If this information is not provided, official leave may not be granted.	Voting Leave	85	18				
PS Form <b>3971</b> , April 2001 (Page 2 of 2)	2 of 2)							

Page 1 of 5

THE FAMILY & MEDICAL LEAVE ACT OF 1993

# **U.S. DOL** SE Employment Standards Administration Wage and Hour Division

---DISCLAIMER----

Fact Sheet No. 028



THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division, administers and enforces the Family and Medical Leave Act (FMLA) for all private, state and local government employees, and some federal employees. Most Federal and certain congressional employees are also covered by the law and are subject to the jurisdiction of the U.S. Office of Personnel Management or the Congress.

FMLA became effective on August 5, 1993, for most employers. If a collective bargaining agreement (CBA) was in effect on that date, FMLA became effective on the expiration date of the CBA or February 5, 1994, whichever was earlier. FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons. The employer may elect to use the calendar year, a fixed 12-month leave or fiscal year, or a 12-month period prior to or after the commencement of leave as the 12-month period.

The law contains provisions on employer coverage; employee eligibility for the law's benefits; entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; notice and certification of the need for FMLA leave; and, protection for employees who request or take FMLA leave. The law also requires employers to keep certain records.

#### EMPLOYER COVERAGE

FMLA applies to all:

- public agencies, including state, local and federal employers, local education agencies (schools), **and**
- private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year **and** who are engaged in commerce or in any industry or activity affecting commerce including joint employers and successors of covered employers.

#### EMPLOYEE ELIGIBILITY

To be eligible for FMLA benefits, an employee **must**:

(1) work for a covered employer;

http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs28.htm

11/1/01

#### THE FAMILY & MEDICAL LEAVE ACT OF 1993

Page 2 of 5

(2) have worked for the employer for a total of 12 months;

(3) have worked at least 1,250 hours over the previous 12 months; and

(4) work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles.

#### LEAVE ENTITLEMENT

A covered employer must grant an eligible employee up to a total of 12 workweeks of **unpaid** leave during any 12-month period for one or more of the following reasons:

- for the birth and care of the newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.

Spouses employed by the same employer are jointly entitled to a **combined** total of 12 work-weeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition.

Leave for birth and care, or placement for adoption or foster care must conclude within 12 months of the birth or placement.

Under some circumstances, employees may take FMLA leave intermittently — which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.
- FMLA leave may be taken intermittently whenever **medically necessary** to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

Also, subject to certain conditions, employees or employers may choose to use accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave.

The employer is responsible for designating if an employee's use of paid leave counts as FMLA leave, based on information from the employee.

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, and any period of incapacity or subsequent treatment in connection with such inpatient care; or
- Continuing treatment by a health care provider which includes any period of incapacity (i.e., inability to work, attend school or perform other regular daily activities) due to:

http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs28.htm

11/1/01

Page 3 of 5

#### THE FAMILY & MEDICAL LEAVE ACT OF 1993

(1) A health condition (including treatment therefor, or recovery therefrom) lasting more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that **also** includes:

- treatment two or more times by or under the supervision of a health care provider; or
- one treatment by a health care provider with a continuing regimen of treatment; or

(2) Pregnancy or prenatal care. A visit to the health care provider is not necessary for each absence; or

(3) A chronic serious health condition which continues over an extended period of time, requires periodic visits to a health care provider, and may involve occasional episodes of incapacity (e.g., asthma, diabetes). A visit to a health care provider is not necessary for each absence; **or** 

(4) A permanent or long-term condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, terminal cancer). Only supervision by a health care provider is required, rather than active treatment; **or** 

(5) Any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (e.g., chemotherapy or radiation treatments for cancer).

#### "Health care provider" means:

- doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctors practice; **or**
- podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice, and performing within the scope of their practice, under state law; or
- nurse practitioners, nurse-midwives and clinical social workers authorized to practice, and performing within the scope of their practice, as defined under state law; or
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; or
- Any health care provider recognized by the employer or the employer's group health plan benefits manager.

#### MAINTENANCE OF HEALTH BENEFITS

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.

In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

#### JOB RESTORATION

http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs28.htm

11/1/01

#### THE FAMILY & MEDICAL LEAVE ACT OF 1993

Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to **before** using FMLA leave, nor be counted against the employee under a "no fault" attendance policy.

Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highlypaid "**key**" employees after using FMLA leave during which health coverage was maintained. In order to do so, the employer must:

- notify the employee of his/her status as a "key" employee in response to the employee's notice of intent to take FMLA leave;
- notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision;
- offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; **and**
- make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.

A "key" employee is a salaried "eligible" employee who is among the highest paid ten percent of employees within 75 miles of the work site.

#### NOTICE AND CERTIFICATION

Employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable.

Employers may also require employees to provide:

- medical certification supporting the need for leave due to a serious health condition affecting the employee or an immediate family member;
- second or third medical opinions (at the employer's expense) and periodic recertification; and
- periodic reports during FMLA leave regarding the employee's status and intent to return to work.

When intermittent leave is needed to care for an immediate family member or the employee's own illness, and is for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt the employer's operation.

Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense.

Also, covered employers must inform employees of their rights and responsibilities under FMLA, including giving specific written information on what is required of the employee and what might happen in certain circumstances, such as if the employee fails to return to work after FMLA leave.

http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs28.htm 11/1/01

#### THE FAMILY & MEDICAL LEAVE ACT OF 1993

#### **UNLAWFUL ACTS**

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

#### ENFORCEMENT

The Wage and Hour Division investigates complaints. If violations cannot be satisfactorily resolved, the U.S. Department of Labor may bring action in court to compel compliance. Individuals may also bring a private civil action against an employer for violations.

#### **OTHER PROVISIONS**

Special rules apply to **employees of local education agencies**. Generally, these rules provide for FMLA leave to be taken in blocks of time when intermittent leave is needed or the leave is required near the end of a school term.

Salaried executive, administrative, and professional employees of covered employers who meet the Fair Labor Standards Act (FLSA) criteria for exemption from minimum wage and overtime under Regulations, 29 CFR Part 541, do not lose their FLSA-exempt status by using any unpaid FMLA leave. This special exception to the "salary basis" requirements for FLSA's exemption extends only to "eligible" employees' use of leave required by FMLA.

The FMLA does not affect any other federal or state law which prohibits discrimination, nor supersede any state or local law which provides greater family or medical leave protection. Nor does it affect an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan. The FMLA also encourages employers to provide more generous leave rights.

#### FURTHER INFORMATION

The final rule implementing FMLA is contained in the January 6, 1995, Federal Register. For more information, please contact the nearest office of the **Wage and Hour Division**, listed in most telephone directories under U.S. Government, Department of Labor.



#### Certification of Health Care Provider (Family and Medical Leave Act of 1993)

### U.S. Department of Labor

Employment Standards Administration Wage and Hour Division



(When completed, this form goes to the employee, not to the L	Department of Labor.) OMB No.: 1215-0181 Expires: 06/30/02
1. Employee's Name	2. Patient's Name (If different from employee)
<ol> <li>Page 4 describes what is meant by a "serious health cond patient's condition<sup>1</sup> qualify under any of the categories described</li> </ol>	
(1) (2) (3) (4) (5)	(6) , or None of the above

4. Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

 a. State the approximate date the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present incapacity<sup>2</sup> if different):

b. Will it be necessary for the employee to take work only intermittently or to work on a less than full schedule as a result of the condition (including for treatment described in Item 6 below)?

If yes, give the probable duration:

c. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated<sup>2</sup> and the likely duration and frequency of **episodes of incapacity**<sup>2</sup>:

<sup>1</sup> Here and elsewhere on this form, the information sought relates **only** to the condition for which the employee is taking FMLA leave.

Form WH-380 Revised December 1999

<sup>&</sup>lt;sup>2</sup> "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

6. a. If additional treatments will be required for the condition, provide an estimate of the probable number of such treatments.

If the patient will be absent from work or other daily activities because of **treatment** on an **intermittent** or **part-time** basis, also provide an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

- b. If any of these treatments will be provided by **another provider of health services** (e.g., physical therapist), please state the nature of the treatments:
- c. If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (*e.g.*, prescription drugs, physical therapy requiring special equipment):
- 7. a. If medical leave is required for the employee's **absence from work** because of the **employee's own condition** (including absences due to pregnancy or a chronic condition), is the employee **unable to perform work** of any kind?
  - b. If able to perform some work, is the employee **unable to perform any one or more of the essential functions of the employee's job** (the employee or the employer should supply you with information about the essential job functions)? If yes, please list the essential functions the employee is unable to perform:
  - c. If neither a. nor b. applies, is it necessary for the employee to be absent from work for treatment?

- 8. a. If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation?
  - b. If no, would the employee's presence to provide **psychological comfort** be beneficial to the patient or assist in the patient's recovery?
  - c. If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need:

Signature of Health Care Provider	Type of Practice
Address	Telephone Number
	Date

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

Employee	Signature
----------	-----------

Date

Page 3 of 4

- A "Serious Health Condition" means an illness, injury impairment, or physical or mental condition that involves one of the following:
- 1. Hospital Care

Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity<sup>2</sup> or subsequent treatment in connection with or consequent to such inpatient care.

- 2. Absence Plus Treatment
  - (a) A period of incapacity<sup>2</sup> of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity<sup>2</sup> relating to the same condition), that also involves:
    - (1) Treatment<sup>3</sup> two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or
    - (2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment**<sup>4</sup> under the supervision of the health care provider.
- 3. Pregnancy

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

4. Chronic Conditions Requiring Treatments

A chronic condition which:

- (1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
- (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (3) May cause episodic rather than a continuing period of incapacity<sup>2</sup> (e.g., asthma, diabetes, epilepsy, etc.).
- 5. Permanent/Long-term Conditions Requiring Supervision

A period of **Incapacity**<sup>2</sup> which is **permanent or long-term** due to a condition for which treatment may not be effective. The employee or family member must be **under the continuing supervision of, but need not be receiving active treatment by, a health care provider**. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for **restorative surgery** after an accident or other injury, **or** for a condition that **would likely result in a period of Incapacity**<sup>2</sup> **of more than three consecutive calendar days in the absence of medical intervention or treatment**, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis).

This optional form may be used by employees to satisfy a mandatory requirement to furnish a medical certification (when requested) from a health care provider, including second or third opinions and recertification (29 CFR 825.306).

Note: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

<sup>3</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>4</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

#### Public Burden Statement

We estimate that it will take an average of 10 minutes to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

#### DO NOT SEND THE COMPLETED FORM TO THIS OFFICE; IT GOES TO THE EMPLOYEE.

Page 4 of 4

Employer Response to Employee Request for Family or Medical Leave (Optional Use Form — See 29 CFR § 825.301) **U.S. Department of Labor** Employment Standards Administration Wage and Hour Division



#### (Family and Medical Leave Act of 1993)

_	(Employee's Name)
From	
	(Name of Appropnate Employer Representative)
-	ct: REQUEST FOR FAMILY/MEDICAL LEAVE
On _	, you notified us of your need to take family/medical leave due to: (Date)
	The birth of a child, or the placement of a child with you for adoption or foster care; or
	A serious health condition that makes you unable to perform the essential functions for your job: or
	A serious health condition affecting your 🖸 spouse, 🛛 child, 🔲 parent, for which you are needed to provide care.
Value	otified us that you need this leave beginning on and that you expect
roui	
leave	
leave Excep perior leave equiv you d	(Date) to continue until on or about
leave Exception leave equiv you d of a	(Date) to continue until on or about
leave Excel perior leave equiv you c of a contr your	(Date) to continue until on or about
leave Excep period leave equiv you d of a contr your This i	(Date) to continue until on or about
leave perior leave equiv you d of a contr your This i 1. Y	(Date) to continue until on or about
Exceperio leave equiv you c of a contr your This i 1. Y 2. T 3. Y yu a	(Date) to continue until on or about

5. (a) If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you, and it is agreed that you will make premium payments as follows: (Set forth dates, e.g., the 10th of each month, or pay periods, etc. that specifically cover the agreement with the employee.)
(b) You have a minimum 30-day ( <i>or, indicate longer period, if applicable</i> ) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, <i>provided</i> we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work. We will □ □ will not pay your share of health insurance premiums while you are on leave.
<ul> <li>(c) We □ will □ will not do the same with other benefits (e.g., life insurance, disability insurance, etc.) while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you □ will □ will not be expected to reimburse us for the payments made on your behalf.</li> </ul>
6. You will will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until certification is provided.
<ul> <li>7. (a) You are are not a "key employee" as described in § 825.217 of the FMLA regulations. If you are a "key employee:" restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us as discussed in § 825.218.</li> <li>(b) We have have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. (Explain (a) and/or (b) below. See §825.279 of the FMLA regulations.)</li> </ul>
8. While on leave, you will will not be required to furnish us with periodic reports every (indicate interval of periodic reports, as appropriate for the particular leave situation) of your status and intent to return to work (see § 825.309 of the FMLA regulations). If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you will will not be required to notify us at least two work days prior to the date you intend to report to work.
9. You will will not be required to furnish recertification relating to a serious health condition. (Explain below. if necessary, including the interval between certifications as prescribed in §825.308 of the FMLA regulations.)
This optional use form may be used to satisfy mandatory employer requirements to provide employees taking FMLA leave with Written notice detailing spectfic expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. (29 CFR 825.301(b).) Note: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.
Public Burden Statement
We estimate that it will take an average of 5 minutes to complete this collection of information, including the time for reviewing instructions. searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden. send them to the Administrator, Wage and Hour Division, Department of Labor, Room S-3502. 200 Constitution Avenue, N.W., Washington. D.C. 20210.
DO NOT SEND THE COMPLETED FORM TO THE OFFICE SHOWN ABOVE.

# **Employee and Labor Relations Manual Section 515**



#### **Summary of Changes**

Employee Benefits Leave

515.2

#### 514.5 Forms Required

#### 514.51 Form 3971

A request for LWOP is submitted by the employee on Form 3971, *Request for or Notification of Absence*. If the request for leave indicates that the LWOP will extend over 30 days, a written justification and statement of reason for the desired absence is required.

#### 514.52 Form 50

Form 50, *Notification of Personnel Action*, is prepared when LWOP is in excess of 30 days (see Handbook EL-301, *Guidelines for Processing Personnel Actions*).

#### 515 Absence for Family Care or Serious Health Condition of Employee

#### 515.1 Purpose

Section 515 provides policies to comply with the Family and Medical Leave Act of 1993 (FMLA). Nothing in this section is intended to limit employees' rights or benefits available under other current policies (see 511, 512, 513, 514) or collective bargaining agreements. Likewise, nothing increases the amount of paid leave beyond what is provided for under current leave policies or in any collective bargaining agreement. The conditions for authorizing the use of annual leave, sick leave, or LWOP are modified only to the extent described in this section.

#### 515.2 **Definitions**

The following definitions apply for the purposes of 515:

- a. Son or daughter biological, adopted, or foster child, stepchild, legal ward, or child who stands in the position of a son or daughter to the employee, who is under 18 years of age or who is 18 or older and incapable of self-care because of mental or physical disability.
- b. *Parent* biological parent or individual who stood in that position to the employee when the employee was a child.
- c. Spouse --- husband or wife.
- d. Serious health condition illness, injury, impairment, or physical or mental condition that involves any of the following:
  - Hospital care —\_inpatient care (i.e., an overnight stay) in a hospital or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or subsequent to such inpatient care.
  - (2) Absence plus treatment —\_a period of incapacity of more than 3 consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition) that also involves either one of the following:
    - (a) Treatment two or more times by a health care provider.

#### ELM 16, August 2000

345

Summary of Changes

Employee Benefits Leave

- (b) Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider.
- (3) *Pregnancy* any period of incapacity due to pregnancy or for prenatal care.
- (4) Chronic condition requiring treatments a chronic condition that meets all of the three following conditions:
  - (a) Requires periodic visits for treatment by a health care provider or by a nurse or physician's assistant under direct supervision of a health care provider.
  - (b) Continues over an extended period of time (including recurring episodes of a single underlying condition).
  - (c) May cause episodic, rather than a continuing period of, incapacity. Examples of such conditions include diabetes, asthma, and epilepsy.
- (5) Permanent or long-term condition requiring supervision a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples of such conditions include Alzheimer's, a severe stroke, and the terminal stages of a disease.
- (6) Condition requiring multiple treatments (nonchronic condition) any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment. Examples of such conditions include cancer (which may require chemotherapy, radiation, etc.), severe arthritis (which may require physical therapy), and kidney disease (which may require dialysis).

**Note:** Cosmetic treatments (such as most treatments for orthodontia or acne) are not "serious health conditions" unless complications occur. Restorative dental surgery after an accident or removal of cancerous growths is a serious health condition provided all the other conditions are met. Allergies, mental illness resulting from stress, and treatments for substance abuse are protected only if all the conditions are met. Routine preventative physical examinations are excluded. Also excluded as a regimen of continuing treatments are treatments that involve only over-the-counter medicine or activities such as bed rest that can be initiated without a visit to a health care provider.

e. *Health care provider* — doctor of medicine or osteopathy; Christian Science practitioner listed with the First Church of Christ, Scientist, in

ELM 16, August 2000

515.2

346

Summary of Changes

#### Employee Benefits Leave

515.43

Boston, MA; physician; or other attending practitioner who is performing within the scope of his or her practice.

#### 515.3 Eligibility

For an absence to be covered by the FMLA, the employee must have been employed by the Postal Service for an accumulated total of 12 months and must have worked a minimum of 1,250 hours during the 12-month period before the date leave begins.

#### 515.4 Leave Requirements

#### 515.41 Conditions

Eligible employees *must* be allowed an total of up to 12 workweeks of leave within a Postal Service leave year for one or more of the following:

- a. Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. Entitlement to be absent for this condition expires 1 year after the birth.
- b. Because of the placement of a son or daughter with the employee for adoption or foster care. Entitlement to be absent for this condition expires 1 year after the placement.
- c. In order to care for the spouse, son, daughter, or parent of the employee if the spouse, son, daughter, or parent has a serious health condition.
- d. Because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

#### 515.42 Leave Type

Absences that qualify as FMLA leave may be charged as annual leave, sick leave, continuation of pay, or leave without pay, or a combination of these. Leave is charged consistent with current leave policies and applicable collective bargaining agreements.

#### 515.43 Authorized Hours

Eligible employees are entitled to 12 workweeks per leave year of FMLA-protected absences. This amount is twelve times the hours normally, or regularly, scheduled in the employee's workweek. Occasional or sporadic overtime hours are excluded. Thus:

- a. Full-time employees who normally work 40 hours per week are entitled to up to 480 hours of FMLA-covered absences within a leave year.
- Part-time employees who have regular weekly schedules are entitled to 12 times the number of hours normally scheduled in their workweek.
   For example, a part-time employee with a normal schedule of 30 hours a week is entitled to 360 hours (12 weeks times 30 hours).
- c. Part-time employees who do not have normal weekly schedules are entitled to the total number of hours worked in the previous 12 weeks, not including occasional or sporadic overtime hours.

Summary of Changes

Employee Benefits Leave

Absences in addition to the 12 workweeks of FMLA leave may be granted in accordance with other leave policies or collective bargaining agreements (see 511, 512, 513, 514).

#### 515.5 **Documentation**

#### 515.51 General

An employee must provide a supervisor a Form 3971, *Request for or Notification of Absence*, together with documentation supporting the request, at least 30 days before the absence if the need for the leave is foreseeable. If 30 days notice is not practicable, the employee must give notice as soon as practicable. Ordinarily the employee should give at least verbal notification within 1 or 2 business days of the time the need for leave becomes known. A copy of the completed Form 3971 is returned to the employee along with a copy of Publication 71, which details the specific expectations and obligations and the consequences of a failure to meet these obligations.

Additional documentation may be requested of the employee, and this must be provided within 15 days or as soon as practicable considering the particular facts and circumstances.

During an absence, the employee must keep his or her supervisor informed of intentions to return to work and of status changes that could affect his or her ability to return to work. Failure to provide documentation can result in the denial of FMLA protection.

#### 515.52 New Son or Daughter

An employee requesting time off because of the birth of the employee's son or daughter and to care for the son or daughter, or because of the placement of a son or daughter with the employee for adoption or foster care, may be required to substantiate the relationship and provide the birth or placement date.

#### 515.53 Care of Others for Medical Reasons

An employee requesting time off to care for a spouse, parent, son, or daughter who has a serious health condition may be required to substantiate the relationship and to provide documentation from the health care provider stating the date the serious health condition began, probable duration of the illness, appropriate medical facts, nature of the need to care for, and when the employee will be needed to provide such care or psychological support.

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

ELM 16, August 2000

515.5

348

Employee Benefits Leave

515.62

Summary of Changes

#### 515.54 Additional Medical Opinions

A second medical opinion by a health care provider who is designated and paid for by the Postal Service may be required. A health care provider selected for the second opinion may not be employed by the Postal Service on a regular basis. In case of a difference between the original and second opinion, a third opinion by a health care provider may be required. The third health care provider is jointly designated or approved by management and the employee, and the third opinion is final. The Postal Service pays the health care provider for the third opinion. Recertifications of a medical condition, for which the employee bears the cost, may also be required. Such medical opinions are obtained off the clock.

