

## **Crowe & Dunlevy**

### **International Public Management Association for Human Resources**

#### **Update on the Family and Medical Leave Act (FMLA)**

**and**

#### **American With Disabilities Act Amendment Act (ADAAA)**

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**April, 2010**

## **INDEX**

### **FMLA UPDATE**

- Attachment A**            **Certification for Serious Injury of Illness of Covered Servicemember for Military Family Leave**
- Attachment B**            **Certification of Qualifying Exigency For Military Family Leave**
- Attachment C**            **Certification of Health Care Provider for Employee's Serious Health Condition**
- Attachment D**            **Certification of Health Care Provider for Family Member's Serious Health Condition**
- Attachment E**            **Appendix C to Part 825 – Employee Rights and Responsibilities Under the Family And Medical Leave Act**
- Attachment F**            **Notice of Eligibility and Rights & Responsibilities**
- Attachment G**            **Designation Notice**

### **AMERICANS WITH DISABILITIES ACT, AMENDMENT ACT**

- Attachment A**            **Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008**
- Attachment B**            **Summary of Key Provisions: EEOC's Notice of Proposed Rulemaking (NPRM) to Implement the ADA Amendments Act of 2008 (ADAAA)**
- Attachment C**            **Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended**

# **FMLA UPDATE**

I. FMLA – Update

A. New Law

1. National Defense Authorization Act ("NDAA")
2. Regulatory Changes and Updates

II. NDAA: Two Types of Leave

A. Type of Leave

1. Military Caregiver Leave (a/k/a Covered Servicemember Leave)
2. Qualifying Exigency Leave

B. Military Caregiver Leave

1. 26 weeks of leave in a "single 12-month period"
2. Eligible employees are the spouse, child, parent, or next of kin of military personnel, including Reserves and National Guard ("covered servicemember")
3. Applicable when covered servicemember is undergoing treatment, recuperation, or therapy for a serious injury or illness incurred in the line of active duty
4. Extends leave to additional family members (i.e. next of kin)
5. The employer may require certification of servicemembers' serious injury or illness. See Attachment A
6. The single 12-month period begins on the first day of qualifying leave measured forward

C. Covered Servicemember

1. A member of the Armed Forces, including Reserves or National Guard
  - a. Undergoing medical treatment, recuperation or therapy, or in outpatient status or on the temporary disability retired list for a serious illness or injury.
2. A veteran who is:

- a. Undergoing medical treatment, recuperation or therapy, for a serious illness or injury, and;
- b. who was a member of the Armed Forces at anytime during the period of 5 years preceding the date on which treatment, recuperation or therapy began.

D. Serious Illness or Injury

- 1. A serious illness or injury for a current member of Armed Forces means:
  - a. incurred in line of duty on active duty; or
  - b. an illness or injury that existed before active duty and was aggravated by service in the line of duty;
  - c. that renders the servicemember medically unfit to perform the duties of the member's office, grade, rank or rating
- 2. A serious illness or injury for a Veteran of the Armed Forces means:
  - a. illness or injury incurred in the line of duty on active duty or existed before active duty and was aggravated by service, and
  - b. that manifested itself before or after the servicemember became a veteran

E. Qualifying Exigency Leave

- 1. Intended to help military families manage their affairs while the covered military member is called on active duty or called to active duty status.
- 2. Covered military members include:
  - a. a member of reserve components of the Armed Forces;
  - b. a retired member of the Regular Armed Forces in Reserve;
  - c. a member of the Regular Armed Forces.
- 3. Uses FMLA's traditional 12 weeks of leave
- 4. Active Duty
  - a. For members of the Regular Armed Forces;
    - i. Duty during the deployment of the member to a foreign country.

- b. For members of the National Guard or Reserves;
  - i. Duty during the deployment of the member to a foreign country under a call or order to active duty under Section 101 (a)(13)(B) of Title 10, United States Code.
- 5. Eligible employees of covered military include:
  - a. Spouse
  - b. Child
  - c. Parent
- 6. Applicable when the employee's spouse, child, or parent is on active duty or has been notified of an impending call to active duty
- 7. Qualifying Exigency Leave
  - a. Short-notice deployment
  - b. Military events and related activities
  - c. Childcare and school activities
  - d. Financial and legal arrangements
  - e. Counseling
  - f. Rest and recuperation
  - g. Post-deployment activities
  - h. Additional activities not encompassed in other categories, but agreed to by the employer and employee
  - i. Foreseeable because of the notification of the impending call or order to active duty
- 8. Certification
  - a. The employer may require certification of the employee's need for leave. See Attachment B
  - b. Written notice of requirement is necessary

### III. FMLA Regulatory Changes

#### 1. Notice

- a. Removed categorical penalty provisions for failure to appropriately designate FMLA leave
- b. New rule makes clear that when an employee suffers individualized harm because the employer failed to follow notification rules, the employer may be liable for failure to appropriately designate
- c. New DOL forms were developed for certification of need

#### 2. Light Duty

- a. New rule provides that "light duty" work does not count against an employee's FMLA leave entitlement
- b. During "light duty" period, the employee's right to restoration is held in abeyance (or until the end of the applicable 12 month FMLA leave year)

#### 3. Serious Health Condition

- a. Retains the six individual definitions of a "serious health condition" with modifications
- b. One of the definitions involves "more than three consecutive, full calendar days of incapacity," plus "two visits to a healthcare provider"
  - i. Two visits must occur within 30 days of the beginning of the period of incapacity
  - ii. First visit must take place within 7 days of the first day of incapacity
- c. Second definition of a "serious health condition" involves
  - i. more than three, consecutive, full calendar days of incapacity, and
  - ii. a regimen of continuing treatment; and
  - iii. first visit must take place within 7 days of the first day of incapacity

- d. A third definition of a "serious health condition" involves treatment of a chronic serious health condition
  - (1) "Periodic visits" is defined as at least two visits per year
- 4. Use of Paid Leave
  - a. Old regulations applied different procedural requirements to the use of vacation or personal leave as opposed to medical or sick leave
  - b. Now, to be entitled to substitute paid leave for unpaid FMLA leave, employee must comply with employer's paid leave policy
  - c. Employees who do not comply with employer's paid leave policy remain entitled to unpaid FMLA leave
- 5. Perfect Attendance Awards
  - a. New regulations allow employers to deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave so long as it treats all employees taking non-FMLA leave in the same way
  - b. For example, if employees using paid time off qualify for the award, then employees substituting paid time off for FMLA cannot be disqualified because of that FMLA time
- 6. Employer Notice Obligations
  - a. Consolidates all employer notice requirements into a "one-stop" section of the regulations
- 7. Employers are required to provide employees
  - a. General notice about the FMLA (e.g. a poster and employee handbook upon hire)
  - b. Eligibility notice
  - c. Rights and responsibilities notice
  - d. Designation notice
  - e. Time for providing notice is extended to 5 days (previously 2 days)
  - f. New DOL forms for complying with notice requirements were created

8. Employee Notice
  - a. Old rule was interpreted to allow employees to provide notice of the need for FMLA leave up to two full business days after an absence
  - b. Now, employees needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances
9. Medical Certification Process (Content and Clarification)
  - a. Recognizes HIPPA implications and medical privacy concerns
  - b. Expanded the type of person who can contact employee's medical provider
  - c. Employer's representative contacting the employee's healthcare provider must be (1) a healthcare provider themselves; (2) H.R. professional; (3) a leave administrator; or (4) a management official
  - d. May not be the employee's direct supervisor under any circumstance
  - e. Employers may not ask the healthcare provider for any information beyond what is required for the certification form
  - f. Updates DOL form WH-380 and created separate forms for the employee and covered family members that allow healthcare provider to provide a diagnosis as part of the certification. See Attachments C and D.
  - g. For incomplete certifications or for clarification or authentication of certifications the employer can contact the healthcare provide (see 9.c. above). However the employer must first:
    - i. Specify, in writing, what information is lacking
    - ii. Give the employee 7 calendar days to cure shortcomings
10. Medical Certification Process (Timing)
  - a. Employers may request a new certification each leave year for medical conditions that last longer than one year
  - b. Intended to aid with recertification process for conditions that are of "lifetime" or "unknown" duration