#### 515.55 Employee Incapacitation

An employee requesting time off that is covered by FMLA because of his or her own incapacitation must satisfy the documentation requirements for sick leave in 513.31 through 513.38 or for LWOP in 514.4. If medical opinions are required in addition to initial documentation, they are administered as described in 515.54.

#### 515.56 Return to Work After Employee Incapacitation

To return to work from an FMLA-covered absence because of their own incapacitation, employees must provide certification from their health care provider that they are able to perform the essential functions of their positions with or without limitations. Limitations described are accommodated when practical. In addition, bargaining unit employees must comply with collective bargaining agreements, which include Postal Service policies in 865 (summarized in section VI of Publication 71), 513.37, and other handbooks and manuals.

#### 515.6 Intermittent Leave or Reduced Schedule

#### 515.61 New Son or Daughter

Absences requested because of the birth and subsequent care of the employee's newborn son or daughter or because of the placement of a son or daughter with the employee for adoption or foster care may be taken on an intermittent basis or reduced work schedule only if the request for such intermittent leave or schedule modification is approved by the supervisor. Eligibility for this leave expires 1 year after the birth or placement. Approval is based on employee need, Postal Service need, and costs to the Postal Service.

#### 515.62 Care of Others for Medical Reasons or Employee Incapacitation

Absences requested to care for a spouse, son, daughter, or parent with a serious health condition or due to the employee's own health condition may be taken on an intermittent basis or by establishing a reduced work schedule when medically necessary.

Summary of Changes

Employee Benefits Leave

#### 515.63 Temporary Change in Duty Assignment

If an employee requests intermittent leave or a reduced work schedule, the Postal Service may assign the employee, with equivalent pay and benefits, temporarily to the duties of another position consistent with applicable collective bargaining agreements and regulations if such an assignment better accommodates the recurring periods of absence.

#### 515.64 Fair Labor Standards Act Status

An employee exempt from the Fair Labor Standards Act (FLSA) normally may not take leave in less than 1-day increments. However, leave taken for an FMLA-covered reason on an intermittent basis or by temporarily establishing a reduced work schedule can be taken in less than 1-day increments without affecting the employee's FLSA-exempt status.

#### 515.7 Return to Position

Employees whose absence is covered by the FMLA are normally entitled to return to the positions they held when the absence began, or to equivalent positions with equivalent pay, benefits, working conditions, and other terms of employment if they are able to perform the essential functions of the positions. Returning employees are not entitled to any right, benefit, or position to which they would not have been entitled had they not been absent, or to intangible, unmeasurable aspects of the job such as the perceived loss of potential for future promotional opportunities. If an employee was hired for a specific term or only to perform work on a discrete project, then there is no further reinstatement obligation under this section if the employment term or project is over and the employment would not have otherwise continued.

#### 515.8 Benefits

All benefits accrue to employees during an FMLA absence pursuant to the applicable provision of the ELM.

#### 515.9 Family Leave Poster

All postal facilities, including stations and branches, are required to conspicuously display WH Publication 1420, *Your Rights Under the Family and Medical Leave Act of 1993.* It must be posted, and remain posted, on bulletin boards where it can be seen readily by employees and applicants for employment.

#### 516 Absences for Court-Related Service

#### 516.1 General

#### 516.11 Determining Nature of Court-Related Service

Installation heads ascertain the exact nature of court service and determine if the employee (a) is entitled to paid court leave, (b) must take annual leave or LWOP, or (c) is to serve in an official duty status. If a summons to witness

ELM 16, August 2000

515.63

U.S. Department of Labor

Employment Standards Administration Wage and Hour Division Washington, D.C. 20210



NOV 1 5 1993

Dear Mr. Burrus

This is in response to your request for an advisory opinion under the Family and Medical Leave Act of 1993 (FMLA) regarding mandatory "modified" or "light duty" job programs for temporarily disabled employees.

You ask if an employer can require a temporarily disabled "eligible employee," who seeks FMLA leave for a serious health condition that makes the employee unable to perform the employee's position, to accept an alternative position (with similar pay and benefits) that has been modified to eliminate the essential functions which the employee cannot perform. If so, you ask if the employer can deny the requested FMLA leave and require the employee's presence at work in the modified job.

The FMLA Regulations, 29 CFR Part 825, at § 825.702(d), provide that if FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, <u>require</u> the employee to take a job with a reasonable accommodation. Thus, an employer could not require an employee to work in a restructured job instead of granting the employee's FMLA leave request in the example you posed in your inquiry.

FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave [see § 825.215(e)(4)], but the employee cannot be induced by the employer to accept a different position against the employee's wishes.

As noted in your letter, § 825.204 of the regulations addresses temporary transfers to alternative positions with equivalent pay and benefits for employees who request intermittent leave or leave on a reduced leave schedule for planned medical treatment, including for a period of recovery from a serious health condition.

Sincerely, Echaveste Maria Administrator

\* \* \* \* \* \* \* \* \* \* \* \*

#### Letter Ruling: May 12, 1995 (FMLA-61)

This is in response to your letter requesting an interpretation of the Family and Medical Leave Act of 1993 (FMLA) regarding substitution of an employee's accrued paid leave for unpaid FMLA leave. Specifically, one of your members has been told by his employer that he must substitute vacation leave that he would otherwise not yet be entitled to use for part of his FMLA leave. Under the employer's vacation leave plan, an employee who has worked 800 hours in the current vacation year earns paid vacation that may not be used until the next vacation year.

Section 102(d)(2) of FMLA (29 U.S.C. 2612(d)(2)) provides generally that an employee may elect, or an employer may require the employee, to substitute certain of the accrued paid vacation leave, personal leave, family leave, or sick or medical leave of the employee for the unpaid leave provided under the Act. The legislative history indicates that the purpose of this section was "to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under this act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves." (House Report 103-8, Feb. 2, 1993, p. 38.) The Department interprets these provisions to mean that the employee has both earned the leave and is able to use that leave during the FMLA leave period. Consequently, in the particular situation that you describe, the employer could not require the employee to substitute leave that is not yet available to the employee to use under the terms of the employer's leave plan.

The foregoing would neither prevent an employer from voluntarily advancing paid leave to an employee nor an employee from voluntarily accepting such leave during an FMLA absence. Section 403 of FMLA (29 U.S.C. 2653) specifically states that "[n]othing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."

This above is intended as general guidance only and assumes that no other compliance questions are at issue. Please contact this office directly should the above not fully address your concerns.

> /s/ Daniel F. Sweeney Deputy Assistant Administrator

\* \* \* \* \* \* \* \* \* \* \* \*

#### Letter Ruling: July 21, 1995 (FMLA-68)

This is in response to your letter asking two question regarding the application of the Family and Medical Leave Act of 1993 (FMLA).

The first question is whether an employer can count an absence for sickness or injury as an FMLA absence if the employee does not request that it be counted as such. So long as the employer is a covered employer, the employee is an eligible employee, and the reason for the absence meets one of the conditions described in the definitions of "serious health conditions" under the FMLA, the employer may designate (and so advise the employee) and count the absence against the employee's 12-week FMLA entitlement even if the employee has not requested that it be counted as such.

Your second question concerns a negotiated leave of absence policy that was in effect prior to FMLA. Under this policy, employees are not required to use up all of their accrued vacation, sick time, personal time, and any other compensated time before their leave begins. You indicate that, especially in maternity situations, employees may consider this leave preferable to FMLA leave. The FMLA Regulations, 29 CFR Part 825, provide that an employer must observe any employment benefit program or plan that provides greater family and medical leave rights to employees than the rights established by FMLA. (See Regulations 825.700.) There is not enough information in you letter to determine conclusively if the negotiated leave of absence policy provides a greater benefit. If in fact it does, the employer may not cite FMLA as a reason not to adhere to the employer's established policy.

As discussed in Regulations 825.207(h), an employee who complies with an employer's less stringent leave plan requirements may not be denied leave for an FMLA purpose on the grounds that the stricter requirements of FMLA have not been met.

The above answers are based on the limited information provided in your letter and assume that no other compliance issues exist. The application of FMLA in any particular situation will of course be affected by the facts in that situation.

If you have specific questions not addressed by the above, you may contact the office of the Wage and Hour Division responsible for enforcing FMLA in your area located at U.S. Courthouse and Federal Building, 15 Henry Street, Room 101K, Binghampton, New York 13901, telephone: (607) 773-2609.

> /s/ Daniel F. Sweeney Deputy Assistant Administrator

**UNITED STATES** POSTAL SERVICE

February 7, 1994

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

I was glad to see that the APWU published a user-friendly FMLA booklet to help employees understand their rights and obligations under this law. I think it's important that employees receive support and consideration when confronted with pressing family health obligations or serious illnesses.

With regard to the questions regarding FMLA which you and Corine Rodriguez discussed, our responses are:

Question: Do employees retain the no-layoff protection when FMLA interrupts the 20 pay periods worked per year during the six year period of continuous service?

Answer: Yes. However, since the maximum FMLA time off is 12 weeks or 6 pay periods per leave year, loss of the no-layoff protection would normally be for other reasons. The only time FMLA would interrupt the years required for protection is in cases where more than 12 weeks of FMLA during two different "leave" years result in more than 6 pay periods of absence during an individual employee's "anniversary" year. In these rare cases the no-layoff protection must manually be restored. This is accomplished by sending a memorandum to the Minneapolis Information Service Center.

Question: Does OWCP and Military Leave count towards the 1250 work hour criteria for eligibility for FMLA?

Answer: No. Whether an employee has worked the minimum 1250 hours of service is determined according to the principles

established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. OWCP and Military Leave do not qualify as work under these principles.

If we can answer any other questions, please contact Corine at (202) 268-3823.

Sincerely,

Shunghleynah

Sherry A. Cagnoli Manager Contract Administration (NALC/NRLCA) Labor Relations



### American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

March 9, 1994

William Burrus Executive Vice President (202) 842-4246

Dear Ms. Cagnoli:

Since our last meeting on the Family and Medical Leave Act a number of questions have arisen that require uniform responses. It is important that the parties practice and the implementation of the law be consistent with the intent of Congress.

National Executive Board Moe Biller President

William Burrus Executive Vice President

Douglas, C. Holbrook

Secretary-Treasurer Thomas A. Neill Industrial Relations Director

Robert L. Tunstall Director, Clerk Division

James W. Lingberg Director, Maintenance Division

Donald A. Ross Director, MVS Division

George N. McKeithen Director, SDM Division

Regional Coordinators James P. Williams Central Region

Philip C. Flemming, Jr. Eastern Region

Elizabeth "Liz" Powell Northeast Region

Archie Salisbury Southern Region

Raydell R. Moore Western Region Following are the questions and the union's interpretation of the law:

1. What certification is required for employees requesting FMLA because of the birth or placement of a son or daughter and in order to care for such son or daughter after birth:

The required information is limited to: Employee's Name Name of employee's son or daughter Date of birth or placement of this son or daughter Employee's signature

(Optional Form WH-380)

2. Is medical certification required for the birth or placement of a son or daughter?

No, unless the employee is requesting intermittent leave or a reduced schedule

(Optional Form WH-380)

3. Can an employee use intermittent leave or work a reduced schedule for the birth of a son or daughter or to care for a newborn son or daughter?

Yes, but only with the agreement of the employer.

825.203
4. Can an employee use intermittent leave or work a reduced schedule because of pregnancy or the serious health condition of a newborn child?

Yes, provided the mother or the newborn child has a serious health condition

825.101

5. Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child or parent have a serious.health condition?

No, provided proper medical certification has been provided. (The employee must attempt to schedule their leave so as not to disrupt the employer's operation and may be assigned to an alternative position with equivalent pay and benefits that better accommodates the intermittent or reduced leave schedule)

825.203 825.117

6. Is an employee entitled to FML if their absence is required during procedures intended to induce pregnancy, ie in-vitro fertilization and other insemination procedures?

Yes, as certified by the attending physician 825.114 (c)

7. Is treatment for substance abuse covered as a serious health condition?

## Yes, provided a stay in an in-patient treatment facility is required

825.114

8. Is an employee required to provide medical documentation for each absence after a medical physician has certified that the employee is receiving continuing treatment?

No, provided the medical certification includes an explanation of the continuing treatment under the supervision of the health care provider to resolve the health condition

825.114

9. Does the employee have the option of using LWOP in conjunction with annual or sick leave for FML?

Yes, provided the absence is covered by the provisions of FMLA

825.208 Article 10, Sec 6

10. Can an employee be disciplined or receive other administrative action for absences covered by the FMLA?

No

825.220

11. What can an employer do if it questions the adequacy of a medical certification?

If the certification includes the required information as contained on Form WH 380, the employer may only require the employee to obtain a second opinion at the employers expense.

11. Is advance written notice required for employees use of FML?

No, in the case of a medical emergency the employee should provide notice by telephone, telegraph, fax or other electronic means. Additional information must be provided when it can readily be accomplished as a practical matter.

825.302 825.303

13. Can properly submitted Family and Medical Leave request be denied because of operational reasons?

No. If the absence is otherwise justified under the FMLA, the leave cannot be denied

825.100 825.112

14. If an employee provides notice of the need for FMLA leave, what information must the employer provide to the employee?

A. Whether or not the leave will be counted against the FMLA entitlement

B. Any requirements for the employee to furnish medical certification and the consequences of failing to do so

C. The employee's right to substitute paid leave or LWOP

D. Any requirement for the employee to make health benefit payments and the arrangements for making such payments

E. Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment

F. The employee's right to restoration to the same or an equivalent job upon return from leave

G. The employee's potential liability for payment of health insurance premiums paid by the employer if the employee fails to return to work

825.301 (c)

Thank you for your attention to this matter.

Sincerely,

liam Burrus Executive Vice President

Sherry Cagnoli, Manager Labor Relations 475 L'Enfant Plaza, SW Washington, DC 20260

WB:rb



April 12, 1994

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

This is in response to your March 9 correspondence concerning the need for uniform responses to Family and Medical Leave Act (FMLA) questions. Enclosed for your review is Attachment 1, the responses we prepared for your questions as well as Attachment 2, additional questions and answers which have arisen since our last meeting.

The responses represent our best efforts to provide guidance and information to all our employees so that workplace relationships are not dissolved while workers attend to pressing family health obligations or their own serious illness. If you have any questions concerning our answers or if you would like to discuss them, please call Corine T. Rodriguez of my staff at (202) 268-3823.

I appreciate your help and cooperation in this matter.

Sincerely,

Shunghlagurh'

Sherry A. Cagholi Manager Contract Administration (NALC/NRLCA) Labor Relations

Enclosures

Attachment 1

1. What certification is required for employees requesting FMLA because of the birth or placement of a son or daughter and in order to care for such son or daughter after birth:

The required information is:

- a) That the employee is the parent.
- b) Date of birth or placement of this son or daughter.

Note: There are no specified optional forms which the supervisor must accept. Optional forms are acceptable only if they are completed with sufficient detail (as described in 825.306).

2. Is medical certification required for the birth or placement of a son or daughter?

No medical certification is required for the placement or to care for a son or daughter who does not have a serious health condition.

825.302(c)

Medical certification is required if the mother is requesting time off because of the pregnancy.

825.114

3. Can an employee use intermittent leave or work a reduced schedule for the birth or placement of a son or daughter or to care for a newborn son or daughter?

Yes, but only with the agreement of the employer.

825.203

4. Can an employee use intermittent leave or work a reduced schedule because of pregnancy or the serious health condition of a newborn child?

Yes, when medically necessary due to the mother's pregnancy or the newborn child's serious health condition. The employer may require a certification from the health care provider that such leave is medically necessary and the expected duration and schedule of such leave.

825.117

5. Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child or parent has a serious health condition?

No, provided proper medical certification has been provided. (The employee must attempt to schedule their leave so as not to disrupt the employer's operation and may be assigned to an alternative position with equivalent pay and benefits that better accommodates the intermittent or reduced leave schedule.)

825.203 and 825.117

 Are employees entitled to FMLA if their absence is required during procedures intended to induce pregnancy, i.e., in-vitro fertilization and other insemination procedures.

Yes, as certified by the attending physician.

825.114c and 825.114 (3)

7. Is treatment for substance abuse covered as a serious health condition?

Yes, if certified by the medical care provider as a serious health condition.

825.114

8. Is an employee required to provide medical documentation for each absence after a medical provider has certified that the employee is receiving continuing treatment?

No, but the employer may request certification if there is reason to question the appropriateness of the leave or its duration. An employer may request recertification of medical conditions to support leave requests at any reasonable interval, but not more often than every 30 days, unless:

- a) The employee requests an extension of leave.
- b) Circumstances have changed significantly from the original request.
- c) The employer receives information that casts doubt upon the continuing validity of the certification.
- d) The absence is for a different condition or reason.

825.305(b) and 825.308

9. Does the employee have the option of using LWOP in conjunction with annual or sick leave for FMLA?

Yes, subject to the approval of the leave in accordance with normal leave approval procedures.

825.208 and Article 10, section 6

10. Can an employee be disciplined or receive other administrative action for absences covered by the FMLA?

No. However, if the absence exceeds more than 12 weeks as authorized by FMLA, an employee could be subject to disciplinary action or other administrative action.

825.220(c)

11. What can an employer do if it questions the adequacy of a medical certification?

If the certification includes the required information, the employer may require the employee to obtain a second medical opinion at the employer's expense. The second health care provider may not be employed on a regular basis by the employer.

825.307 and 825.308

12. Is advance written notice required for employees' use of FMLA?

Not in the case of unexpected emergencies. In such cases, the employee should provide notice by telephone, telegraph, FAX or other electronic means. Additional information must be provided when it can readily be accomplished as a practical matter.

825.302 and 825.303

13. Can properly submitted FMLA requests be denied because of operational reasons?

No. If the absence is otherwise justified under FMLA, the leave cannot be denied. (When the necessity for leave is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice as practicable. If the necessity for leave is based on planned medical treatment the employee shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer and shall provide the employer with not less than 30 days notice, as practicable.

825.100, 825.112, 825.203 and PL 103-3 Section 102(e)

- 14. If an employee provides notice of the need for FMLA leave, what information must the employer provide to the employee?
  - a) Whether or not the leave will be counted against the FMLA entitlement.

- b) Any requirements for the employee to furnish medical certification and the consequences of failing to do so.
- c) The employee's right to use annual, sick leave, or LWOP.
- d) Any requirement for the employee to make health benefit payments and the arrangements for making such payments.
- Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment.
- f) The employee's right to restoration to the same or an equivalent job upon return from leave.
- g) The employee's potential liability for payment of health insurance premiums paid by the employer if the employee fails to return to work.

825.301 (c)

Attachment 2

## FAMILY AND MEDICAL LEAVE (FMLA) QUESTIONS & ANSWERS

- Q. Can an FLSA exempt employee now take leave in less than full day increments?
- A. Only if the time off is due to reasons covered by FMLA. Charging an FLSA exempt employee a partial day of leave for any other reason is a violation of the Fair Labor Standards Act.
- Q. How are the 12 weeks of FMLA tracked?
- A. By the leave request forms (3971) maintained for two years. When a leave is requested for a condition covered by FMLA, the supervisor writes FMLA in the form's remarks section. In most cases it will be pretty obvious to the supervisor when an employee is getting close to 12 weeks. When questions arise, the supervisor may have to review the request forms submitted by the employee since the start of the leave year.
- Q. Must the employee state the leave is FMLA?
- A. No, leave requested for a covered condition is part of the 12 workweeks provided by the FMLA policy. When an employee requests leave for a covered condition, the supervisor should note "FMLA" in the request form's remarks section, and give the employee the required notice.
- Q. I am having trouble getting a baby sitter on Saturdays and need to be off every other Saturday to care for my 5 month old baby. Can I take family leave every other Saturday for that purpose?
- A. Leave requested to care for your child, other than for medical reasons, may be taken on an intermittent basis only with your supervisor's approval. (ELM 516.61.)
- Q. When may a supervisor deny or delay leave requested for a condition covered by family leave?
- A. When less than 30 days' notice, or as much notice as practical under the circumstances, is given. Another situation is when leave requested on an intermittent or

-2-

reduced schedule because of the birth and care of the newly born child, or because of the placement of a child with the employee. Such leave is approved based on the employee's need, Postal Service need, and costs to the Postal Service. (ELM 515.51 and 515.61.)