- c. If the minimum duration of the condition is 30 days or more employers may not request recertification until the minimum (or 30 days) expires and only in connection with an absence
- d. If the duration of the condition is less than 30 days, recertification can only be required if
  - i. employee requests an extension
  - ii. circumstances of the previous certification have changed significantly
  - iii. information is received which casts doubt on the employee's stated reason of the leave or continuing validity of the certification
- e. In all cases, employers may request recertification of an ongoing condition every 6 months in conjunction with an absence

B. Fitness-for-Duty Certifications

- 1. The old rule allowed employers to enforce uniformly-applied policies or practices that require all employees who take leave to provide a fitness-for-duty certification
- 2. The new rule provides that employer may uniformly required fitness-for-duty certification to specifically address the employee's ability to perform the essential functions of the job
- 3. In order to require a fitness-for-duty certification that specifically addresses the employee's ability to perform the essential functions of the job, the employee must be provided with a list of the essential functions of the employee's job no later than when the designation notice is given to the employee.
- 4. May require fitness-for-duty certification when an employee takes intermittent leave when there are reasonable job-safety concerns

IV. General Notice

A. Poster

- 1. Post and keep posted a notice explaining the FMLA and the procedures for filing complaints of violations of the FMLA with the USDOL Wage and Hour Division

2. Post prominently where it can be readily seen by employees and applicants for employment
3. Text must be large enough to be easily read and have fully legible text
4. Electronic posting is okay if it otherwise meets the requirements

B. Handbook

1. A notice explaining the FMLA benefit's and leave rights must be included in an employee handbook or other written notice if the employer has written materials explaining employee benefits and leave rights
2. Otherwise, a copy of a general notice must be given to each new employee upon hiring
3. In either case, distribution may be accomplished electronically

C. The notice contained in Appendix C of the FMLA regulations may be used to accomplish the general notice. See Attachment E

1. The employer must provide the notice in the language in which employees are literate if employees are not literate in English

V. Eligibility Notice

A. Notice of need for leave

1. An employer has notice of need for FMLA leave when an employee requests leave or the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason

B. Timing of Employee Notice

1. Foreseeable Leave

a. 30 days

- i. When leave is based on expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember

2. As soon as practicable

- a. If 30 days is not practicable, such as because of a lack of knowledge, a change in circumstances, or a medical emergency

- b. Leave due to a qualifying exigency regardless of how far in advance such leave is foreseeable
    - c. Generally, absent unusual circumstances, employees must give notice within the time prescribed by the employer's usual and customary notice requirements applicable to such leave, such as designated phone number or person
  - 3. Complying with the employer's policy
    - a. An employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave
    - b. An employer may also require that the employee contact a specific person
    - c. Absent unusual circumstance which justify failure to comply with the employer's policy, FMLA – protected leave may be delayed or denied
- C. Type of employee notice
  - 1. The request may be verbal notice
    - a. It is sufficient if it makes the employer aware that the employee needs FMLA-qualifying leave and provides the anticipated timing and duration of the leave
    - b. It may include the condition that renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or his/her family member is under the continuing care of a healthcare provider that renders the family member unable to perform daily activities; that military member is on active duty or call to active duty and is for one of the exigency reasons listed above; or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known
    - c. Calling in sick without providing more information will not be considered sufficient notice to trigger an employers' obligations
  - 2. The first time the employee seeks leave under the FMLA
    - a. The employee need not expressly assert rights under the FMLA or even mention the FMLA