- Q. Is FMLA in addition to sick and annual leave?
- A. FMLA is in addition to annual or sick leave that is taken for reasons not covered by FMLA. FMLA does not provide for additional sick or annual leave. It merely provides up to 12 workweeks absence for covered conditions. During such absence either annual, sick or LWOP is taken by the employee depending on the reason for the absence, and the employee's leave balances.
- Q. Can a step increase be deferred as a result of FMLA?
- A. It can happen, but is not likely. There is a maximum of 12 weeks during a leave year for leave taken as FMLA. An employee must have 13 weeks of LWOP during the step increase wait period for a step increase to be deferred. I should mention that the Family and Medical Leave Act does not require accrual of any rights or benefits during a period of leave.
- Q. Do employees retain the no-layoff protection when FMLA interrupts the 20 pay periods worked per year during the six year period of continuous service?
- A. Yes. However, since the maximum FMLA time off is 12 weeks or 6 pay periods per leave year, loss of the no-layoff protection would normally be for other reasons. The only time FMLA would interrupt the years required for protection is in cases where more than 12 weeks of FMLA during two different "leave" years result in more than 6 pay periods of absence during an individual employee's "anniversary" year. In these rare cases the no-layoff protection must manually be restored. This is accomplished by sending a memorandum to the Minneapolis Information Service Center.



May 17, 1994

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

This is in response to your April 20 inquiry regarding the eligibility of postal employees to use leave donated under the Leave Sharing Program for absences authorized under the Family and Medical Leave Act.

Employees who suffer serious personal health conditions and who are eligible for coverage under the Family and Medical Leave Act may participate in the Leave Sharing Program (LSP). However, eligibility is not automatic in that the employee must qualify under the current provisions of the LSP. For example, donated leave would not be available to employees who may qualify for FMLA before they exhaust their earned/unused sick and annual leave balances and accumulate 80 hours or more of leave without pay due to the serious health condition. Also, an employee may be eligible for coverage under FMLA but may be excluded from the LSP because he/she is a noncareer employee.

This is certainly consistent with existing leave policies and with our viewpoint that employees need our support and consideration when confronted with serious illnesses. If you have any further questions, please contact Corine T. Rodriguez at (202) 268-3823.

Sincerel

Sherry A. Cagnoli Manager Contract Administration (NALC/NRLCA) Labor Relations



## American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

William Burrus Executive Vice President (202) 842-4246

February 2, 1995

#### Dear Tony:

National Executive Board Moe Biller President

William Burrus Executive Vice President

Douglas C. Holbrook Secretary-Treasurer

Thomas A. Neill Industrial Relations Director

Robert L. Tunstall Director, Clerk Division

James W. Lingberg Director, Maintenance Division

Donald A. Ross Director, MVS Division

George N. McKeithen Director, SDM Division

Regional Coordinators

 James P, Williams Central Region

Philip C. Flemming, Jr. Eastern Region

Elizabeth "Liz" Powell Northeast Region

Archie Salisbury Southern Region

Raydell R. Moore Western Region In compliance with the Privacy Act the Postal Service has published in the Federal Register a listing of personnel who are authorized access to restricted medical information. Pursuant to Section 221.3 "Files Maintenance", "All correspondence and other records containing restricted medical information must be marked RESTRICTED-MEDICAL (rather than confidential) and filed in locked cabinets. Keys must be kept by medical personnel only. Only medical personnel may have access to these files."

Due to the reduction of medical personnel in postal facilities there are few postal officials authorized to access restricted medical records. Postal supervisors and Compensation Specialist routinely access and demand for their use and evaluation restricted medical information, including "physician diagnosis and prognoses" and "employee medical history". Compensation Specialist and designated supervisors are not "medical personnel" as defined by the Privacy Act and USPS official designation and are not authorized to have access to the information contained in such restricted medical information. In addition, the published regulations require that such restricted medical information be maintained only in the "office of the contract physician" where on-site postal medical personnel are not available.

It is the position of the Union that supervisors, non-certified managers and specialist may not review or maintain medical information in any form that includes prognosis and/or diagnosis, and may not insist that such information be provided to them as a condition for approved absence from work. If such information is required as a condition for approval for absence from work, to modify job assignment or request a reduced schedule, the restricted medical information must be transmitted directly from the employee or physician to the postal official who is certified for access to restricted information. Page 2 - Anthony Vegliante

This is to determine the USPS' interpretation of the right of supervisors, Compensation Specialist and other non-designated postal officials to receive, access, review and maintain restricted medical records and information of postal employees.

Please respond at your earliest opportunity that the union can evaluate its response as appropriate.

Sincerely,

યાર William Burrus **Executive** Vice President

Mr. Anthony Vegliante, Manager Grievance and Arbitration Division United States Postal Service 475 L'Enfurt Plaza, SW Washington, DC 20260

WB:rb opeiu#2 afl-cio



Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

This letter is in further response to your correspondence of February 7 concerning the nature of medical documentation needed by supervisors to approve leave.

The enclosed memorandum from Dr. David H. Reid, III, National Medical Director for the Postal Service, serves to distinguish between a diagnosis or medical prognosis, and medical facts, as they relate to Section 513.36 of the Employee and Labor Relations Manual (ELM). It is intended to clear up any confusion which may exist in the field.

As noted by Dr. Reid, medical information which contains a diagnosis and a medical prognosis constitutes a restricted medical record as defined in Section 214.3 of Handbook EL-806.

Dr. Reid observes that restricted medical records are not necessary to support a request for approved leave when required by Section 513.36 of the (ELM): "A health care provider can provide an explanation of medical facts sufficient to indicate that an employee is, or will be, incapacitated for duty without giving a specific diagnosis or medical prognosis."

It is additionally the Postal Service's position that this application is consistent with the documentation requirements attendant to a request for leave under the Family and Medical Leave Act (FMLA).

If you have any questions on the foregoing, please contact Charles Baker of my staff at (202) 268-3842.

Sincerely,

Anthomy J. Vegliante Manager Contract Administration APWU/NPMHU

Enclosure



June 22, 1995

MANAGERS, HUMAN RESOURCES (ALL AREAS) MANAGERS, HUMAN RESOURCES (ALL DISTRICTS) SENIOR AREA MEDICAL DIRECTORS

SUBJECT: Documentation Requirements

It has recently come to my attention that there is some confusion in the field concerning the substance of medical information needed by a supervisor to approve leave pursuant to Section 513.36 of the Employee and Labor Relations Manual. The following restates the Postal Service's position.

When employees are required to submit medical documentation to support a request for approved leave, such documentation should be furnished by the employee's attending physician or other attending practitioner, with an explanation of the nature of the employee's illness or injury sufficient to indicate that the employee was or will be unable to perform his or her normal duties during the period of absence. Normally, statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation.

In order to return to duty when medical documentation is required, an employee must submit to the supervisor information from the appropriate medical source which includes:

- 1. Evidence of incapacitation for the period of absence.
- Evidence of the ability to return to duty with or without limitations.

Medical information which includes a diagnosis and a medical prognosis is not necessary to approve leave. A health care provider can provide an explanation of medical facts sufficient to indicate that an employee is, or will be, incapacitated for duty without giving a specific diagnosis or medical prognosis. If medical documentation is received by an employee's supervisor that provides a diagnosis and a medical prognosis, it must be forwarded to the health unit or office of the contract medical provider and treated as a "restricted medical record" under Section 214.3 of Handbook EL-806. In order to facilitate operational scheduling and planning, supervisors may request medical information relative to the duration of an absence, future absences, or an employee's future ability to perform the full duties of a position or duty assignment. Such information may be given to a supervisor by an employee or health care provider without divulging restricted medical information.

David H. Reid, III MD National Medical Director Office of Employee Health and Services

## U.S. Department of Labor

Employment Standards Administration Wage & Hour Division Federal Building, Room 643 210 Walnut Street Des Moines, Iowa 50309



October 19, 1998

Michael D. Gillespie, Steward, APWU Des Moines, Iowa Area Local APWU, AFL-CIO 1118 E. University Des Moines, IA 50316

## Subject: Family Medical Leave Act

This is in response to your correspondence of July 21, 1998, pertaining to the above. I'm sorry for the delay in responding.

Section 29 CFR § 825.700 requires employers to observe any employment benefit program or plan that provides greater family or medical leave benefits. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan.

According to Section 5(B) of the Collective Bargaining Agreement, charges to annual leave or leave without pay for approved sick leave absences for which the employee has insufficient sick leave are at the employee's option.

If you have any further questions, let me know.

20 hr Donald R. Chleborad

District Director

Working for America's Workforce

# CBR



# American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

April 4, 1995

William Burrus Executive Vice President (202) 842-4246

National Executive Board Moe Biller President

William Burrus Executive Vice President

Douglas C. Holbrook Secretary–Treasurer

Thomas A. Neill Industrial Relations Director

Robert L. Tunstall Director, Clerk Division

James W. Lingberg Director, Maintenance Division

Donald A. Ross Director, MVS Division

George N. McKeithen Director, SDM Division

Regional Coordinators James P. Williams Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R. Moore Western Region

I am in receipt of your March 29, 1995 response to my earlier letter of March 13 regarding the issuance of discipline for an absence under FMLA. Your response indicates that there was an obligation on the part of the employee to provide "documentation" regarding the pregnancy. If intended as written, this is contrary to DOL regulations as well as the agreement between USPS and APWU. It is established that "documentation" is not required for birth. The employee's certification represented by her physical appearance or a statement (verbal or written) of pregnancy is sufficient to qualify for FML. The parties have agreed in the "questions and answers" distributed to our respective representatives. If the employer has independent information casting doubts upon the employee's certification, the employer is free to require the employee to submit to a second medical evaluation. We have not established that an employee is required to present a medical statement from a physician to verify pregnancy. In fact, the DOL form provides that the employee "self certifies" the documentation for leave. The supervisor is responsible for designating the absence as qualifying under the FMLA upon notification of the medical condition involving pregnancy.

I trust that this is not an area of dispute between the parties, but merely sentence construction in your response. In the event there is a dispute between the parties I would appreciate the employer's position being reduced to writing and provided to my office at your earliest convenience.

Thank you for your attention to this matter.

Sincerely,

William Burrus Executive Vice President

Corine T. Rodriquez Labor Relations Specialist 475 L'Enfant Plaza, SW Washington, DC 20260

Dear Ms. Rodriquez:



March 29, 1995

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Dear Mr. Burrus:

This is in response to your March 13 correspondence regarding a letter of warning which included a Family Medical Leave Act (FMLA) qualifying incident as part of the disciplinary action.

The investigation indicates that the supervisor was informed of the pregnancy on the date the employee went into the hospital. He requested documentation which was never provided by the employee and he subsequently failed to designate the leave as FMLA qualifying.

However, it's my understanding that he will not use this period as a basis for discipline. Additionally, he will take steps to assure that employees are aware of their responsibility to disclose the cause of absence in order to gain the protection of the FMLA and he will furnish employees with written notice of their rights and obligations under the act, and any medical documentation which may be required.

If you have any questions or need any other information, please call me at (202) 268-3823. Thank you for your assistance in this matter.

Sincerely,

Corine T. Rodriguez

Labor Relations Specialist Contract Administration (NALC/NRLCA) Labor Relations



# American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

William Burrus Executive Vice President (202) 842-4246

November 22, 1995

Dear Tony:

National Executive Board Moe Biller President

William Burrus Executive Vice President Douglas C. Holbrook Secretary-Treasurer

Thomas A. Neill Industrial Relations Director

Robert L. Tunstall Director, Clerk Division

James W. Lingberg Director, Maintenance Division

Donald A. Ross Director, MVS Division

George N. McKeithen Director, SDM Division

Regional Coordinators James P. Williams Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R. Moore Western Region This is to formally address an issue that has recently been identified as an area of possible disagreement regarding time spent by Stewards under the national agreement and the Family and Medical Leave Act. I am informed by Pat Heath of your staff that other postal officials have interpreted the law as omitting Steward time as "time worked" under FLSA regulations.

The parties have agreed through Article 19 of the national agreement and Chapter 440 of the Employee and Labor Relations Manual (ELM) that "total pay received for steward's duty time, in accordance with the applicable collective-bargaining agreement" is defined within "all remuneration for employment received" and included as time worked under FLSA.

As you are aware, many locals have reached agreement with management to provide for full-time Stewards under the collective bargaining agreement and Stewards in other offices spend a considerable portion of their work day performing Steward duties. I must assume that this convoluted interpretation would apply similarly to facilitators under the Employee Involvement Programs, labor management meetings and other activities that are sanctioned by the collective bargaining agreements, but are not specifically addressed in the Fair Labor Standard Act.

While Ms Heath of your staff has not provided a definitive response to the inquiry, I am appalled that postal officials in responsible positions would offer such interpretations that go to the heart of the employer/employee relationship. Page 2 - Vegliante

I request an official response to the inquiry of whether or not it is the USPS position that authorized Steward time, during the course of a regular schedule, is or is not credited towards the required 1250 hours for FMLA eligibility.

Thank you for your attention to this matter.

Sincerely,

Executive Vice President

Anthony J. Vegliante, Manager Grievance & Arbitration Division Labor Relations 475 L'Enfant Plaza, SW Washington, DC 20260

WB:rb opeiu#2 afl-cio



December 12, 1995

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Dear Bill:

This is in response to your November 22 correspondence regarding whether steward's duty time should be counted as time worked toward the 1,250 hours eligibility requirement for FMLA.

After additional research we agree with your interpretation that authorized steward time, during the course of a regular schedule, is credited towards the required 1,250 hours for FMLA eligibility.

If you have any questions concerning this matter, please contact Corine T. Rodriguez at (202) 268-3823.

Anthony J. Vegliante Manager Contract Administration (APWU/NPMHU)



January 5, 1996

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Dear Bill:

This is in reference to your correspondence dated December 18 regarding sick leave for dependent care. Let me assure you that no one on my staff informed supervisors that sick leave for dependent care <u>cannot</u> be used for those absences covered by the Family and Medical Leave Act (FMLA). They were informed that there are absences covered by the sick leave for dependent care provisions that do not qualify as FMLA absences but when an absence <u>is</u> FMLA qualifying, there may be an overlap.

If you have any questions regarding this matter, please contact Donna Gill of my staff at 268-2373.

Jel F

Anthopy J. Vegilante Manager Contract Administration, APWU/NPMHU



February 22, 1996

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Dear Bill:

This will serve to further respond to your correspondence dated January 23 and follow up to your telecon with Donna Gill on February 13 regarding the Sick Leave for Dependent Care MOU. There is no dispute that this provision allows employees to use up to 80 hours of earned sick leave to care for family members. There is no requirement that employees use sick leave to cover such absences. It is incumbent upon the employee to submit a request for sick leave when he/she wants to be paid sick leave to cover such absences. The parties do not require the employee to use sick leave under such circumstances.

I hope this satisfactorily addresses your concerns.

hla Anthony J. Vegliante

Manager Contract Administration APWU/NPMHU



February 22, 1996

Mr. William Burrus American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Dear Mr. Burrus:

This is in response to your February 5 and February 9 correspondence concerning the Family and Medical Leave Act (FMLA) and clarification of the following issues:

1) Employees are not required to submit documentation for each absence related to a chronic condition if (a) the original documentation gives an estimate of the probable number of and the interval between episodes of incapacity, (b) the circumstances are unchanged, and (c) the supervisor does not have information that casts doubt upon the employee's stated reason for the absence. The parties at this level are not in dispute on this issue. We suggest that you refer any specific problems to the local offices for resolution.

2) Management should not disallow or delay an employee's taking FMLA leave, pending requests for sick or annual leave, if the employee gives timely verbal or other notice.

Under FMLA, if an employee does not choose to substitute paid leave for FMLA unpaid leave, management may require the employee to substitute accrued paid leave. This must be noted on the PS Form 3971 and a copy returned to the employee or the employee may be notified by a written notice. However, written notice does not have to be provided on each separate occasion as long as notice is 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.

With respect to LWOP, management has the discretion to approve or disapprove LWOP and that decision is made based on the needs of the employee, the needs of the Postal Service, and the cost to the Postal Service. There is no requirement that the employee exhaust paid leave before the approval of LWOP nor can LWOP be denied in cases where an employee has exhausted all paid leave but is entitled to FMLA unpaid leave.

Should you have any further questions concerning these issues, you may call Corine Rodriguez at (202) 268-3823.

Anthony J. Vegliante Manager Contract Administration (APWU/NPMHU)

Issue: Whether or not employees returning from a FMLA absence may be denied employment after submission of a physician's statement that the employee is fit to return to duty (825.310c).

Answer: No.

Issue: Whether or not the Postal Service may require a second medical opinion through a fitness for duty exam by a USPS designated physician for a FMLA absence for the condition justifying FMLA (825.310e).

Answer: Not prior to returning the employee to active status. After the employee returns to work, management maintains the same rights as they would otherwise have if an employee who has not been on leave comes to work and they have reason to believe the employee may be incapable of performing the work without endangering himself or others around him.

Issue: May disciplinary action against an employee include any absences covered by FMLA (825.220.3.b)?

Answer: No.

Issue: Is the employer required to post form 1420? After being properly notified by the employee of a FMLA condition, is the employer required to notify the employee of employee obligations and provide the employee with their rights and obligations (825.300 and 825.301)?

Answer: Yes, the form 1420 should be posted. The employee should be provided a copy of Publication 71 and a copy of the completed and signed PS 3971, Request for or Notification of Absence, with the type of leave and additional documentation requirements noted.

Issue: Can an employee returning from a FMLA absence or being examined for a FMLA condition be required to provide access to employee private medical records as a condition of employment (825.310a)?

Answer: Employees returning from an FMLA absence or being examined for an FMLA condition are not required to provide access to their private medical records. However, documentation necessary to determine FMLA coverage may be required.

Issue: If the employer does not meet its posting and notice obligation within the required time frames, at what point can the omission be corrected and how is the time spent on FMLA treated?

Answer: The obligation is met when the omission is corrected. The time spent on leave will not count against the employee's 12 weeks of FMLA entitlement even though leave for covered conditions will be protected by the FMLA. Should you have any further questions concerning these issues, you may call Corine Rodriguez at (202) 268-3823.

Anthony J. Vegliante

Manager Contract Administration (APWU/NPMHU)

UNITED STATES POSTAL SERVICE

September 12, 1996

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Dear Bill:

This is in response to your July 30 correspondence concerning a system to address disputes arising out of the Family and Medical Leave Act and the Privacy Act. After our last discussion, we agreed to send you a written summary of our understanding regarding your concerns.

You indicated that there is a problem in the field with managers who insist on retention and review of records containing a prognosis or diagnosis. The National Medical Director for the Postal Service, Dr. David Reid, III, addressed the documentation requirements for approval of leave in a memorandum dated June 22, 1995. As noted by Dr. Reid, medical information received by an employee's supervisor that provides a diagnosis and a medical prognosis must be forwarded to the health unit or office of the contract medical provider and treated as a "restricted medical record" under Section 214.3 of Handbook EL-806. This application is consistent with the documentation requirements under the FMLA. Therefore, to address your concerns we can reissue the memorandum and review specific complaints on a case by case basis.

In response to your questions regarding those issues needing agreement or disagreement as to the basic principle, we submit the following as our understanding of our final discussion:

Issue: Whether or not supervisors/postmasters/managers may maintain files containing medical records including prognosis or diagnosis.

Answer: Management may maintain WH380, union FMLA forms, or other certifications from health care providers that do not contain restricted medical information. Documents containing diagnosis or prognosis must be returned to the employee, destroyed, or forwarded to the medical unit.

Should you have any further questions concerning these issues, you may call Corine Rodriguez at (202) 268-3823.

Anthony J. Vegliante Manager Contract Administration (APWU/NPMHU)



# American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

William Burrus **Executive Vice President** (202) 842-4246

August 31, 2001

Dear Mr. Vegliante:

1.

2.

This letter is to inquire as to the Postal Service's position a number of issues concerning the FMLA. The following are the areas of concern that we seek your position:

National Executive Board Moe Biller President

William Burrus Executive Vice President

Robert L. Tunstall Secretary-Treasurer

Greg Beli Industrial Relations Director

C. J. "Cliff" Guffey Director, Clerk Division

James W. Lingberg Director, Maintenance Division

**Regional** Coordinators

Leo F. Persails Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R. Moore Western Region

Son or Daughter over the age of 18. It has been the understanding of the APWU that if a serious health condition exists that meets the requirements of 825.113 (c)(1) for a child over the age of 18 the condition can be temporary allowing an employee to be protected under the FMLA for an absence. In other words we believe the condition need not be a life long condition. An example of this may be a "coma" which could be temporary.

- **APWU Forms**. It has come to our attention that the Postal Service has not been accepting APWU Forms with regards to care of a family member without asking for additional information. The additional information being sought questions the employee specifically about what care the employee will be providing the family member. We believe the agreed to APWU forms meet all the required information that an employee needs to provide and once completely filled out satisfy the documentation requirements of the FMLA. It is also our position that the parties through your letter to me have agreed that the APWU forms were acceptable and no additional information would be required if the forms were completely filled out.
- Pre-Certification/providing documentation prior to any 3. absence. Management in a number locations has been forcing employees to go back to their physicians to provide updated medical information after the employee had provided such

Robert C. Pritchard Director, MVS Division 4. information initially prior to any absence for the condition. The management contention has been that the documentation must be provided in connection with an absence and the condition will not be pre-certified. The APWU contends that once the employee submits this information management is obligated to review the medical certification and should it be necessary request

completed information, clarification or a second opinion at that time. When the employee is absent for the covered condition management at that point is permitted to request a recertification as provided for in the FMLA regulations.

5. Conflict between employee's physician opinion and second opinion. In cases where an employee is sent for a second opinion and the opinion conflicts with the employee's physician's opinion it is the position of the APWU that if the Postal Service chooses not to accept the employee's physician's opinion the conflict must be resolved by a third opinion and need not be initiated by a request from the employee for a third opinion..

Thank you for your attention to the above concerns.

Sincerely,

Hum BURRUS

William Burrus Executive Vice President

Anthony J. Vegliante, Vice President Labor Relations United States Postal Service 475 L'Enfant Plaza Washington, DC 20260

cc: Greg Bell

LABOR RELATIONS



September 19, 2001

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

This is in response to the four questions posed in your August 31, 2001 letter concerning the Family And Medical Leave Act (FMLA).

 The regulations at 29 U.S.C. § 2611 and 29 C.F.R. § 825.113 are clear that sons or daughters 18 years of age or older qualify if they are *incapable of self-care* <u>because</u> of a mental or physical disability (emphasis added). 29 C.F.R. § 825.113(c)(2) further explains that:

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

There is ample case law concerning the application of the provisions found at 29 CFR § 1630.2(h), (i) and (j). Furthermore, Department of Labor Opinion Letter 51 addresses this issue. Our position is that, as a general rule, a temporary condition such as pregnancy would not qualify as a physical or mental disability. Each situation should be evaluated on a case by case basis.

- 2. We responded to this specific question by letter dated January 3, 2001. Our position has not changed.
- 3. I understand your position in item #3, (continued and misnumbered on page 2 as item #4) to be that an employee has a statutory right to submit certification of a serious health condition, even when there is no need or request for leave. We disagree. The FMLA is a leave act. Certification is not required until there is a need for leave.

475 L'ENFANT PLAZA SW WASHINGTON DC 20260-4100 WWW.USPS.COM 4. Both the law and regulation state that the employer "may" obtain a third opinion. It is our position that when a second medical opinion conflicts with the first, the Postal Service is not required by statute or regulation to seek a third opinion.

If you have any further questions, please contact Sandy Savoie at 202-268-3823.

Doug A. Tulino Manager Labor Relations Policies and Programs



## American Postal Workers Union, AFL-CIO

1300 L Street, NW. Washington, DC 20005

## Article 15 - 15 Day Statement of Issues and Facts

William Burrus President (202) 842-4246

May 23, 2002

Mr. Anthony J. Vegliante Vice President, Labor Relations U.S. Postal Service, Room 9100 475 L'Enfant Plaza Washington, D.C. 20260

National Executive Board William Burrus President

Cliff C J \* Guffey Executive Vice President Robert L Tunstall

Secretary-Treasurer

Greg Bell Industrial Relations Director

James "Jim" McCarthy Director Clerk Division

Steven G. "Steve" Raymer Director: Maintenance Division

Robert C Bob Pritchard Director MVS Division

Regional Coordinators Sharyn M. Stone Central Region

Jim Burke Eastern Region Elizabeth "Liz" Powell

Northeast Region

Terry R Stapleton Southern Region

Omar G. Gonzalez Western Region Re: APWU No.HQTG20022, USPS No. Q00C4QC02126262, Cert. No. 70000600002122938431 (Union Business/FMLA 1250 hour requirement)

Dear Mr. Vegliante:

The meeting on the above referenced dispute was held between the parties on in accordance with Article 15 of the Collective Bargaining Agreement. Article 15, Section 2 (Step 4) provides that if the parties have not reached agreement within fifteen days of their meeting that each party shall provide the other with a statement in writing of its understanding of the issues involved, and the facts giving rise to the dispute.

The following is the APWU's statement of issues and facts concerning this dispute. Recently, representatives of the APWU met with Mr. Thomas Valenti and other Postal Service representatives to discuss the above-referenced case. In accordance with Article 15.2 (Step 4)(a), the APWU is providing you with this statement of the APWU's understanding of the issues involved and the facts giving rise to the dispute. The parties agreed to extend the time limits for this statement.

It is the position of the APWU that, when APWU officers are on leave without pay for the purpose of conducting Union business, the hours they spend in that status must be counted as "hours of service with" the employer, within the meaning of 29 U.S.C. § 2611(2)(a)(ii). Many Union stewards and officers perform their grievance-processing duties while on the clock, by mutual agreement of the parties. Unquestionably, this paid work time is "service with" the Employer under the statute. Other officers may be full-time Union officers on leave without pay, or may for other reasons be on leave without pay to conduct Union business, but their services are likewise service to the Employer within the meaning of the statute.

The Postal Service's reliance on the regulations of the Department of Labor, 29 C.F.R. § 825.110(c) is misplaced for several reasons. First, whether or not employees are

8 **(1**) 53

performing "hours of service" for the Employer is a matter that is subject to the agreement of the parties. While the parties' collective bargaining agreement may not diminish statutory rights, it is the contractual relationship between the parties that determines the services to be performed for the employer. By refusing to recognize leave without pay for Union business as service to the Employer for purposes of the FMLA, the Postal Service seems to be seeking to reserve the right to discipline Union officers for taking leave that would otherwise be protected by the FMLA. Such discipline would violate the National Labor Relations Act, and the National Agreement, because it would discriminate against employees for serving as Union officers.

Furthermore, if the Department of Labor's Regulations could be read to permit employers to exclude from "hours of service" under Section 2611(2)(A)(ii) service on leave without pay for union business, those regulations would be contrary to the statute and therefore invalid.

Please contact Cliff Guffey if you wish to discuss this matter.

Sincerely,

President

APWU #: HQTG20022 USPS #: Q00C4QC02126262 Dispute Date: Contract Articles: 10, ELM

cc: Industrial Relations

# American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

## Article 15 - 15 Day Statement of Issues and Facts

May 23, 2002

Mr. Anthony J. Vegliante Vice President, Labor Relations U.S. Postal Service, Room 9100 475 L'Enfant Plaza Washington, D.C. 20260

National Executive Board William Burrus President

William Burrus President

(202) 842-4246

APNU

Cliff "C J " Guffey Executive Vice President

Robert L. Tunstall Secretary-Treasurer

Greg Bell Industrial Relations Director

James 'Jim McCarthy Director Clerk Division

Steven G Steve" Raymer Director, Maintenance Division

Robert C Bob Pritchard Director MVS Division

Regional Coordinators Sharyn M. Stone Central Region

Jim Burke Eastern Region

Elizabeth Liz Powell Northeast Region

Terry R Stapleton Southern Region

Omar G. Gonzalez Western Region Re: APWU No.HQTG200012, USPS No. Q98C4QC00175842, FMLA/21 Day Absence, Cert. No. 70000600002122938455

Dear Mr. Vegliante:

The meeting on the above referenced dispute was held between the parties on April 18, 2002 in accordance with Article 15 of the Collective Bargaining Agreement. Article 15, Section 2 (Step 4) provides that if the parties have not reached agreement within fifteen days of their meeting that each party shall provide the other with a statement in writing of its understanding of the issues involved, and the facts giving rise to the dispute. The parties mutually agreed to time limit extension.

The following is the APWU's statement of issues and facts concerning this dispute. Whether the Postal Service violates the FMLA by requiring a detailed medical report from bargaining unit employees seeking to return to work from FMLA leave after certain illnesses or ailments, or after absences of more than 21 days and delaying such return until the information is provided?

The Postal Service violates the FMLA by requiring employees to provide a detailed medical report in order to return to duty from an FMLA absence. The FMLA, 29 USC 2652 (b) clearly states that "the rights established under the Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." By requiring employees to provide more information than what the law and regulations require the Postal Service is violating the Act. The law requires that the employee only need provide "a certification from the employee's health care provider that the employee is able to resume work.." 29 USC 2614 (4) The regulations entitle employees to return to work if they provide a medical certification constituting "a simple statement of an employee's ability to return to work." 29 CFR 310(c)
The Postal Service is seeking to rely on 29 USC 2614(a)(4) and 29 CFR 310(a) and (b) and the EL-311, Section 342 and the ELM Section 864.41. The EL-311 and the ELM were issued unilaterally by the Postal Service, subject to challenge under Article 19 of the National Agreement and they were not collectively bargained. Accordingly, the EL-311 and the ELM are not provisions of a collective bargaining agreement within the meaning of 29 USC 2614(a)(4) and 29 CFR 825.310(a) and (b).

Furthermore, the ELM provisions in question have been challenged under the Article 19 and that challenge has not been resolved.

Please contact me if you wish to discuss this matter.

Sincerely RAUS William Burrus

President

APWU #: HQTG200012 USPS #: Q98C4QC00175842 Dispute Date: Contract Articles: 10, ELM, FMLA

cc Industrial Relations



1300 L Street, NW, Washington, DC 20005

# Article 19 Appeal to Arbitration

February 7, 2001

Greg Bell Industrial Relations Director 1300 L Street, NW Washington, DC 20005 (202) 842-4273 (Office) (202) 371-0992 (Fax)

Mr. Anthony J. Vegliante Vice President, Labor Relations U.S. Postal Service 475 L'Enfant Plaza Washington, D.C. 20260

Dear Mr. Vegliante:

Re: Appeal to Arbitration; Article 19; APWU No. A19G20013, (Publication 71) Cert No. 70993220000202415851

Moe Biller President

William Burrus Executive Vice President

National Executive Board

Robert L. Tunstall Secretary-Treasurer

Greg Beli Industrial Relations Director

C J "Cliff" Guffey Director, Clerk Division

James W. Lingberg Director Maintenance Division Roberi C. Pritchard Director, MVS Division

Regional Coordinators Leo F Persails Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R Moore Western Region Article 19 provides that within fifteen days after an issue has been submitted to arbitration, each party shall provide the other with a statement in writing of its understanding of the precise issues involved, and the facts giving rise to such issues.

In accordance with the provisions of Article 19 of the Collective Bargaining

Agreement, the APWU appeals to arbitration the above referenced matter.

Please direct your statement of issues and facts to me as the case officer.

Sincerely,

Sneg Ball Greg Bell, Director

Industrial Relations

APWU #: A19G20013 Appeal Date: 2/7/01 Case Officer: Greg Bell Contract Article(s): 19, FMLA

cc: Resident Officers Industrial Relations



1300 L Street, NW, Washington, DC 20005

February 20, 2001

## Article 19 - 15 Day Statement

Greg Bell Industrial Relations Director 1300 L Street, NW Washington, DC 20005 (202) 842-4273 (Office) (202) 371-0992 (Fax)

Mr. Anthony J. Vegliante Vice President, Labor Relations U.S. Postal Service 475 L'Enfant Plaza Washington, D.C. 20260

National Executive Board Moe Biller President

William Burrus Executive Vice President

Robert L. Tunstall Secretary-Treasurer

Greg Bell Industrial Relations Director

C. J. "Cliff" Guffey Director, Clerk Division

James W. Lingberg Director, Maintenance Division

Robert C. Pritchard Director, MVS Division

Regional Coordinators Leo F. Persails Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R. Moore Western Region

Re: Article 19 Statement of Issues and Facts, APWU No.A19G20013 (Publication 71) Cert No. 70993400001185548059

Dear Mr. Vegliante:

The above referenced case was appealed to arbitration on 2/7/01 in accordance with Article 19 of the Collective Bargaining Agreement. Article 19 provides that within fifteen days after an issue has been submitted to arbitration, each party shall provide the other with a statement in writing of its understanding of the precise issues involved, and the facts giving rise to such issues.

The following is the APWU's statement of issues and facts concerning this case:

1. In Section 2.a. Publication 71 refers to "medical reports." This is improper and should read "medical certifications." 2. Publication 71 requires the employee to provide the phone number of his/her physician. This is not a requirement under the FMLA and will lead to abuse by managers improperly contacting the employee's physician. 3. Additional language was added since the meeting with the APWU which states "employees may be required to provide recertification periodically." This language is to vague and may lead to abuse. 4. The Section on Return to Duty violates the Family and Medical Leave Act.

Please contact me if you wish to discuss this matter.

Sincerely,

Industrial Relations

UNITED STATES POSTAL SERVICE 475 L'Enfant Plaza, SW Washington, DC 20260

FEB 2 4 1984

Mr. James W. Lingberg FLD 24 A National Representative-at-Large Haintenance Craft Division 817 14th Street, N. W. Washington, D. C. 20005-3399

Dear Mr. Lingberg:

Recently you met with Frank Dyer in prearbitration discussion of HIC-NA-C 65. The question in this grievance is the delay in returning an employee to duty after an absence of 21-days or more of extended illness or injury.

It was mutually agreed to full settlement of this issue as follows:

 To avoid undue delay in returning an employee to duty, the on-duty medical officer, contract physician, or nurse should review and make a decision based upon the presented medical information the same day it is submitted.

Normally the employee will be returned to work on his/her next work day provided adequate medical documentation is submitted within sufficient time for review.

 The reasonableness of the Service in delaying an employee's return beyond his/her next work day shall be a proper subject for the grievance procedure on a case-by-case basis.

Please sign and return the enclosed copy of this letter acknowledging your agreement with this settlement, withdrawing HIC-NA-C 65 from the pending national arbitration listing.

Sincerely,

William E

Director V ( Office of Grievance and Arbitration Labor Relations Department

₩. Lingberg Canies

Rational Representativé-at-Large Maintenance Craft Division American Postal Workers Union, AFL-C10

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Re: Case No. Q90C-4Q-C 95048663 Washington, DC - Headquarters

Recently, you met with Postal Service representatives to discuss the above-captioned grievance, currently pending national level arbitration.

This grievance concerns the effect of the Memorandum of Understanding (MOU) concerning "Paid Leave and LWOP" found on page 312 of the 1998 National Agreement.

The parties hereby reaffirm the attached Memorandum of Understanding dated November 13, 1991, which serves as the parties' further agreement on the use of paid leave and LWOP.

We further agree that:

- 1. As specified in ELM 513.61, if sick leave is approved, but the employee does not have sufficient sick leave to cover the absence, the difference is charged to annual leave or to LWOP at the employee's option.
- 2. Employees may use LWOP in lieu of sick or annual leave when an employee requests and is entitled to time off under ELM 515, Absences for Family Care or Serious Health Problem of Employee (policies to comply with the Family and Medical Leave Act).
- 3. In accordance with Article 10, Section 6, when an employee's absence is approved in accordance with normal leave approval procedures, the employee may utilize annual and sick leave in conjunction with leave without pay. As we have previously agreed, this would include an employee who wishes to continue eligibility for health and life insurance benefits, and/or those protections for which the employee may be eligible under Article 6 of the National Agreement.

Page 2 – Q90C-4Q-C 95048663 Washington, DC - Headquarters

With the above understandings, which shall apply to currently pending timely grievances and those filed in the future, we agreed to settle this grievance. Please sign below as acknowledgment of your agreement to resolve this grievance, removing it from the pending national arbitration listing.

Pete Bazylewicz Manager

Manager // Grievance and Arbitration

William Burrus Executive Vice President American Postal Workers' Union, AFL-CIO

Date: M- RUI 799

Attachment



1300 L Street, NW, Washington, DC 20005

William Burrus Executive Vice President (202) 842-4246

Dear Tony:

April 22, 1999

By copy of your letter dated June 23, 1995 agreement was reached that forms prepared by APWU had been reviewed by appropriate Headquarters functional areas and "are acceptable for usage by managers to approve or disapprove FMLA leave requests." I have received information that Districts have informed APWU Locals that the forms will no longer be accepted.

Moe Biller President William Burrus Executive Vice President Robert L. Tunstall Secretary-Treasurer Greg Bell Industrial Relations Director C. J. "Cliff Guffey Director, Clerk Division James W. Lingberg Director, Waintenance Division Robert C. Pritchard Director, MS Division

National Executive B

Regional Coordinators Leo F. Persails Central Region

Jim Burke Eastern Region Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R. Moore Western Region The decision to discontinue the recognition of the APWU forms is reported to be in response to alleged information received from the Department of Labor that they intend to modify the WH 380; however in a meeting with DOL officials they disavow any intent to modify this form. If and when DOL modifies the information required of employees to justify FMLA absences, the union is available to discuss the need to modify the APWU forms, but in the interim, the national parties mutually agreed to the contents of the APWU forms and further agreed that they would be acceptable for FMLA absences. Local postal officials are not empowered to modify the parties' national agreement.

Please respond that the local parties are advised of the national policy on the acceptance of the APWU forms.

Sincerely,

William Burrus

Executive Vice President

Mr. Anthony Vegliante Vice President Labor Relation 475 L'Enfant Plaza, SW Washington, DC 20260



April 29, 1999

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

This is in response to your April 22 letter to Anthony Vegliante, Vice President, Labor Relations, concerning the recognition of APWU forms for certification of Family and Medical Leave Act (FMLA) absences.

We are not aware of any information concerning modifications to the Department of Labor's (DOL) Optional Form WH-380, Certification of Health Care Provider. Since you have discussed the matter with DOL officials and they have indicated they have no plans to modify the WH-380, this issue should not be a concern.

Postal policy is that the APWU forms, or any other forms, are acceptable so long as the required information (information such as that required on a current WH-380) is provided by the health care provider.

We are unaware that any "...Districts have informed APWU Locals that the [APWU] forms will no longer be accepted." If you provide the name(s) of the district(s) where this has allegedly occurred, we will have the appropriate area office look into the matter.

Sincerely Charles E. Baker

Charles E. Baker Acting Manager Contract Administration (NALC/NRLCA)

475 L'ENFANT PLAZA SW WASHINGTON DC 20260-4100



1300 L Street, NW; Washington, DC 20005

William Burrus Executive Vice President (202) 842-4246

January 12, 2000

## Dear Doug:

National Executive Board Moe Biller President

William Burrus Executive Vice President

Robert L. Tunstall Secretary–Treasurer

Greg Bell Industrial Relations Director

C. J. "Cliff" Guffey Director, Clerk Division

James W. Lingberg Director, Maintenance Division Robert C. Pritchard Director, MVS Division

Regional Coordinators Leo F. Persails Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R. Moore Western Region On January 10<sup>t</sup> I discussed with Corrine Rodriguez of your staff the interpretation of the Family and Medical Leave Act related to an employee's obligation to have worked 1250 hours prior to being eligible for leave. I have received several inquiries from employees who have been advised by their supervisors that they will be ineligible in the year 2000 because they did not work 1250 hours in 1999. This is an erroneous interpretation of the law which requires that the 1250 hours applies to the 365 days prior to the date of the absence. This is to request the employer's interpretation of the law as it applies to an employee's eligibility for FMLA leave.

Thank you for your attention to this matter.

Sincerely,

Executive Vice President

Mr. Doug Toulino Labor Relations, USPS 475 L'Enfant Plaza, SW Washington, DC 20260

WB:rb opeiu#2 afl-cio



February 9, 2000

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

This is in response to your January 12, 2000 letter regarding the interpretation of Postal policy concerning recertification of FMLA conditions.

The request arises because you have been informed that "local managers are interpreting the Family and Medical Leave Act to require that employees must recertify FMLA conditions each FMLA leave year. This means that employees who certified during calendar year 1999 who suffer from the same serious health condition are being required to recertify in the year 2000."

Pursuant to Public Law 103-3, 29 U.S.C. 2613(3), SUBSEQUENT RECERTIFICATION. —"The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis."

Therefore, we are in agreement that employees should not be required to automatically provide recertification for a serious health condition simply because the leave year has ended and a new leave year has begun. Managers should refer to 29 CFR Part 825.308 for the circumstances and the time frame under which recertifications may be required.

Sincerely,

Doug A. Tulino Manager Labor Relations Policies and Programs

475 L'ENFANT PLAZA SW WASHINGTON DC 20260-4100

1300 L Street, NW, Washington, DC 20005

February 27, 1997

Dear Tony:

In the implementation of the Leave Sharing agreement, the parties have agreed that employees who have been donated leave may apply the leave to periods of LWOP and receive payment. In at least one case eminating from DesMoines, the Data Center has refused to apply the donated leave retroactively and instead has retroactively deducted earned sick leave accumulated after the employees return to duty.

This is to determine if there is a disagreement between the parties over the right of employees to apply donated leave retroactively to a period of authorized absence.

Thank you for your attention to this matter.

Sincerely,

Executive Vice President

Anthony J. Vegliante, Manager Grievance & Arbitration Division 475 E'Enfant Plaza, SW Washington, DC 20260

WB:rb opeiu#2 afl-cio



May 1, 1997

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Dear Bill:

This letter is in response to your correspondence dated February 27, 1997, concerning the application of donated leave to periods of LWOP and receive payment. You indicated that in Des Moines, the Data Center has refused to apply donated leave retroactively and instead has retroactively deducted earned sick leave accumulated after the employee's return to duty.

There is no disagreement between the parties over the right of employees to apply donated leave retroactively to a period of authorized absence. The Des Moines issue was investigated and a PS Form 2240 has been generated in order to credit the employee's leave retroactively.

If there are any questions concerning this matter, you may contact Barbara L. Phipps of my staff at (202) 268-3834.