3. When the employee seeks leave for an FMLA-qualifying reason for which he/she has previously taken leave
  - a. When an employee seeks leave due to an FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for the leave of the need for FMLA leave

D. Employer Obligation

1. Notice of eligibility or change of eligibility status
  - a. Within 5 business days, absent extenuating circumstances, of acquiring knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee whether or not the employee is eligible to take FMLA
  - b. Eligibility means that the employee has worked for the employer 12 months and 1250 hours and is employed at a worksite where 50 or more employees are employed within 75 miles
  - c. It may be oral or in writing (written notice is recommended)
  - d. Appendix D to the FMLA rules may be used. See Attachment F
  - e. It must state whether or not the employee is eligible. If the employee is not eligible, it must state at least one reason why the employee is not eligible, including the applicable number of months worked, hours of service worked, and whether or not the employee is employed at a worksite where 50 or more employees are employed within a 75 mile radius
  - f. Only one notice of eligibility status is required during the 12-month period even if FMLA leave is taken for a different qualifying reason, unless eligibility status has changed
  - g. If eligibility status has changed, such as the employee has worked less than 1250 hours, the employer must give notice of the change
2. Notice of rights and responsibilities
  - a. Each time eligibility notice discussed above is provided
  - b. The notice must be in writing and must include all of the rights and responsibilities set out in Appendix D to the FMLA regulations. See Attachment F

E. Designation Notice

1. Written notice that the leave has or has not qualified for FMLA must be provided when the employer has enough information to determine that the leave is being taken for an FMLA-qualifying event, such as after receiving a certification
2. The notice must be given within 5 business days, absent extenuating circumstances
3. Only one notice is required for each FMLA-qualifying reason during the applicable 12-month period, regardless of whether the leave is taken in a block of time or on an intermittent or reduced leave schedule
4. If paid leave is required to be substituted for FMLA, notice must be given at the time of the designation
5. The notice may be given with the eligibility notice if the employer has sufficient information
6. If a fitness for duty certification will be required before the employee is restored to duty it must be given at this time. If the certification must address the employee's ability to perform the essential functions of the employee's job, the employer must include a list of the essential functions of the position
7. Appendix E of the FMLA regulations can be used. See Attachment G
8. If information given in the notice changes, such as the employee exhausts the FMLA leave, the employer must provide written notice of the change within 5 business days of receipt of the employer's first notice of need for leave subsequent to any change
9. The notice must include the amount of leave that will be counted against the employee's FMLA leave entitlement, if known. If not known, then the employer must provide notice of the amount of leave counted upon the request by the employee, but not more often than once in a 30 day period, and only if leave taken in that period

F. Retroactive Designation

1. The employer may retroactively designate leave provided that the failure to timely designate leave does not cause harm or injury to the employee or where the employer and employee mutually agree

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



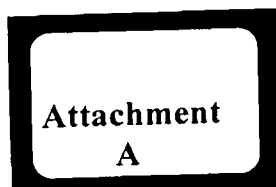
OMB Control Number: 1215-0181  
Expires: 12/31/2011

**Notice to the EMPLOYER INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a covered servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

**SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave INSTRUCTIONS to the EMPLOYEE or COVERED SERVICEMEMBER:** Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a covered servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 C.F.R. § 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

**SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a covered servicemember's serious injury or illness includes written documentation confirming that the covered servicemember's injury or illness was incurred in the line of duty on active duty and that the covered servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave.



Certification for Serious Injury or Illness  
of Covered Servicemember - - for  
Military Family Leave (Family and  
Medical Leave Act)

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



**SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave:** (This section must be completed first before any of the below sections can be completed by a health care provider.)