Sincerely

Peter A. Sgrol/ Acting Manager Contract Administration APWU/NPMHU

475 L'ENFANT PLAZA SW WASHINGTON DC 20260-4100



June 22, 1999

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Dear Bill:

This is in regard to the meeting held on June 19 with Curtis Warren of my staff, Corine Rodriguez of the Programs and Policies section of this office, and Jim Moore of Human Resources.

As discussed in the meeting, postal policy regarding return to work as specified in the EL-311, Part 342 is separate from the issue concerning recertification for chronic conditions.

The Postal Service follows the regulations concerning recertification under subpart 825.308 of the Family and Medical Leave Act (FMLA):

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:
(1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or (2) The employee receives information that casts doubt upon the employee's stated reason for the absence.

If you know of specific districts or areas where there is a concern regarding this issue, please contact Curtis Warren at (202) 268-5359 with that information.

Sincerel

Peter A. Sgro Manager Contract Administration, APWU

475 L'ENFANT PLAZA SW WASHINGTON DC 20260-4100



August 31, 1999

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005

Dear Bill:

This is in response to your July 15 correspondence concerning the right of a Postal Service physician to request medical information relative to an FMLA condition.

I had earlier responded that we do not have a dispute concerning contact with the employee's physician at this level. Generally, we agree that when the Postal Service seeks to clarify information that has been provided by the employee to certify a serious health condition, we need the employee's permission to contact his or her physician [39 CFR 825.310(c)]. Your February 24 letter was specific about a situation and a certain employee. That was why I indicated that a response at the local level would be more productive.

However, we disagree with your viewpoint, as expressed in the second paragraph of the July 15 letter, "that the written advance notice detailing specific expectations and obligations of the employee limits the medical information to that specified on DOL Form WH 380." This is unduly limiting because the regulations allow for more information than that which is contained in Form WH-380. For example, the regulations allow the employer to request information concerning whether the employee is able to perform the essential functions of his or her position (Part 825.115). Accordingly, the Postal Service position is that we are in compliance with the FMLA and the collective bargaining agreement when we give advance notice via Publication 71 that additional information may be required upon return to duty.

We believe that the statutory reference in 29 U.S.C. section 2614 (a)(4) supports this position:

#### (4) Certification

As a condition of restoration under paragraph 1 for an employee who has taken leave (because of the employee's own serious health condition), the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid, State or local law or a collective bargaining agreement that governs the return to work of such employees.

If you would like to meet to discuss these issues, please contact me at your earliest convenience.

Sincerely Peter Saro

Manager Contract/Administration

475 L'ENFANT PLAZA SW WASHINGTON DC 20260-4100

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

> RE: J94C-1I-C 97069215 Fields, C. Carol Stream, IL 60199-9518

Dear Bill:

Recently, we met to discuss the above captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance is whether leave without pay (LWOP) hours converted to paid hours as a result of an arbitrator's award returning an employee to duty are counted towards the 1250 hour eligibility.

The parties agree that they do not have a dispute on this issue. When an employee is awarded back pay, accompanied by equitable remedies (i.e. full back pay with seniority and benefits, or a "make whole" remedy), the hours the employee would have worked if not for the action which resulted in the back pay period, are counted as work hours for the 1250 work hour eligibility requirement under the Family Medical Leave Act (FMLA). However, If an employee answers "yes" to question # 9 on PS Form 8038, asking to substitute annual or sick leave for any part of the back pay period that they were not ready, willing, and able to perform their postal job, the leave is not counted as work hours for the 1250 work hour eligibility requirement under the FMLA.

Additionally, if a remedy modifies an action, resulting in a period of suspension or LWOP, that time is not counted as work hours for the 1250-work hour eligibility requirement under the FMLA.

Accordingly, we agreed to close this case. Please sign and return the enclosed copies of this letter as your acknowledgement of agreement to close this case.

Time limits at this level were extended by mutual consent.

alent.

Thomas J. Valenti Labor Relations Specialist Contract Administration

January 23, 2001

William Burrès Executive Vice-President American Postal Workers Union, AFL-CIO

#### U.S. Postal Service

## **Employee Statement To Recover Back Pay**

**INSTRUCTIONS:** Those employees who are entitled to back pay following an unwarranted or unjustified personnel action in which the employee was

- a. separated (except erroneous separation for optional retirement),
- b. placed on indefinite suspension, or
- c. denied employment,

must complete the four pages of this form and provide all supporting documentation required before a claim for back pay can be processed. If additional sheets are attached to this form as documentation, they should be referenced at the top by the corresponding question number.

#### I - Employee Identification

Name (Last, First, MI)	Social Security Number	Designation / Activity Code
Back Pay Period: From (Month / Day / Year)	To (Month / Day / Year)	

Address of Employing Office (Street, City, State, and ZIP+4)

### **II** - Statement Questions 1. Did you have any earnings from new employment during the back pay period? Yes No If YES, you must submit a statement from your employer(s) showing the hours worked and gross earnings during back pay period. Attach your employment / earnings statement. Did you have any earnings from previous part-time employment that continued 🗌 Yes 🗌 No 2a. after the beginning of the back pay period? 2b. If YES, were the hours expanded during this period? Yes No If your hours were expanded, you must submit a statement from your employer(s) showing the hours worked and gross earnings during the back pay period and the 6-month period prior to the beginning of the back pay period. Attach your employment / earnings statement. 3. Yes No Were you self-employed during the back pay period? If YES, you must submit an affidavit indicating the gross amount earned and any deductions for ordinary and necessary business expenses incurred in conjunction with such self-employment. Any business expense deductions claimed must be itemized and substantiated by receipts or other documentation, if available. If such employment existed prior to the back pay period, you must also submit your earnings for the 6-month period prior to the beginning of the back pay period. Attach your affidavit and employment / earnings statement.

TransFORM PS Form 8038, July 1990 (Page 1 of 4)

4.	Did you seek other employment during the back pay period?		nck pay period?	Yes No
	If YES, you must furnish the information required below based on the type of personnel action and the length of time involved in your back pay case.			
	<ul> <li>a. SEPARATIONS AND INDEFINITE SUSPENSIONS. If the original action resulted in separation or indefinite suspension and no outside employment was obtained for all or part of the back pay period, you must furnish the following.</li> <li>(1) If the back pay period is 45 days or less, no further action is required.</li> <li>(2) If the back pay period is more than 45 days but does not exceed 6 months, you must provide a statement certifying the reasons why outside employment was not obtained for all parts of the back pay period, except for the first 45 days.</li> <li>(3) If the back pay period is more than 6 months, you must provide detailed</li> </ul>			
	information co all parts of the ba information for E. (a) the date o (b) the busine (c) whether th (d) the name (e) whether an	oncerning the efforts you ma ack pay period, except for the ACH employer you contacted r approximate date the cont ass name, address, and tele the contact was in person, by	ade to obtain other employment for ne first 45 days. Give the following ed: act was made; phone number; / telephone, or by mail; who conducted the interview; / as filed; and	
	employment with obtained, you mu parts of the back	ust provide the information r	action resulted in denial of d no outside employment was equired in item 4a(3) above for ALL her employment was not obtained.	
5.	Did you receive unemployment compensation for any period(s) during the back		Yes No	
	<ul> <li>pay period?</li> <li>If YES, identify the state from which unemployment compensation was received, date(s) covered, and amount(s) received.</li> <li>Name of state from which unemployment compensation was received:</li> </ul>			
	Starting Date	Ending Date	Amount Received	
			\$	
			\$	
			\$	
			\$	
		· · · · [- · · · · · · · · · · · · · · ·	\$	
			\$	
	Attach additional sl	heets if necessary.	\$	
TransFORM PS For	rm 8038, July 1990 (Page 2 o	f 4)		



6.	Did you receive workers' compensation for any period(s) during the back pay period?			🗌 Yes 🗌 No
	If YES, check whether you received in full or in partial compensation. Identify date(s) covered and amount(s) received.			
	Starting Date	Ending Date	Amount Received	
			\$	
			\$	
			\$	
	Attach additional sheets if necessary.			
7.	Did you receive annuity payments for any period(s) during the back pay period? If YES, write in your retirement account number, and identify date(s) covered and amount(s) received.			🗆 Yes 🗌 No
	Starting Date	Ending Date	Amount Received	
			\$	
			\$	
			\$	
	Attach additional sheet	s if necessary.	· · · · · · · · · · · · · · · · · · ·	
8.	During the back pay period, were you ready, willing, and able to perform your postal job?			🗌 Yes 🗌 No
	If NO, explain why and	for how long you were unable to	work.	
	Attach additional sheet	· · · · ·		
9.		te credited annual or sick leave not ready, willing, and able to p		🗌 Yes 🗌 No
	If YES, identify date(s) to be covered and type of credited leave to be substituted.			
	Starting Date	Ending Date	Type of Credited Leave	
	Attach additional sheets if necessary.			

TransFORM PS Form 8038, July 1990 (Page 3 of 4)

10.	With regard to health benefits coverage, do you wish to:		
	<ul> <li>a. Enroll in a new plan or option as though a new employee, OR</li> <li>b. Reinstate your prior enrollment, retroactive to the date it was terminated? (Only one box may be checked YES; however, if no coverage is desired, both boxes must be checked NO.)</li> </ul>	☐ Ye ☐ Ye	s 🗌 No s 🗌 No
11.	With regard to life insurance,		
	If you are eligible, your life insurance coverage will be reinstated, retroactive to the date of your removal or indefinite suspension. You may also be eligible to increase your optional life insurance coverage if you meet the requirements in the Employee and Labor Relations Manual (ELM), Chapter 4. You must contact your personnel office to determine your life insurance coverage eligibility.		·
	If you were denied employment, do you wish to:		
	<ul> <li>a. Elect life insurance coverage as a new employee, OR</li> <li>b. Have such coverage begin retroactive to the date employment was denied? (Only one box may be checked YES; however, if no coverage is desired, both boxes must be checked NO.)</li> </ul>	Ye Ye Ye	s 🗌 No s 🗌 No
12.	With regard to the Thrift Savings Plan, do you wish to:		
	<ul> <li>a. Enroll as a new employee if an open season took place during the period shown, OR</li> <li>b. Reinstate the withholding in place at the time of your removal / suspension? (Only one box may be checked YES; however, if no enrollment or withholdings are desired, both boxes must be checked NO.)</li> </ul>	□ Ye □ Ye	is 🗌 No is 🗍 No
13.	Do you have any outstanding debt to the U.S. Postal Service, e.g., from a window shortage, overpayment of compensation, etc.?	🗋 Ye	s 🗌 No
	If YES, the U.S. Postal Service will deduct a portion of that debt from your back pay award in accordance with ELM, Chapter 4. If you wish to have a higher amount deducted, indicate that amount here. \$		

#### **III - Employee Signature**

Privacy Act Statement. The collection of this information is authorized by 39 USC, Section 401 and 1003. This information will be used to determine the amount of back pay you are entitled to under a decision/award or settlement agreement authorized by an appropriate authority. As a routine use, this information may be disclosed to a congressional office at your request; to OMB for review of private relief legislation; to a labor organization as required by the NLRA; where pertinent, in a legal proceeding to which the USPS is a party; to an appropriate law enforcement agency for investigative or prosecutorial purposes; to a government agency where relevant to a hiring, contracting, or licensing decision by the requesting agency; to a government agency function; to Federal Records Center for storage; to the EEOC for investigating a formal EEO complaint filed against the USPS under 29 CFR 1613; to the Merit Systems Protection Board or Office of Special Counsel for proceedings involving possible prohibited personnel practices; to an independent certified public accountant during an official audit of USPS finances; to generies having taxing authority for taxing purposes; to financial organizations receiving allotments; to OPM, SSA, VA, OWCP, insurance carriers, plans, or other program management agencies or systems for use in determining or processing a claim for health, life insurance, retirement or other program benefits under such system; to OPM for its active employee/annuitant data systems used to analyze federal retirement and insurance costs; and to federal, state, or local governments administering benefit or other programs to conduct a computer match to verify eligibility, indebtedness, or compliance with requirements of the program. Completion of this form is voluntary. However, if this information is not provided, your back pay claim cannot be processed.

Civil Penalty for Presenting Fraudulent Claim. A person who submits a false claim is liable for a civil penalty of \$2,000, an amount equal to two times the amount of damages sustained due to the false claim, and the costs of any civil action brought to recover such amounts. (See 96 Statute 978; 31 USC, 3729-3731.)

Criminal Penalty for Presenting Fraudulent Claim or Making False Statements. A person who submits a false claim or makes a false statement is liable for a criminal fine of not more than \$10,000 or imprisonment for not more than 5 years or both. (See 62 Statute 698, 749; 18 USC 287, 1001.)

I hereby certify that my answers to the above questions are true and correct to the best of my knowledge and belief, and I understand the above provisions regarding the Privacy Act Statement and the civil and criminal penalties for presenting fraudulent claims or making false statements.

Date

TransFORM PS Form 8038, July 1990 (Page 4 of 4)



1300 L Street, NW, Washington, DC 20005

William Burrus Executive Vice President (202) 842-4246

August 31, 2000

Re: Employer contact with private physician

### Tony:

National Executive Board Moe Biller President

William Burrus Executive Vice President

Robert L. Tunstall Secretary–Treasurer

Greg Bell Industrial Relations Director

C. J. "Cliff" Guffey Director, Clerk Division

James W. Lingberg Director, Maintenance Division

Robert C. Pritchard Director, MVS Division

Regional Coordinators Leo F. Persails Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R. Moore Western Region Pursuant to the terms of the national agreement this is to initiate a Step 4 grievance contesting the employer's interpretation of its rights under the Family and Medical Leave Act and OWCP regulations. The specific questions asked by your contracted physician refer specifically to the employees' medical certification and are not consistent with the limitations of inquiring about work limitations.

I am aware of the FMLA regulations and the instructions provided your office by the Acting Director for Federal Employees' Compensation on the subject of contacts with employees' physicians. The union interprets those questions posed by Crawford and Company as exceeding those permitted by the regulations and the parties agreement.

Article 21 of the national agreement commits the parties to the "appropriate regulations which comply with applicable regulations of the Office of Workers Compensation Programs and any amendments thereto."

As remedy, the union request that the employer cease and desist from requesting the information included in the Crawford and Company forms and

Page 2 - Vegliante

that all documents obtained by Crawford and Company relating to the unauthorized inquiries be destroyed and employees made whole for all cost incurred.

Sincerely,

Call am

Executive Vice President

Mr. Anthony J. Vegliante Vice President Labor Relations 475 L' Enfant Plaza, SW Washington, DC 20260

WB:rb opeiu#2 afl-cio

Cc: G Santana S Brooks



Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

> Re: Q94C-4QC 99116671 Class Action Washington, DC 20260-4100

Dear Bill:

Recently, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issue on which this case was referred to Step 4 is whether the union has a right to medical documentation without obtaining the consent of the employee whose medical records are needed to process or consider the processing of a grievance.

After review of this matter, we mutually agreed that no national interpretive issue is fairly presented. The parties are in agreement with the March 19 correspondence (attached) which allows for a collective bargaining representative to obtain the aforementioned information in conjunction with a demonstration of relevancy.

Accordingly, we agreed to close this case.

Please sign and return the enclosed copies of this letter as your acknowledgement of agreement to close this case.

Time limits at this level were extended by mutual consent

Chome & Ualent

Thomas J. Valenti Labor Relations Specialist Contract Administration

William Burrus Executive Vice President American Postal Workers Union, AFL-CIO

Date: September 20, 1999

Attachment



March 19, 1999

Mr. William Burrus Executive Vice President American Postal Workers Union AFL-CIO 1300 L Street. NW Washington, DC 20005-4128

Dear Bill:

This letter is in regard to your February 23 correspondence and my February 19 response concerning the union's right to medical documentation for the processing of grievances. Upon further review, the following revises the earlier Postal Service position regarding union requests for medical information.

In requesting employee medical documentation, a collective bargaining representative, i.e., authorized union representative, must demonstrate that the information sought is relevant and necessary to his/her duties in accordance with the collective bargaining agreement.

Demonstration of relevancy is addressed by answering the following two questions:

- What is the precise bargaining issue, grievance, or contemplated grievance involved?
- Why does the union claim that the information being sought is relevant and necessary to resolving the issue or dispute?

Upon receipt of this type of request and demonstration of relevancy, the information will be released, as appropriate.

Specific instructions to the field regarding the aforementioned process can be located in Management Instruction (MI) EL-860-98-2, Employee Medical Records. This MI was sent to the American Postal Workers Union on January 9. Enclosed is a copy of the transmittal letter and document.

Should there be any questions regarding the foregoing, please contact Thomas J. Valenti of my staff at (202) 268-3831.

Sincere

Peter A. Sgro Acting Manager Contract Administration (APWU/NPMHU)

Enclosure

475 L'Enfant Plaza SW Washington DC 20260-4100



1300 L Street, NW, Washington, DC 20005

July 19, 1999

William Burrus Executive Vice President (202) 842-4246

Dear Corrine:

I am enclosing a copy of FMLA instructions ostensibly prepared by Nancy Forden of the Law Department. The instructions at page 8 requires that "If the employee still contends that FMLA leave is appropriate, a third opinion may be required, again at Postal Service expense." This differs from the specific language of the DOL regulations which provide at 825.307 (2) Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act". This is materially different from the instructions that require an action by the employee and provisionally denies the employee the benefit of the Act prior to the employer deciding to refer for a third opinion and prior to the receipt of a contrary third opinion.

Please review and inform me of your decision

Sincerely,

Executive Vice President

Ms. Corrine Rodriguez Labor Relations 475 L'Enfant Plaza, SW Washington, DC 20260

WB:rb opeiu#2 afl-cio

National Executive Board Moe Biller President

William Burrus Executive Vice President

Robert L. Tunstall Secretary–Treasurer

Greg Bell Industrial Relations Director

C. J. "Cliff" Guffey Director, Clerk Division

James W. Lingberg Director, Maintenance Division

Robert C. Pritchard Director, MVS Division

Regional Coordinators Leo F. Persails Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region Raydell R. Moore Western Region 1



September 7, 1999

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

This is in response to your July 19 correspondence addressed to Corine Rodriguez, of my staff, regarding FMLA second and third opinion guidelines prepared by Nancy Forden of the Law Department.

We do not disagree with 29 C.F.R. Section 825.307 that "pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits."

Indeed the document states in section 6 that employees are provisionally entitled to the benefits of the Act pending the second opinion and the same statement is reiterated in section 8 concerning third opinions. We think the guidelines provide substantial information to managers and supervisors concerning complete certifications and when to proceed with second and third opinions.

Sincerely,

Doug A. Tulino Manager Labor Relations Policies and Programs

475 L'ENFANT PLAZA SW WASHINGTON DC 20260-4100



1300 L Street, NW, Washington, DC 20005

William Burrus Executive Vice President (202) 842-4246

February 23, 2000

### Dear Doug:

I have previously communicated with your office regarding the right to require an employee to submit to an employer fitness for duty upon return from a FMLA absence. As you are aware, the issue was decided in the Routes vs Henderson lawsuit and I am aware that discussions were held on this subject with representatives from the Department of Labor.

I request the written position of the Postal Service on the employer's right to require employees to submit to a USPS fitness for duty prior to their return from FMLA.

Sincerely,

William Burrus Executive Vice President

Mr. Doug Toulino Labor Relations 475 L' Enfant Plaza, SW Washington, DC 20260

WB:rb opeiu#2 afl-cio

National Executive Board Moe Biller President

William Burrus Executive Vice President Robert L. Tunstall

Secretary-Treasurer

Greg Bell Industrial Relations Director C. J. "Cliff" Guffey Director, Clerk Division

James W. Lingberg Director, Maintenance Division Robert C. Pritchard

Director, MVS Division

Regional Coordinators Leo F. Persails Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R. Moore Western Region



March 15, 2000

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

This is in response to your February 23, 2000, correspondence asking for "the written position of the Postal Service on the employer's right to require employees to submit to a USPS fitness for duty prior to their return from FMLA." Our position on this issue has not changed.

Postal Service policy is that employees may not be required to submit to fitness-for-duty examinations by physicians employed by or under contract with the Postal Service before they return to duty from an absence covered under the FMLA.

However, our long standing policy, that in certain circumstances, the Postal Service can require more than a simple statement before allowing an employee to return to duty has not changed. Our discussions with the Department of Labor reaffirm that the provisions in the Employee and Labor Relations Manual, subsection 865 (formerly EL-311.342) are valid insofar as bargaining unit employees are concerned.

Sincerely,

Doug A. Tulino Manager Labor Relations Policies and Programs

475 L'ENFANT PLAZA SW WASHINGTON DC 20260-4100



June 22, 1999

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, NW Washington, DC 20005-4128

Dear Bill:

This is in regard to the meeting held on June 19 with Curtis Warren of my staff, Corine Rodriguez of the Programs and Policies section of this office, and Jim Moore of Human Resources.

As discussed in the meeting, postal policy regarding return to work as specified in the EL-311, Part 342 is separate from the issue concerning recertification for chronic conditions.

The Postal Service follows the regulations concerning recertification under subpart 825.308 of the Family and Medical Leave Act (FMLA):

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:
(1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or (2) The employee's stated reason for the absence.

If you know of specific districts or areas where there is a concern regarding this issue, please contact Curtis Warren at (202) 268-5359 with that information.

Sincerely

Peter A. Sgro Manager Contract Administration, APWU

475 L'ENFANT PLAZA SW Washington DC 20260-4100 LAS OF RELATIONS



January 26, 2001

#### AREA MANAGERS, HUMAN RESOURCES

SUBJECT: Return to Work Protocol - Bargaining Unit Employees

The procedure for the return of bargaining unit employees to duty after an absence due to non-job-related illness or injury under the provisions of Section 865 of the Employee and Labor Relations Manual (ELM) has prompted numerous questions from the field relative to its application under the Family Medical Leave Act. The attached protocol has been developed by the Law Department after consultations with the Wage and Hour Division of the Department of Labor to ensure nationwide consistency of application.

This protocol does not apply to non-bargaining unit employees, as they are not subject to the provisions of a collective bargaining agreement. Bargaining unit employees are covered by the protocol, as they are subject to our collective bargaining agreements, and the ELM is covered by Article 19 of our collective bargaining agreements.

Please ensure that this policy is disseminated to each installation in your area to be used as a reference.

If you have any questions concerning this policy, please contact Charles Baker (202) 268-3832 or Sandy Savoie (202) 268 3832 of my staff.

Doug A. Tulino Manager Labor Relations Policies and Programs

Attachment

475 (Exercit Place SW) Michael DC (20250-1100)

## RETURN TO WORK CERTIFICATION FOR BARGAINING UNIT EMPLOYEES

Prior to returning to duty after an absence due to exposure to a communicable or contagious disease, mental or nervous condition, diabetes, cardiovascular disease, epilepsy, a condition involving hospitalization, or absences of 21 days or more due to their own health condition, bargaining unit employees must submit medical evidence of their ability to return to work, in accordance with part 865 of the Employee and Labor Relations Manual. In the case of an employee using intermittent or reduced schedule leave for a condition covered under the FMLA, the postal medical officer or contract physician will make the decision at the time of the employee's return from his/her first absence for the condition whether it remains necessary for the employee to submit a certification for subsequent absences prior to returning to work.

Bargaining unit employees must submit medical certification regarding the covered condition(s) to their supervisor stating unequivocally that they are fit for the performance of their full duties without hazard to oneself or others, or indicating the duties of their position that they are capable of performing. The medical certification must contain detailed reports with sufficient data for the supervisor, and/or ultimately the medical unit, to determine whether they can return to work without hazard to themselves or others. All necessary information should be received as soon as the employee's physician anticipates his/her return to work, and no later than one workday prior to the anticipated return to work. (See Publication 71 for examples of specific medical information that may be required).

If the employee has timely provided all necessary information, but due to administrative delay must await the result of the medical assessment beyond his or her anticipated date for return to the workplace, the employee is placed on paid (administrative) leave until the results of the medical assessment are available.

The final evaluation of the completeness of the medical certification is made by a postal medical officer or contract physician who also makes the final determination of suitability for return to duty. However, if the postal medical officer or contract physician concludes that there is a reasonable medical concern about safety or a potential for violence, the medical officer or physician can send the employee for a fitness for duty exam prior to the employee's return to the workplace. Pursuant to FMLA regulations at 29 C.F.R. 825.310(b) and 702(e), the fitness for duty physical exam must be job-related and consistent with business necessity and limited to the covered condition(s).

In such cases, depending on the results of the fitness for duty exam and the medical condition and assessment involved, management then has the option to (1) return the employee to duty; (2) allow the employee additional leave (other than administrative), as appropriate, pending his or her ability to return to work; (3) provide light duty work, if appropriate; or (4) separate the employee. However, management must comply with any obligations under the Rehabilitation Act.



November 14, 2000

#### MANAGERS, HUMAN RESOURCES (AREA)

SUBJECT: Family Medical Leave Act - Eligibility

Based on the recently issued Department of Labor (DOL) Opinion Letter, the USPS is amending its position on FMLA eligibility. The DOL Opinion Letter addresses the question of eligibility for intermittent or reduced schedule leave for a serious health condition.

First, DOL has not endorsed lifetime eligibility. Instead, there is a one-year limitation placed upon eligibility for a given condition. The 1250-work hour eligibility test is applied only once, at the beginning of a series of intermittent absences, if all absences are for the same FMLA-qualifying condition during the same 12-month leave year. The employee remains eligible throughout that leave year even if subsequent absences bring the employee below the 1250-work hour requirement.

The employer defines the FMLA leave year. In the Postal Service, FMLA leave is calculated on the basis of the postal leave year.

Example: If an employee meets the 1250 work hour requirement for Multiple Sclerosis (MS), in May 2000, the employee is eligible for FMLA protection for absences due to the MS throughout the remainder of the 2000 postal leave year. The employee would not have to establish eligibility again for absences due to the MS condition in the 2000 leave year, even if the employee falls below the 1250 work hour requirement in December 2000. However, in January 2001, when the new postal leave year begins, the employee will have to meet the 1250 work hour requirement to be eligible for FMLA protection of MS related absences which occur in the 2001 leave year.

It is important to note that if this same employee has a different serious health condition (e.g., hospitalization for and recovery from a hysterectomy) during the 2000 leave year, the employee must meet the 1250 work hour eligibility test at the commencement of the leave for the second condition. If the employee does so, they are eligible for FMLA protection of absences for both conditions. Consequently, the leave for hospitalization is protected and leave for the MS condition continues to be protected for the remainder of the 2000 leave year, or until the 12 week entitlement has been exhausted.

475 L'ENFANT PLAZA SW WASHINGTON DC: 20260-4100 2

However, if the employee is unable to meet the 1250 work hour requirement for the second condition in the 2000 leave year, the employee is NOT entitled to FMLA protection for their hospitalization and recovery, but absences in the 2000 leave year for the MS condition continue to be protected. Therefore, it is possible for this employee to be eligible for FMLA protection of one qualifying condition (MS), but not for the second and different condition. The 1250 work hour eligibility requirement must be re-calculated at the commencement of each subsequent and separate condition for which the employee needs leave, in order to determine eligibility for each condition in each leave year.

The United States Postal Service is in the process of revising Publication 71 to reflect this change. Once we have met our Article 19 obligations with the unions, the revised Publication 71 will be issued.

Cases pending adjudication on this issue that do not reflect this amended position should be resolved.

If you have any questions contact Charles Baker at 202-268-3832 or Sandra Savoie at 202-268-3823.

Sincerely,

Doug' A. Tulino Manager Labor Relations Policies and Programs

U.S. Department of Labor

Employment Standards Administration Wage and Hour Division Washington, D.C. 20210



September 11, 2000

### FMLA - 112

Thank you for your letter seeking an opinion on how the 1,250 hours of service test applies under the Family and Medical Leave Act of 1993 (FMLA) in determining an employee's eligibility for leave taken intermittently or on a reduced leave schedule due to a qualifying serious health condition.

You specifically inquired about determining the eligibility of a part-time employee who used intermittent FMLA leave on a number of occasions due to a chronic serious health condition (multiple sclerosis or MS). Later in the same year, the employee took six weeks of FMLA leave for another serious health condition (a hysterectomy). Although she had worked 1,356.75 hours in 12 months preceding the commencement of this leave, by the conclusion of the leave, she had dropped below 1,250 hours of service in the preceding year (1,195.25). After her return to work, she again needed leave for her MS. Because she only worked a part-time schedule, she had worked fewer than the required 1,250 hours in the 12 months preceding this latest leave. You cited the decision in *Barron v. Runyon*, 11 F. Supp. 2d 676 (E.D. Va. 1998), and asked how this court decision would apply in determining this employee's eligibility for FMLA leave for her MS.

The statute defines an eligible employee in Section 101(2)(A)(i) and (ii) as one who has "... been employed ... for at least 12 months by the employer with respect to whom leave is requested ... and ... for at least 1,250 hours of service with such employer during the previous 12-month period." The FMLA Regulations, at 29 CFR § 825.110 (a)(2), provide that the employee must have performed "at least 1,250 hours of service during the 12-month period *immediately preceding the commencement of leave.*" This regulation is consistent with both the Senate and House Committee Reports, which state that "the employee must ... have worked for the employer for at least 1,250 hours of service during the 12 months period *immediately preceding the commencement of the leave.*" <sup>1</sup> In addition, § 825.110(d) expressly states that

Working to Improve the Lives of America's Workers

<sup>&</sup>lt;sup>1</sup> Report from the Committee on Labor and Human Resources (S.5), Report 103-3, January 27, 1993, p. 23; Report from the Committee on Education and Labor (H.R. 1), Report 103-8, Part 1, February 2, 1993, p. 35; emphasis added.

# FMLA - 112

determinations of whether an employee has worked for the employer for at least 12 months and for 1,250 hours in the past 12 months must be made "as of the date leave commences." The issue, then, is what the term "leave" means -- whether it encompasses all leave for the same serious health condition, or whether each intermittent leave absence for the same condition is considered separate leave under the Act and regulations.

The FMLA regulations define intermittent leave as "leave taken in separate blocks of time due to a single qualifying reason" (§§ 825.203 and 825.800; emphasis added). This definition is based upon the statutory provisions and the legislative history pertaining to intermittent leave. The FMLA authorizes employees to take intermittent leave or leave on a reduced schedule "when medically necessary." Section 102(b)(1).

The Congressional Committee Reports recognize that some serious health conditions require that an employee be "absent from work on a recurring basis" rather than for a single block of time, and that "continuing treatment or supervision may sometimes take the form of intermittent visits to the doctor.<sup>22</sup> Intermittent leave may be medically necessary for planned and/or unanticipated medical treatment, or for recovery from a serious health condition. Intermittent leave may be taken for an employee's own or a family member's serious health condition. Congress confirmed that, when an employee uses intermittent leave, only the amount of time actually used may be counted against the 12 weeks of leave to which an employee is entitled. Section 102(b)(1).

The intermittent leave concept assumes alternating periods of absence from and presence at work for the same FMLA-qualifying reason. If each such absence were treated as a separate period of FMLA leave, requiring an employee to reestablish eligibility with each absence, there would have been no need for Congress to codify the concept of intermittent leave. Thus, it is our position that the 1,250-hour eligibility test is applied only once, on the commencement of a series of intermittent absences, if all involve the same FMLA-qualifying serious health condition during the same 12-month FMLA leave year. The employee in such a case remains entitled to FMLA leave for that

-2-

<sup>&</sup>lt;sup>2</sup> Report from the Committee on Labor and Human Resources (S.5), Report 103-3, January 27, 1993, pp. 27-29; Report from the Committee on Education and Labor (H.R. 1), Report 103-8, Part 1, February 2, 1993, pp. 27 & 40-41.

## FMLA - 112

FMLA reason throughout that 12-month period, even if the 1,250-hour calculation is not met at some later point in the 12-month period during the series of related intermittent absences.

Once an employee is determined to be eligible for FMLA leave, whether the leave is taken continuously or intermittently, the statute (§ 102(a)) provides for "...a total of 12 workweeks of leave during any 12-month period for one or more..." qualifying reasons. The regulations (29 CFR §§ 825.200(b) through (e)) permit an employer to choose from four different methods for determining the 12-month period that will be used to calculate an employee's FMLA leave entitlement. The four methods are the calendar year, any fixed 12-month "leave year," a 12-month period measured forward from the date any employee's first FMLA leave begins, and a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.<sup>3</sup> Where an employer has selected either the calendar year, fixed year, or the 12-month period measured forward, it is our position that an employee's eligibility, once satisfied, for intermittent FMLA leave for a particular condition would last through the entire current 12-month period as designated by the employer for FMLA leave purposes. If an employer uses the rolling backward method, an employee's eligibility for absence due to a particular condition would continue for 12 months from the date of the first FMLA absence for the condition. Under all of these methods, eligibility could be re-calculated at the time of the first absence for the condition after the conclusion of the 12-month period. Furthermore, it is important to realize that this analysis is separate and distinct from determining whether an eligible employee's leave entitlement has been exhausted.

In Barron v. Runyon, the court considered these questions under the FMLA and rendered a decision consistent with our analysis set forth above. In Barron, the court held that an employee need only establish eligibility once at the beginning of the intermittent leave, and "an employee who requests several distinct periods of absence for 'a single qualifying reason' is seeking only one period of Intermittent leave." 11 F. Supp. 2d at 682. The court observed that the rule for determining employee eligibility

<sup>&</sup>lt;sup>3</sup> If an employer fails to designate the 12-month period from one of the regulatory options, the option that provides the most beneficial outcome for the employee must be used. See 29 CFR § 825.200(e).

### FMLA - 112

based on whether 50 employees are employed within 75 miles (29 CFR § 825.110(f)) is determined when the employee gives notice of the need for leave and, once eligible. the employee's eligibility is not affected by any subsequent changes in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. An employer, for instance, could not terminate FMLA leave after it has commenced if the employee-count drops below 50. The court found this regulation "directly analogous to the situation [that] once an employee is determined eligible based on the number of hours he has worked in the twelve months preceding the first date of the leave, 'the employee's eligibility is not affected by any subsequent change in the number of hours he worked in the twelve months prior to any subsequent date on which he takes an absence pursuant to his intermittent leave for the same medical condition." Id. The court also concluded that FMLA leave "cannot be taken 'forever' on the basis of one leave request. Instead, the statute grants an employee twelve weeks of leave per twelve-month period, not indefinitely." 11 F. Supp. 2d at 683. See also Butler v. Owens-Brockway Plastic Products. Inc. 5WH Cases 2d 1281 (6<sup>th</sup> Circuit 1999), in which the court held that the 1,250 hours of service must be computed from the date of commencement of leave rather than the date of the adverse action that violated the Act.

The following three examples will help to illustrate how an employee's eligibility is determined by FMLA's 1,250-hour test:

1. Assume an employee is diagnosed with an FMLA-qualifying chronic condition, such as MS as in your example, that results in an employee needing intermittent leave due to the episodic nature of the condition. For example, if an employee with MS who was eligible to take intermittent FMLA leave in April and May needed leave again when the episodes of incapacity recurred in July and again in October, the employee would be entitled to FMLA leave without having to re-qualify under the 1,250-hour eligibility test so long as the absences occurred within the same 12-month period and the employee had not exhausted the 12-week leave entitlement for this or any other FMLA-qualifying reason. If the employee needed leave for MS again in a new 12-month period, the employee would have to re-qualify under the 1,250-hour eligibility test to be entitled to take FMLA leave for the same chronic condition in the new 12-month period.
FMLA - 112

- 2. Assume the same facts as in the first example and, in addition, assume that the employee requests FMLA leave for up to six weeks for another serious health condition that requires major surgery and a subsequent period of recovery (e.g., a hysterectomy). If, at the time of this second and different FMLA-qualifying circumstance, the employee met the 1,250-hour eligibility test, the employee would be entitled to FMLA leave for *that* (*i.e.*, second) reason. In addition, the employee would also continue to be eligible for intermittent FMLA leave for the chronic serious health condition (*i.e.*, MS) for the remainder of the current 12-month period or until the 12-week leave entitlement has been exhausted.
- 3. Assume the same facts as in the second example except, at the time of the second and different FMLA-qualifying circumstance, the employee does <u>not</u> meet the 1,250-hour eligibility test. In this situation, the employee would not be entitled to FMLA leave for *that* (*i.e.*, second) reason. Thus, it is possible that an employee could remain eligible for leave for one FMLA-qualifying reason for which prior notice had been given when the employee met the 1,250-hour test (*i.e.*, MS), but not be eligible for FMLA leave for a different FMLA-qualifying reason (*i.e.*, surgery and recovery), due to the 1,250-hour test being re-calculated at the *commencement* of the subsequent and separate need for leave.

Our response is based solely upon the information contained in your letter and addresses only the application of the 1,250-hour eligibility test in the context of intermittent leave. We have assumed that all other FMLA requirements are satisfied, or are otherwise not an issue.

I trust that our reply is responsive to your request, and apologize for any inconvenience caused by our delay in not being able to respond sooner to your letter. Please contact this office if you have any questions or require further assistance.

Sincerely,

T. Michael Kerr Administrator



### **American Postal Workers Union, AFL-CIO**

1300 L Street, NW, Washington, DC 20005

December 21, 2000

William Burrus Executive Vice President (202) 842-4246

> Anthony J. Vegliante, Vice President Labor Relations United States Postal Service 475 L'Enfant Plaza Washington, DC 20260

> > RE: FMLA Regulation - 825.106 How Joint Employment is Treated

National Executive Board Moe Biller President

William Burrus Executive Vice President

Douglas C. Holbrook Secretary–Treasurer

Greg Bell Industrial Relations Director

Robert L. Tunstall Director, Clerk Division

James W. Lingberg Director, Maintenance Division Robert C. Pritchard

Director, MVS Division

George N. McKeithen Director, SDM Division

Regional Coordinators Leo F. Persails Central Region

Jim Burke Eastern Region

Elizabeth "Liz" Powell Northeast Region

Terry Stapleton Southern Region

Raydell R. Moore Western Region Dear Mr. Vegliante:

This letter concerns the issue of union officials eligibility for FMLA protection while on Union business. Specifically, when a Union official is on union LWOP for union business the time on such status is not being counted toward the 1250 hour eligibility requirement by the Postal Service. We believe that this is improper and in violation of Section 825.106 of the FMLA. We believe that Union officials, that are on LWOP, benefit from a joint employment status where the Postal Service is the primary employer. This status would allow for time spent on LWOP/Union Business to count toward the 1250 hour eligibility requirement with the Postal Service. After close examination the following regulation it is clear that the joint employment status exists (underline and bold my emphasis):

Sec. 825.106 How is ``joint employment" treated under FMLA?

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

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

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

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

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

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

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. <u>An employee on</u> <u>leave who is working for a secondary employer is considered employed</u> <u>by the secondary employer, and must be counted for coverage and</u> <u>eligibility purposes, as long as the employer has a reasonable expectation</u> <u>that employee will return to employment with that employer.</u>

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA (see Sec. 825.220(a)). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

I seek the Postal Service's position on the above matter. Please contact me if you wish to discuss this matter further.

Sincerely,

いもん RNKS Burrus

Executive Vice President

cc: Greg Bell, Director Randy Sutton

WB:RL:kj opeiu#2 afl-cio LABOR RELATIONS



January 16, 2001

Mr. William Burrus Executive Vice President American Postal Workers Union, AFL-CIO 1300 L Street, N.W. Washington, DC 20005-4128

Dear Bill:

This is in response to your December 21, 2000 letter, requesting the Postal Service's position on whether Leave Without Pay (LWOP) used for union business is counted toward the 1250 hours required for eligibility under the Family Medical Leave Act (FMLA).

Our long-held position on this issue has not changed. As you stated in your letter, when an employee is on LWOP for union business, the time on such status is not being counted by the Postal Service toward the 1250 work hour eligibility requirement.

Union officials on LWOP are not subject to joint employment status under Section 825.106 of the FMLA.

The Postal Service has never considered itself a "joint employer" under FMLA with the American Postal Workers' Union, AFL-CIO (APWU) because of our divergent interests. Employees on LWOP for union business do not have their work or working conditions controlled by the Postal Service, are not acting directly or indirectly in the interest of the Postal Service, and are not providing the same services as those provided by the Postal Service.

Furthermore, Section 825.110(c) of the FMLA states that whether an employee has worked the minimum 1250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. LWOP hours are not work hours within the meaning of FLSA. As stated on page 9 of the APWU publication, *How the Family and Medical Leave Act Affects You, "The requirement of 1250 hours during the 12-month period prior to the date leave commences includes 'worked hours' only. Periods of annual, sick, administrative leave or LWOP for any purpose, including union activity, are not counted as 'worked hours.'"* 

Please contact Charles Baker at 202-268-3832 or Sandra Savoie at 202-268-3823, of my staff, if you have further question on this issue.

Sincerely,

ulis

Doug A. Tulino Manager Labor Relations Policies and Programs

475 L'ENFANT PLAZA SW WASHINGTON DC 20260-4100



AREA MANAGERS, HUMAN RESOURCES

SUBJECT: Documentation for FMLA Request

The attached APWU Forms 1 through 5, dated June 26, 1995 provide supporting documentation for leave requests covered by the Family and Medical Leave Act (FMLA). These forms have been reviewed by the appropriate Headquarters functional areas and are acceptable for usage by managers to approve or disapprove FML leave requests.

The Postal Service does not require a specific format for FML documentation. Information provided by the employee is acceptable as long as it is in compliance with Publication 71, Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act IV, Section IV.

Manager Contract Administration (APWU/NPMHU)

## EMPLOYEE CERTIFICATION OF OWN SERIOUS ILLNESS-FMLA

This form is to be used by employee when requesting FMLA and medical documentation is not required pursuant to 513.36 and 515.5 of ELM.