**Part A: EMPLOYEE INFORMATION**

Name and Address of Employer (this is the employer of the employee requesting leave to care for covered servicemember):

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Name of Employee Requesting Leave to Care for Covered Servicemember:

\_\_\_\_\_  
First Middle Last

Name of Covered Servicemember (for whom employee is requesting leave to care):

\_\_\_\_\_  
First Middle Last

Relationship of Employee to Covered Servicemember Requesting Leave to Care:

Spouse  Parent  Son  Daughter  Next of Kin

**Part B: COVERED SERVICEMEMBER INFORMATION**

(1) Is the Covered Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves?  Yes  No

If yes, please provide the covered servicemember's military branch, rank and unit currently assigned to:

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Is the covered servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)?  Yes  No If yes, please provide the name of the medical treatment facility or unit:

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(2) Is the Covered Servicemember on the Temporary Disability Retired List (TDRL)?  Yes  No

**Part C: CARE TO BE PROVIDED TO THE COVERED SERVICEMEMBER**

Describe the Care to Be Provided to the Covered Servicemember and an Estimate of the Leave Needed to Provide the Care:

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**SECTION II: For Completion by a United States Department of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator). (Please ensure that Section I above has been completed before completing this section.) Please be sure to sign the form on the last page.**

**Part A: HEALTH CARE PROVIDER INFORMATION**  
Health Care Provider's Name and Business Address:

\_\_\_\_\_

Type of Practice/Medical Specialty: \_\_\_\_\_

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider: \_\_\_\_\_

Telephone: ( ) \_\_\_\_\_ Fax: ( ) \_\_\_\_\_ Email: \_\_\_\_\_

**PART B: MEDICAL STATUS**

(1) Covered Servicemember's medical condition is classified as (Check One of the Appropriate Boxes):

**(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

**(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

**OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating.

**NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380 or an employer-provided form seeking the same information.)

(2) Was the condition for which the Covered Service member is being treated incurred in line of duty on active duty in the armed forces?  Yes  No

(3) Approximate date condition commenced: \_\_\_\_\_

(4) Probable duration of condition and/or need for care: \_\_\_\_\_

(5) Is the covered servicemember undergoing medical treatment, recuperation, or therapy?  Yes  No. If yes, please describe medical treatment, recuperation or therapy:

**PART C: COVERED SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER**

- (1) Will the covered servicemember need care for a single continuous period of time, including any time for treatment and recovery?  Yes  No  
If yes, estimate the beginning and ending dates for this period of time: \_\_\_\_\_
- (2) Will the covered servicemember require periodic follow-up treatment appointments?  
 Yes  No If yes, estimate the treatment schedule: \_\_\_\_\_
- (3) Is there a medical necessity for the covered servicemember to have periodic care for these follow-up treatment appointments?  Yes  No
- (4) Is there a medical necessity for the covered servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)?  Yes  No If yes, please estimate the frequency and duration of the periodic care:

\_\_\_\_\_  
\_\_\_\_\_

**Signature of Health Care Provider:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents 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 information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

Certification of Qualifying Exigency  
For Military Family Leave  
(Family and Medical Leave Act)

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



OMB Control Number: 1215-0181  
Expires: 12/31/2011

**SECTION I: For Completion by the EMPLOYER**

**INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and while you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.309.

Employer name: \_\_\_\_\_

Contact Information: \_\_\_\_\_

**SECTION II: For Completion by the EMPLOYEE**

**INSTRUCTIONS to the EMPLOYEE:** Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 C.F.R. § 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: \_\_\_\_\_  
                    First                                    Middle                                    Last

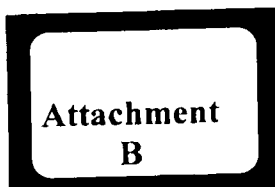
Name of covered military member on active duty or call to active duty status in support of a contingency operation:  
\_\_\_\_\_  
                    First                                    Middle                                    Last

Relationship of covered military member to you: \_\_\_\_\_

Period of covered military member's active duty: \_\_\_\_\_

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a covered military member's active duty or call to active duty status in support of a contingency operation. Please check one of the following:

- A copy of the covered military member's active duty orders is attached.
- Other documentation from the military certifying that the covered military member is on active duty (or has been notified of an impending call to active duty) in support of a contingency operation is attached.
- I have previously provided my employer with sufficient written documentation confirming the covered military member's active duty or call to active duty status in support of a contingency operation.