EMPLOYEE'S	
NAME	

Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)

(1) (2) (3) (4) (5) (6) None of the above

Date condition commenced:

Probable duration of condition:		
---------------------------------	--	--

The employee must provide a completed Form PS 3971 for each pay period, noting type of leave requested.

Employee's Signature	Date	

6/26/95

## FMLA DESCRIPTION OF SERIOUS HEALTH CONDITION<sup>1</sup>

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

#### 1. Hospital Care

*Inpatient care* (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment<sup>2</sup> in connection with or consequent to such inpatient care.

#### 2. Absence Plus Treatment

A period of incapacity of *more than three consecutive calendar days* (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(a) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services
(e.g., physical therapist) under orders of, or on referral by, a health care provider; or
(b) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment<sup>9</sup> under the supervision of the health care provider.

#### 3. Pregnancy

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

#### 4. Chronic Conditions Requiring Treatments

A chronic condition which;

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

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

(c) May cause *episodic* rather than a continuing period of incapacity<sup>4</sup> (e.g., *asthma, diabetes, epilepsy*).

#### 5. Permanent/Long-term Conditions Requiring Supervision

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

#### 6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity<sup>4</sup> of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

<sup>&</sup>lt;sup>1</sup> Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

<sup>&</sup>lt;sup>2</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>&</sup>lt;sup>3</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

<sup>\*&</sup>quot;Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of ELM. Form PS 3971 must be completed by employee.

EMPLOYEE'S NAME				
	 			-

Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)

(1) (2) (3) (4) (5) (6) None of the above

Without giving a specific diagnosis or prognosis, briefly note how the medical facts meet the criteria of the category checked above.

Date condition commenced: Probable duration of condition: Probable duration of the present incapacity (if different):

Will the employee be required to be off from work intermittently or work a reduced schedule as a result of this condition and/or treatments? \_ Note the probable time and duration.

If the condition is chronic (#4) or pregnancy (#3), note if the employee is presently incapacitated and the likely duration and frequency of episodes of incapacity.

If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known.

Is the employee able to perform the functions of employee's position? \_ If no, describe the physical restrictions placed on the employee, including the duration of such restrictions.

Health Care Provider's	Date	
Signature		

Address 6/26/95

## FMLA DESCRIPTION OF SERIOUS HEALTH CONDITION<sup>1</sup>

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

#### 1. Hospital Care

*Inpatient care* (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment<sup>2</sup> in connection with or consequent to such inpatient care.

#### 2. Absence Plus Treatment

A period of incapacity of *more than three consecutive calendar days* (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(a) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services
(e.g., physical therapist) under orders of, or on referral by, a health care provider; or
(b) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment<sup>9</sup> under the supervision of the health care provider.

#### 3. Pregnancy

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

#### 4. Chronic Conditions Requiring Treatments

A chronic condition which;

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

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

(c) May cause *episodic* rather than a continuing period of incapacity<sup>4</sup> (e.g., *asthma, diabetes, epilepsy*).

#### 5. Permanent/Long-term Conditions Requiring Supervision

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

#### 6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity<sup>4</sup> of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

<sup>&</sup>lt;sup>1</sup> Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

<sup>&</sup>lt;sup>2</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>&</sup>lt;sup>3</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

<sup>\*&</sup>quot;Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

#### HEALTH CARE PROVIDER CERTIFICATION OF EMPLOYEE'S FAMILY MEMBER SERIOUS ILLNESS-FMLA

EMPLOY NAME	'EE'S				
PATIENT	S'S NAME				
Relations	hip to employ	yee	SpouseParentChi	incapable	e 18 or if older and of self care due to a physical disability)
condition		A. Does th	dition (On the back of this for e patient's condition qualify category.)		
(1)	(2)	(3)	(4)(5)(6)	None of the al	bove
	iving a speci egory checke	fic diagnos	sis or prognosis, briefly note	how the medical	facts meet the criteria
Probable	lition comme duration of c duration of th	ondition:	ncapacity (if different):		
			be off from work intermitte nd/or treatments? Note th		
	to perform re		pregnancy (#3), note if the activities) and the likely du		-
the treatm	ents, an estir	nate of the	ents are required for the con probable number of treatme nated dates of the treatments	nts, the length of a	Ę į
transporta	tion? If no	, would the	e for basic medical, hygiene e employee's presence to pro e the probable duration of th	ovide psychologica	
Health Ca Signature	re Provider's	5		Date	
Address 6/26/95		<u></u>			APWU FORM 3

## FMLA DESCRIPTION OF SERIOUS HEALTH CONDITION<sup>1</sup>

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

#### 1. Hospital Care

*Inpatient care* (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment<sup>2</sup> in connection with or consequent to such inpatient care.

#### 2. Absence Plus Treatment

A period of incapacity of *more than three consecutive calendar days* (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(a) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services
(e.g., physical therapist) under orders of, or on referral by, a health care provider; or
(b) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment<sup>9</sup> under the supervision of the health care provider.

#### 3. Pregnancy

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

#### 4. Chronic Conditions Requiring Treatments

A chronic condition which;

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

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

(c) May cause *episodic* rather than a continuing period of incapacity<sup>4</sup> (e.g., *asthma, diabetes, epilepsy*).

#### 5. Permanent/Long-term Conditions Requiring Supervision

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

#### 6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity<sup>4</sup> of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

<sup>&</sup>lt;sup>1</sup> Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

<sup>&</sup>lt;sup>2</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>&</sup>lt;sup>3</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

<sup>\*&</sup>quot;Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

## NOTICE OF NEED FOR INTERMITTENT LEAVE OR FOR A REDUCED WORK SCHEDULE-FMLA

The Employer must approve absences needed for intermittent leave or a reduced work schedule to care for a sick immediate family member or for an employee's own serious health condition that has been properly certified by a health care provider when required pursuant to 513.36 and 515.5 of ELM. Intermittent or reduced schedule for birth or placement of a child may be scheduled only if the employer agrees.

If the need is for a seriously ill family member: Attach Medical Documentation APWU Form 3, when required pursuant to Section 513.36 and 515.5 of the ELM. If the need is for the employee's own serious health condition: Attach Medical Documentation APWU Form 2.

NAME

Relationship to employee

Required reduced or intermittent schedule, including duration:

The employee must provide a completed Form PS 3971 for each pay period, noting type of leave requested.

Employee's Signature	Date	
		APWU FORM 4

## FMLA DESCRIPTION OF SERIOUS HEALTH CONDITION<sup>1</sup>

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

#### 1. Hospital Care

*Inpatient care* (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment<sup>2</sup> in connection with or consequent to such inpatient care.

#### 2. Absence Plus Treatment

A period of incapacity of *more than three consecutive calendar days* (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(a) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services
(e.g., physical therapist) under orders of, or on referral by, a health care provider; or
(b) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment<sup>9</sup> under the supervision of the health care provider.

#### 3. Pregnancy

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

#### 4. Chronic Conditions Requiring Treatments

A chronic condition which;

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

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

(c) May cause *episodic* rather than a continuing period of incapacity<sup>4</sup> (e.g., *asthma, diabetes, epilepsy*).

#### 5. Permanent/Long-term Conditions Requiring Supervision

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

#### 6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity<sup>4</sup> of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

<sup>&</sup>lt;sup>1</sup> Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

<sup>&</sup>lt;sup>2</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>&</sup>lt;sup>3</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

<sup>\*&</sup>quot;Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

## DESIRED OR NEEDED ABSENCES FOR BIRTH OR PLACEMENT OF SON OR DAUGHTER UNDER FMLA

Note: Entitlement to Family and Medical Leave because of (1) birth, (2) placement for adoption or (3) placement for foster care of a son or daughter expires 12 months after birth, placement or adoption. Employees may use up to 12 weeks each Postal leave year as long as the leave is continuous and the absence is within the first year of the birth, placement or adoption.

An absence due to care for a new son or daughter or the placement of a son or daughter is not a serious medical condition and does not require certification by a health care provider, but it may require documentation.\* Intermittent leave or reduced schedule for this purpose requires approval by the employer. FMLA leave for birth, placement or adoption must be continuous unless an intermittent or reduced schedule is approved by the employer.

Employee's name

Date of birth, placement or foster care of this son or daughter\*

Schedule desired or needed (employee is entitled up to 12 weeks).

From:

To:

The employee must provide a completed Form PS 3971 for each pay period, noting type of leave requested.

\* Documentation may be required of the father if unmarried or not living with spouse, or of employee for adoption or placement under foster care.

Employee's Signature	Date	

6/26/95

## FMLA DESCRIPTION OF SERIOUS HEALTH CONDITION<sup>1</sup>

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

#### 1. Hospital Care

*Inpatient care* (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment<sup>2</sup> in connection with or consequent to such inpatient care.

#### 2. Absence Plus Treatment

A period of incapacity of *more than three consecutive calendar days* (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(a) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services
(e.g., physical therapist) under orders of, or on referral by, a health care provider; or
(b) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment<sup>9</sup> under the supervision of the health care provider.

#### 3. Pregnancy

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

#### 4. Chronic Conditions Requiring Treatments

A chronic condition which;

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

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

(c) May cause *episodic* rather than a continuing period of incapacity<sup>4</sup> (e.g., *asthma, diabetes, epilepsy*).

#### 5. Permanent/Long-term Conditions Requiring Supervision

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

#### 6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity<sup>4</sup> of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

<sup>&</sup>lt;sup>1</sup> Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

<sup>&</sup>lt;sup>2</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>&</sup>lt;sup>3</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

<sup>\*&</sup>quot;Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

# APWU FORMS 6 & 7

# HAVE NOT BEEN ACCEPTED BY THE POSTAL SERVICE

	r:
cond treat and	, SS# am a disabled veterar er treatment by theVA facility. As required by my medical lition, it will be necessary that I be absent from work on occasion to receive medica ment. My absence(s) to attend to the required treatment are covered by the Family Medical Leave Act which permits the employer to demand medical certification of reatment and condition.
polic cons phys This	Veterans' Hospitals' have a policy of not completing FMLA forms. Due to this by it will not be possible for me to provide documentation at your request; however, distent with the provisions of the Family and Medical Leave Act, the employer's dician may contact the employee's physician with the consent of the employee. letter is intended as my consent to have your designated physician contact my dician to verify:
5 5 5 5 5	Whether my condition meets the definition of a Serious Health Condition The date of treatment Duration of condition Will I be off work intermittently or work a reduced schedule, if continuing treatments are required The nature and regimen of treatments, if continuing treatments are required, length of absence required and estimated dates of treatments, if known and any physical restrictions, including duration. Nature of my illness.
	is not to be interpreted that I am authorizing the employer or the employer's ician to inquire of the diagnosis or prognosis of my condition.
. ,	

## FMLA DESCRIPTION OF SERIOUS HEALTH CONDITION<sup>1</sup>

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

#### 1. Hospital Care

*Inpatient care* (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment<sup>2</sup> in connection with or consequent to such inpatient care.

#### 2. Absence Plus Treatment

A period of incapacity of *more than three consecutive calendar days* (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(a) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services
(e.g., physical therapist) under orders of, or on referral by, a health care provider; or
(b) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment<sup>9</sup> under the supervision of the health care provider.

#### 3. Pregnancy

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

#### 4. Chronic Conditions Requiring Treatments

A chronic condition which;

(a) Requires *periodic visits* for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
(b) Continues over an *extended period of time* (including recurring episodes of a *single underlying* condition); and
(c) New equest period of the period of the period of increase with (a period of the p

(c) May cause *episodic* rather than a continuing period of incapacity<sup>4</sup> (e.g., *asthma, diabetes, epilepsy*).

#### 5. Permanent/Long-term Conditions Requiring Supervision

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

#### 6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity<sup>4</sup> of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

<sup>&</sup>lt;sup>1</sup> Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

<sup>&</sup>lt;sup>2</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>&</sup>lt;sup>3</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

<sup>\*&</sup>quot;Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery thereform.

MANAGEMENT REQUEST FOR CLARIFICATION OF MEDICAL CERTIFICATION
Employee's name
Date of Original Medical Certification
Supervisor
You verbally requested on that I obtain clarification of my medical certification. I shall need more specific information regarding your request. The Family and Medical Leave Act provides that you are entitled to:
<ul> <li>*The name of my health care provider and the type of medical practice</li> <li>* A certification of which part of the definition applies to my condition</li> <li>*A brief statement as to how the medical facts meet the criteria of the definition</li> <li>*The date the serious health condition commenced and its probable duration,</li> <li>*Whether my absence will be intermittent or require a reduced work schedule</li> <li>*Additional treatments, if necessary</li> <li>*If pregnancy or chronic condition, will I require a reduced leave schedule or intermittent leave</li> <li>*The nature of treatments provided by a different provider</li> <li>*The regimen of continuing treatment if required</li> <li>*Whether of not I can perform work of any kind or the essential functions of my position</li> </ul>
The Family and Medical Leave Act requires that <b>you provide me with</b> <u>advance</u> written notice detailing the specific expectations and obligations. This is to request that you provide me in writing whether you request the opportunity to contact my physician and the specific clarification of my certification that you seek.
Employee's Signature
April 17, 2001 APWU FORM 7

## FMLA DESCRIPTION OF SERIOUS HEALTH CONDITION<sup>1</sup>

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

#### 1. Hospital Care

*Inpatient care* (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment<sup>2</sup> in connection with or consequent to such inpatient care.

#### 2. Absence Plus Treatment

A period of incapacity of *more than three consecutive calendar days* (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(a) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services
(e.g., physical therapist) under orders of, or on referral by, a health care provider; or
(b) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment<sup>9</sup> under the supervision of the health care provider.

#### 3. Pregnancy

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

#### 4. Chronic Conditions Requiring Treatments

A chronic condition which;

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

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

(c) May cause *episodic* rather than a continuing period of incapacity<sup>4</sup> (e.g., *asthma, diabetes, epilepsy*).

#### 5. Permanent/Long-term Conditions Requiring Supervision

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

#### 6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity<sup>4</sup> of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

<sup>&</sup>lt;sup>1</sup> Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

<sup>&</sup>lt;sup>2</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>&</sup>lt;sup>3</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

<sup>\*&</sup>quot;Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

# **SAMPLE FORMS**

This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of ELM. Form PS 3971 must be completed by employee.

EMPLOYEE'S NAME JOHN DOE

Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)

(1) X (2) (3) (4) (5) (6) None of the above

Without giving a specific diagnosis or prognosis, briefly note how the medical facts meet the criteria of the category checked above. MR. DOE WAS HOSPITALIZED OVER NIGHT FOR SURGERY ON HIS LEFT KNEE AND HAS BEEN SCHEDULED FOR FOLLOW-UP VISITS AND COULD EXPERIENCE FLARE-UPS OF HIS CONDITION

Date condition commenced: 6/26/95

Probable duration of condition: SIX MONTHS

Probable duration of the present incapacity (if different): FOUR WEEKS

Will the employee be required to be off from work intermittently or work a reduced schedule as a result of this condition and/or treatments? YES Note the probable time and duration. 1 TO 2 DAYS PER MONTH FOR THE NEXT 6 MONTHS

If the condition is chronic (#4) or pregnancy (#3), note if the employee is presently incapacitated and the likely duration and frequency of episodes of incapacity.

If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known. ONE OFFICE VISIT PER MONTH ON OR ABOUT THE 15TH OF EACH MONTH FOR THE NEXT SIX MONTHS

Is the employee able to perform the functions of employee's position? **NO** If no, describe the physical restrictions placed on the employee, including the duration of such restrictions. MR. DOE WILL BE UNABLE TO PERFORM ONE OR MORE FUNCTIONS OF THIS POSITION FOR THE NEXT FOUR WEEKS BEGINING ON 6/26/95 AND WILL BE UNABLE TO DO SO DURING ANY OF THE FLARE-UPS NOTED ABOVE.

Health Car	e Provider's Signature	DR. GET BETTER	Date	6/26/95	
Address	1 MEDICAL PLAC	E BIG CITY USA			

6/26/95

This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of ELM. Form PS 3971 must be completed by employee.

#### EMPLOYEE'S NAME JOHN DOE

Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)

(1) (2) **X** (3) (4) (5) (6) None of the above

Without giving a specific diagnosis or prognosis, briefly note how the medical facts meet the criteria of the category checked above. <u>MR. DOE'S LEFT SHOULDER CONDITION THAT DOES NOT ALLOW HIM TO</u> <u>RAISE HIS ARM ABOVE HIS SHOULDER FOR THE NEXT FOUR DAYS AND HE HAS BEEN</u> <u>SCHEDULED FOR FOLLOW-UP VISITS FOR PHYSICAL THERAPY</u>.

Date condition commenced: <u>6/26/95</u> Probable duration of condition: <u>SIX MONTHS</u> Probable duration of the present incapacity (if different): <u>FOUR DAYS</u>

Will the employee be required to be off from work intermittently or work a reduced schedule as a result of this condition and/or treatments? <u>YES</u> Note the probable time and duration. <u>1 DAY PER WEEK FOR THE NEXT 6</u> <u>MONTHS</u>

If the condition is chronic (#4) or pregnancy (#3), note if the employee is presently incapacitated and the likely duration and frequency of episodes of incapacity.

If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known. **ONE OFFICE VISIT PER WEEK FOR THE NEXT SIX MONTHS FOR PHYSICAL THERAPY.** 

Is the employee able to perform the functions of employee's position? <u>NO</u> If no, describe the physical restrictions placed on the employee, including the duration of such restrictions. <u>MR. DOE WILL BE UNABLE TO</u> <u>PERFORM ONE OR MORE FUNCTIONS OF HIS POSITION FOR THE NEXT FOUR DAYS AND</u> <u>WILL BE UNABLE TO DO SO ON THE DAYS OF HIS PHYSICAL THERAPY AS NOTED ABOVE.</u>

			r	1
Health Car	e Provider's Signature	DR. GET BETTER	Date	6/26/95

#### Address 1 MEDICAL PLACE BIG CITY USA

6/26/95

This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of ELM. Form PS 3971 must be completed by employee.

#### EMPLOYEE'S NAME JANE DOE

Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)

(1) (2) (3) X (4) (5) (6) None of the above

Without giving a specific diagnosis or prognosis, briefly note how the medical facts meet the criteria of the category checked above. <u>MRS. DOE CONDITION WILL MAKE HER INCAPACITIED FOR DUTY FROM TIME TO TIME FOR PRENATAL CARE AND NORMAL CONDITIONS RELATED TO HER CONDITION.</u>

Date condition commenced: <u>6/26/95</u> Probable duration of condition: <u>NINE MONTHS</u> Probable duration of the present incapacity (if different): <u>ONE DAY</u>

Will the employee be required to be off from work intermittently or work a reduced schedule as a result of this condition and/or treatments? **YES** Note the probable time and duration. **SEE BELOW** 

If the condition is chronic (#4) or pregnancy (#3), note if the employee is presently incapacitated and the likely duration and frequency of episodes of incapacity. <u>**1 TO 2 DAYS PER WEEK FOR THE NEXT 9 MONTHS</u></u></u>** 

If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known. <u>ONE OFFICE VISIT PER MONTH ON OR ABOUT THE 15TH</u> <u>OF EACH MONTH FOR THE NEXT 9 MONTHS</u>

Is the employee able to perform the functions of employee's position? <u>NO</u> If no, describe the physical restrictions placed on the employee, including the duration of such restrictions. <u>MRS. DOE WILL BE UNABLE TO</u> <u>PERFORM ONE OR MORE FUNCTIONS OF HER POSITION TOMORROW AND WILL BE UNABLE</u> <u>TO DO SO DURING ANY OF THE FLARE-UPS CONNECTED WITH HER CONDITION AS NOTED</u> <u>ABOVE.</u>

Health Care Provider's Signature		DR. GET BETTER	Date	6/26/95
Address	1 MEDICAL PLACE	E BIG CITY USA		
6/26/95	<u> </u>		••••••••••••••••••••••••••••••••••••••	APWU FORM 2

This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of ELM. Form PS 3971 must be completed by employee.

EMPLOYEE'S NAME

JOHN DOE

Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)

(1) (2) (3) (4) X (5) (6) None of the above

Without giving a specific diagnosis or prognosis, briefly note how the medical facts meet the criteria of the category checked above. MR. DOE'S KNEE JOINT CONDITION DOES NOT ALLOW HIM WALK FOR EXTENDED PERIODS OF TIME FOR THE NEXT FOUR DAYS AND THE CONDITION IS CHRONIC AND WILL HAVE RECURRING EPISODES.

Date condition commenced: <u>6/26/94</u> Probable duration of condition: <u>ONE YEAR</u> Probable duration of the present incapacity (if different): <u>FOUR DAYS</u>

Will the employee be required to be off from work intermittently or work a reduced schedule as a result of this condition and/or treatments? <u>YES</u> Note the probable time and duration. <u>SEE BELOW</u>

If the condition is chronic (#4) or pregnancy (#3), note if the employee is presently incapacitated and the likely duration and frequency of episodes of incapacity. <u>1 TO 2 DAYS PER MONTH FOR THE NEXT YEAR.</u>

If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known. N/A

Is the employee able to perform the functions of employee's position? <u>NO</u> If no, describe the physical restrictions placed on the employee, including the duration of such restrictions. <u>MR. DOE WILL BE</u> <u>UNABLE TO PERFORM ONE OR MORE FUNCTIONS OF HIS POSITION FOR THE NEXT FOUR</u> <u>DAYS AND WILL BE UNABLE TO DO SO ON THE DAYS WHEN HE HAS A FLARE-UP OF HIS</u> CONDITION AS NOTED ABOVE.

Health Care Provider's Signature	DR. GET BETTER	Date	6/26/95

Address	1 MEDICAL PLACE	<b>BIG CITY USA</b>

6/26/95

## EXAMPLE 5 EMPLOYEE CERTIFICATION OF OWN SERIOUS ILLNESS-FMLA

This form is to be used by employee when requesting FMLA and medical documentation is not required pursuant to 513.36 and 515.5 of ELM.

EMPLOYEE'S NAME | JOHN DOE

Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)

(1) (2) X (3) (4) (5) (6) None of the above

Date condition commenced: <u>6/26/95</u>

Probable duration of condition: <u>3 DAYS</u>

The employee must provide a completed Form PS 3971 for each pay period, noting type of leave requested.

Employee's Signature	JOHN DOE	Date	6/26/95

6/26/95

## EXAMPLE #6 NOTICE OF NEED FOR INTERMITTENT LEAVE OR FOR A REDUCED WORK SCHEDULE-FMLA

The Employer must approve absences needed for intermittent leave or a reduced work schedule to care for a sick immediate family member or for an employee's own serious health condition that has been properly certified by a health care provider when required pursuant to 513.36 and 515.5 of ELM. Intermittent or reduced schedule for birth or placement of a child may be scheduled only if the employer agrees.

If the need is for a seriously ill family member: Attach Medical Documentation APWU Form 3, when required pursuant to Section 513.36 and 515.5 of the ELM. If the need is for the employee's own serious health condition: Attach Medical Documentation APWU Form 2.

NAME

JOHN DOE

Relationship to employee

N/A

Required reduced or intermittent schedule, including duration: <u>I HEREBY NOTIFY YOU</u> <u>THAT I NEED INTERMITTENT LEAVE FOR MY SERIOUS HEALTH CONDITION</u> <u>CERTIFIED ON THE ATTACHED APWU FORM 2. I WILL BE ABSENT FROM</u> 6/25/95 THROUGH 6/27/95.

The employee must provide a completed Form PS 3971 for each pay period, noting type of leave requested.

Employee's Signature	JOHN DOE	Date	6/25/95
6/26/95			APWU FORM 4

## EXAMPLE #7 NOTICE OF NEED FOR INTERMITTENT LEAVE OR FOR A REDUCED WORK SCHEDULE-FMLA

The Employer must approve absences needed for intermittent leave or a reduced work schedule to care for a sick immediate family member or for an employee's own serious health condition that has been properly certified by a health care provider when required pursuant to 513.36 and 515.5 of ELM. Intermittent or reduced schedule for birth or placement of a child may be scheduled only if the employer agrees.

If the need is for a seriously ill family member: Attach Medical Documentation APWU Form 3, when required pursuant to Section 513.36 and 515.5 of the ELM. If the need is for the employee's own serious health condition: Attach Medical Documentation APWU Form 2.

NAME

JOHN DOE

Relationship to employee

WIFE

#### Required reduced or intermittent schedule, including duration: <u>I HEREBY NOTIFY YOU</u> THAT I NEED INTERMITTENT LEAVE TO CARE FOR MY WIFE WHO'S SERIOUS HEALTH CONDITION IS CERTIFIED ON THE ATTACHED APWU FORM 3. I WILL BE ABSENT FROM 6/25/95 THROUGH 6/27/95.

The employee must provide a completed Form PS 3971 for each pay period, noting type of leave requested.

Employee's Signature	JOHN DOE	Date	6/25/95

6/26/95

#### **EXAMPLE #8** HEALTH CARE PROVIDER CERTIFICATION OF EMPLOYEE'S FAMILY MEMBER SERIOUS ILLNESS-FMLA

EMPLOYEE'S NAME	JOHN DOE				
PATIENT'S NAME	PATIENT'S NAME JANE DOE				
Relationship to employe	• _X_SpouseParentChild (under age 18 or if older and incapable of self care due to a mental or physical disability)				
	alth condition (On the back of this form is the description of a "serious health Does the patient's condition qualify under any of the categories described? If so, ble category.)				
(1)(2)	(3) (4) X (5) (6) None of the above				
category checked above. WALK OR STAND F	c diagnosis or prognosis, briefly note how the medical facts meet the criteria of the JANE DOE'S KNEE JOINT CONDITION DOES NOT ALLOW HER TO OR EXTENDED PERIODS OF TIME FOR THE NEXT FOUR DAYS AND THE ONIC AND WILL HAVE RECURRING EPISODES .				
Date condition commen Probable duration of cor Probable duration of the					
	uired to be off from work intermittently or work a reduced schedule as a result of the r treatments? <u>YES</u> Note the probable time and duration. <u>SEE BELOW</u>				
If the condition is chronic (#4) or pregnancy (#3), note if the patient is presently incapacitated (inability to perform regular daily activities) and the likely duration and frequency of episodes of incapacity. <u><b>1 TO 2</b></u> <u><b>DAYS PER MONTH FOR THE NEXT YEAR.</b></u>					
If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known. <u>N/A</u>					
Does the patient require assistance for basic medical, hygiene, nutritional needs, safety, or transportation? <u>YES</u> If no, would the employee's presence to provide psychological comfort be beneficial to the patient's recovery? Note the probable duration of the need. <u>1 TO 2 DAYS PER MONTH</u>					
Health Care Provider's Signature	DR. GET BETTER Date 6/26/95				
Address					

6/26/95

APWU

This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of ELM. Form PS 3971 must be completed by employee.

EMPLOYEE'S NAME	JOHN DOE			
	ealth condition (On the back of this form is the description of a "serious health . Does the patient's condition qualify under any of the categories described? If so, ble category.)			
(1) <b>X</b> (2)	(3) (4) (5) (6) None of the above			
category checked above.	c diagnosis or prognosis, briefly note how the medical facts meet the criteria of the MR. DOE WAS HOSPITALIZED SURGERY AND HAS BEEN SCHEDULED SITS AND COULD EXPERIENCE FLARE-UPS OF HIS CONDITION.			
Date condition commend Probable duration of con Probable duration of the				
· · · · · ·				
Will the employee be rea condition and/or treatme THE NEXT 6 MONTH	quired to be off from work intermittently or work a reduced schedule as a result of this nts? <u>YES</u> Note the probable time and duration. <u>1 TO 2 DAYS PER MONTH FOR</u> <u>(S</u> )			
	c (#4) or pregnancy (#3), note if the employee is presently incapacitated and the likely of episodes of incapacity.			
If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known. <u>ONE OFFICE VISIT PER MONTH ON OR</u> ABOUT THE 15TH OF EACH MONTH FOR THE NEXT SIX MONTHS				
Is the employee able to perform the functions of employee's position? <u>NO</u> If no, describe the physical restrictions placed on the employee, including the duration of such restrictions. <u>MR. DOE WILL BE</u> <u>UNABLE TO PERFORM ONE OR MORE FUNCTIONS OF THIS POSITION FOR THE NEXT FOUR</u> <u>WEEKS AND WILL BE UNABLE TO DO SO DURING ANY OF THE FLARE-UPS NOTED ABOVE.</u>				
Health Care Provider's Signature	DR. GET BETTER Date 6/26/95			
Address 1 MEDICA	L PLACE BIG CITY USA			

required pursuant to 512.41,	13.36 and 515.5 of ELM. Form PS 3971 must be completed by employee.
EMPLOYEE'S NAME	JOHN DOE
	ealth condition (On the back of this form is the description of a "serious health Does the patient's condition qualify under any of the categories described? If so, ble category.)
(1)(2)	(3) (4) (5) (6) None of the above
Category checked above DUTIES OF HIS POS FOLLOW-UP VISITS Date condition commer Probable duration of co	
Will the employee be re condition and/or treatm <u>NEXT 6 MONTHS</u>	uired to be off from work intermittently or work a reduced schedule as a result of thints? <u>YES</u> Note the probable time and duration. <u>I DAY PER WEEK FOR THE</u>
	c (#4) or pregnancy (#3), note if the employee is presently incapacitated and the like f episodes of incapacity.
reatments, an estimate and the actual or estima	g treatments are required for the condition, provide the nature and regimen of the f the probable number of treatments, the length of absence required by the treatments of dates of the treatments, if known. ONE OFFICE VISIT PER WEEK FOR THE OR PHYSICAL THERAPY.
estrictions placed on th UNABLE TO PERFO	erform the functions of employee's position? <u>NO</u> If no, describe the physical employee, including the duration of such restrictions. <u>MR. DOE WILL BE</u> <u>M ONE OR MORE FUNCTIONS OF HIS POSITION FOR THE NEXT FOUR</u> UNABLE TO DO SO ON THE DAYS OF HIS PHYSICAL THERAPY AS
Health Care Provider's Signature	DR. GET BETTER Date 6/26/95

This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of ELM. Form PS 3971 must be completed by employee.

EMPLOYEE'S NAME	JANE DOE			
Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)				
(1)(2)	(3) X (4) (5) (6) None of the above			
	fic diagnosis or prognosis, briefly note how the medical facts meet the criteria of the e. MRS. DOE CONDITION WILL MAKE HER INCAPACITIED FOR DUTY			
	ME FOR PRENATAL CARE AND NORMAL CONDITIONS RELATED TO HER			
CONDITION.				
Date condition commenced: 6/26/95				
Probable duration of condition: <u>NINE MONTHS</u>				
Probable duration of the present incapacity (if different): <b>ONE DAY</b>				

Will the employee be required to be off from work intermittently or work a reduced schedule as a result of this condition and/or treatments? <u>YES</u> Note the probable time and duration. <u>SEE BELOW</u>

If the condition is chronic (#4) or pregnancy (#3), note if the employee is presently incapacitated and the likely duration and frequency of episodes of incapacity. <u>**1 TO 2 DAYS PER WEEK FOR THE NEXT 9 MONTHS</u></u></u>** 

If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known. <u>ONE OFFICE VISIT PER MONTH ON OR</u> <u>ABOUT THE 15TH OF EACH MONTH FOR THE NEXT 9 MONTHS</u>

Is the employee able to perform the functions of employee's position? <u>NO</u> If no, describe the physical restrictions placed on the employee, including the duration of such restrictions. <u>MRS. DOE WILL BE</u> <u>UNABLE TO PERFORM ONE OR MORE FUNCTIONS OF HER POSITION TOMORROW AND</u> <u>WILL BE UNABLE TO DO SO DURING ANY OF THE FLARE-UPS CONNECTED WITH HER</u> <u>CONDITION AS NOTED ABOVE.</u>

Health Care Provider's Signature	DR. GET BETTER	Date	6/26/95

Address	<b>1 MEDICAL PLACE</b>	<b>BIG CITY USA</b>	
6/26/95			APWU FORM 2

This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of ELM. Form PS 3971 must be completed by employee.

EMPLOYEE'S NAME	JOHN DOE				
Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)					
(1)(2)	(3) $(4)$ <u>X</u> $(5)$ $(6)$ None of the above				
category checked above FOR EXTENDED PEI CHRONIC AND WIL: Date condition commen Probable duration of cor					
condition and/or treatme	quired to be off from work intermittently or work a reduced schedule as a result of this ents? <u>YES</u> Note the probable time and duration. <u>SEE BELOW</u> ic (#4) or pregnancy (#3), note if the employee is presently incapacitated and the likely of episodes of incapacity. <u>1 TO 2 DAYS PER MONTH FOR THE NEXT YEAR.</u>				
If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known. $\underline{N/A}$					
Is the employee able to perform the functions of employee's position? <u>NO</u> If no, describe the physical restrictions placed on the employee, including the duration of such restrictions. <u>MR. DOE WILL BE</u> <u>UNABLE TO PERFORM ONE OR MORE FUNCTIONS OF HIS POSITION FOR THE NEXT FOUR</u> <u>DAYS AND WILL BE UNABLE TO DO SO ON THE DAYS WHEN HE HAS A FLARE-UP OF HIS</u> <u>CONDITION AS NOTED ABOVE.</u>					
Health Care Provider's Signature	DR. GET BETTER Date 6/26/95				
Address 1 MEDICA	AL PLACE BIG CITY USA APWU FORM 2				

## EMPLOYEE CERTIFICATION OF OWN SERIOUS ILLNESS-FMLA

This form is to be used by employee when requesting FMLA and medical documentation is not required pursuant to 513.36 and 515.5 of ELM.

EMPLOYEE'S NAME	JOH	IN DOE						
Description of serious health condition (On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)								
(1)	(2)X	_(3)	_(4)	_ (5)	_(6)	_None o	f the above_	
Date condition	commence	ed: <u>6/2</u>	<u>6/95</u>	C				
Probable duration	on of cond	lition:	3 DAYS					

The employee must provide a completed Form PS 3971 for each pay period, noting type of leave requested.

Employee's Signature	JOHN DOE	Date	6/26/95	
6/26/95			APWU FORM 1	

## NOTICE OF NEED FOR INTERMITTENT LEAVE OR FOR A REDUCED WORK SCHEDULE-FMLA

The Employer must approve absences needed for intermittent leave or a reduced work schedule to care for a sick immediate family member or for an employee's own serious health condition that has been properly certified by a health care provider when required pursuant to 513.36 and 515.5 of ELM. Intermittent or reduced schedule for birth or placement of a child may be scheduled only if the employer agrees.

If the need is for a seriously ill family member: Attach Medical Documentation APWU Form 3, when required pursuant to Section 513.36 and 515.5 of the ELM. If the need is for the employee's own serious health condition: Attach Medical Documentation APWU Form 2.

NAME JOHN DOE FOR
Relationship to employee N/A
Required reduced or intermittent schedule, including duration: <u>I HEREBY NOTIFY YOU</u> <u>THAT I NEED INTERMITTENT LEAVE FOR THE SERIOUS HEALTH</u> <u>CONDITION CERTIFIED ON THE ATTACHED APWU FORM 2. I WILL BE</u> <u>ABSENT FROM 6/25/95 THROUGH 6/27/95.</u>
FORSELA

The employee must provide a completed Form PS 3971 for each pay period, noting type of leave requested.

Employee's Signature	JOHN DOE	Date	6/25/95

6/26/95

## NOTICE OF NEED FOR INTERMITTENT LEAVE OR FOR A REDUCED WORK SCHEDULE-FMLA

The Employer must approve absences needed for intermittent leave or a reduced work schedule to care for a sick immediate family member or for an employee's own serious health condition that has been properly certified by a health care provider when required pursuant to 513.36 and 515.5 of ELM. Intermittent or reduced schedule for birth or placement of a child may be scheduled only if the employer agrees.

If the need is for a seriously ill family member: Attach Medical Documentation APWU Form 3, when required pursuant to Section 513.36 and 515.5 of the ELM. If the need is for the employee's own serious health condition: Attach Medical Documentation APWU Form 2.

NAME JOHN DOE FOR
Relationship to employee WIFE
Required reduced or intermittent schedule, including duration: <u>I HEREBY NOTIFY YOU</u> <u>THAT I NEED INTERMITTENT LEAVE TO CARE FOR MY WIFE WHO'S</u> <u>SERIOUS HEALTH CONDITION IS CERTIFIED ON THE ATTACHED APWU</u> FORM 3. I WILL BE ABSENT/FROM 6/25/95 THROUGH 6/27/95.
FOR FAMILY

## MINDED

The employee must provide a completed Form PS 3971 for each pay period, noting type of leave requested.

Employee's Signature	JOHN DOE	Date	6/25/95
1 , 0		L	

6/26/95



April 16, 2001

Senior Area Meillica Directors Area Occupational Fleath Nurse Administrator

SUBJECT: Medical haff Role in Family Medical Leave Act

The function of medical personnel in the administration of FMLA is critical to ensuring proper implementation of this law. The following is provided to clarify your role concerning two aspects of the FML; the return to work process and second/third opinions.

#### Return to Work

Postal Service policy is that medical personnel are responsible for reviewing an employee's medical documulation to determine if that employee can return to work after an absence for a condition covered by Employee and Labor Relations Manual (ELM), part 865.1 and 865.2. The FMLA necessivates some refinement of the process.

First, ELM Bection 865 no longer applies to non-bargaining unit employees who are
returning to work after an FMLA covered absence.

Rather, pursuallt to the terms of the FMLA, non-bargaining unit employees must be returned to work upon submission of a statement from their health care provider that they can return to work and can planform the essential functions of their positions (ELM 515. 7).

Second, bailing unit employees who are returning to work after a FMLA absence for a condition cliverad in ELM 865 must still comply with its provisions.

However, the FMLA curtails an employer's ability to require return to work documentation after Intermittent absences. Therefore, in order to reconcile this with the ELM provision, the Postal Service has welked out a process whereby <u>medical personnel determine -- at the time of the</u> <u>employees' return to mether first absence for the condition -- whether return to work</u> <u>documentation will continue to be required for subsequent intermittent absences for that</u> <u>condition.</u> The attached "Return to Work Protocol" sets forth the process in more detail. Please be advised that a doctor, Occupational Health Nurse Administrator (OHNA) or Occupational Health Nurse (OHN) can determine that an employee can return to work. However, only if Fighal Service or contract physician may determine that an employee is unable to return to thuty after an FMLA absence.

#### Second and Third Cipinions

When there is the send an employee for a second opinion. Health care provider's certification, the FMLA allows employees to send an employee for a second opinion. Health care providers employed by the Postal Sharvise, or those with whom it regularly contracts, cannot be used for second opinions." The effected, the Postal Service must rely on the Medical Staff to provide the names of physicians in the geographic area who can be used. These physicians should be board-certified specialists in the medical area in question. Medical personnel can also provide the employee the medical personnel can contact an employee's health care provider for clarifications concerning the FMLA sericity like in the condition at issue, and the need for leave due to that condition.

I hope that this information is helpful, as we strive to obtain consistent compliance with the FMLA, the Privicy Act, Collective Bargaining Agreements and Postal policy. Please forward this information to all medical personnel in your area.

David H. Reid, III MD USPS National Medical Director

<sup>1</sup> Exceptions  $\pi$  is permissible in rural areas where access to specialists is extremely limited. Consultation with Labor Relations or the Law Department is appropriate in such instances.

### RETURN TO WORK CERTIFICATION FOR BARGAINING UNIT EMPLOYEES

Prior to returning to duty after an absence due to exposure to a communicable or contagious disease, mental or nervous condition, diabetes, cardiovascular disease, epilepsy, a condition involving hospitalization, or absences of 21 days or more due to their own health condition, bargaining unit employees must submit medical evidence of their ability to return to work, in accordance with part 865 of the Employee and Labor Relations Manual. In the case of an employee using intermittent or reduced schedule leave for a condition covered under the FMLA, the postal medical officer or contract physician will make the decision at the time of the employee's return from his/her first absence for the condition whether it remains necessary for the employee to submit a certification for subsequent absences prior to returning to work.

Bargaining unit employees must submit medical certification regarding the covered condition(s) to their supervisor stating unequivocally that they are fit for the performance of their full duties without hazard to oneself or others, or indicating the duties of their position that they are capable of performing. The medical certification must contain detailed reports with sufficient data for the supervisor, and/or ultimately the medical unit, to determine whether they can return to work without hazard to themselves or others. All necessary information should be received as soon as the employee's physician anticipated his/her return to work, and no later than one workday prior to the anticipated return to work. (See Publication 71 for examples of specific medical information that may be required).

If the employee has timely provided all necessary information, but due to administrative delay must await the result of the medical assessment beyond his or her anticipated date for return to the workplace, the employee is placed on paid (administrative) leave until the results of the medical assessment are available.

The final evaluation of the completeness of the medical certification is made by a postal medical officer or contract physician who also makes the final determination of suitability for return to duty. However, if the postal medical officer or contract physician concludes that there is a reasonable medical concern about safety or a potential for violence, the medical officer or physician can send the employee for a fitness for duty exam prior to the employee's return to the workplace. Pursuant to FMLA regulations at 29 C.F.R. 825.310(b) and 702(e), the fitness for duty physical exam must be job-related and consistent with business necessity and limited to the covered condition(s).

In such cases, depending on the results of the fitness for duty exam and the medical condition and assessment involved, management then has the option to (1) return the employee to duty; (2) allow the employee additional leave (other than administrative), as appropriate, pending his or her ability to return to work; (3) provide light duty work, if appropriate; or (4) separate the employee. However, management must comply with any obligations under the Rehabilitation Act.

# NOTES



# NOTES

## NOTES

## CBR

Industrial Relations Department American Postal Workers Union 1300 L Street N.W. Washington, D.C. 20005 Non-Profit U.S. Postage **PAID** WASHINGTON, DC PERMIT NO. 8972