**PART A: QUALIFYING REASON FOR LEAVE**

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached.  Yes  No  None Available

**PART B: AMOUNT OF LEAVE NEEDED**

1. Approximate date exigency commenced: \_\_\_\_\_
- Probable duration of exigency: \_\_\_\_\_
2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency?  No  Yes.
- If so, estimate the beginning and ending dates for the period of absence:
- \_\_\_\_\_
3. Will you need to be absent from work periodically to address this qualifying exigency?  No  Yes.
- Estimate schedule of leave, including the dates of any scheduled meetings or appointments: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):
- Frequency: \_\_\_\_\_ times per \_\_\_\_\_ week(s) \_\_\_\_\_ month(s)
- Duration: \_\_\_\_\_ hours \_\_\_\_\_ day(s) per event.

**PART C:**

If leave is requested to meet with a third party (such as to arrange for childcare, to attend counseling, to attend meetings with school or childcare providers, to make financial or legal arrangements, to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: \_\_\_\_\_ Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: (        ) \_\_\_\_\_ Fax: (        ) \_\_\_\_\_

Email: \_\_\_\_\_

Describe nature of meeting: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PART D:**

I certify that the information I provided above is true and correct.

\_\_\_\_\_  
Signature of Employee

\_\_\_\_\_  
Date

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents 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 information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV. NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYER.**

Certification of Health Care Provider for  
Employee's Serious Health Condition  
(Family and Medical Leave Act)

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



OMB Control Number: 1215-0181  
Expires: 12/31/2011

**SECTION I: For Completion by the EMPLOYER**

**INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: \_\_\_\_\_

Employee's job title: \_\_\_\_\_ Regular work schedule: \_\_\_\_\_

Employee's essential job functions: \_\_\_\_\_

Check if job description is attached: \_\_\_\_\_

**SECTION II: For Completion by the EMPLOYEE**

**INSTRUCTIONS to the EMPLOYEE:** Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: \_\_\_\_\_  
First Middle Last

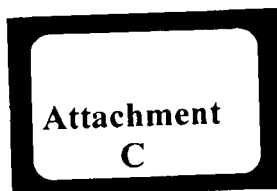
**SECTION III: For Completion by the HEALTH CARE PROVIDER**

**INSTRUCTIONS to the HEALTH CARE PROVIDER:** Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Please be sure to sign the form on the last page.

Provider's name and business address: \_\_\_\_\_

Type of practice / Medical specialty: \_\_\_\_\_

Telephone: ( ) \_\_\_\_\_ Fax: ( ) \_\_\_\_\_



**PART A: MEDICAL FACTS**

1. Approximate date condition commenced: \_\_\_\_\_

Probable duration of condition: \_\_\_\_\_

**Mark below as applicable:**

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?  
\_\_\_ No \_\_\_ Yes. If so, dates of admission:

\_\_\_\_\_

Date(s) you treated the patient for condition:

\_\_\_\_\_

Will the patient need to have treatment visits at least twice per year due to the condition? \_\_\_ No \_\_\_ Yes.

Was medication, other than over-the-counter medication, prescribed? \_\_\_ No \_\_\_ Yes.

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?  
\_\_\_ No \_\_\_ Yes. If so, state the nature of such treatments and expected duration of treatment:

\_\_\_\_\_

2. Is the medical condition pregnancy? \_\_\_ No \_\_\_ Yes. If so, expected delivery date: \_\_\_\_\_

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition: \_\_\_ No \_\_\_ Yes.

If so, identify the job functions the employee is unable to perform:

\_\_\_\_\_

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**PART B: AMOUNT OF LEAVE NEEDED**

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery?  No  Yes.

If so, estimate the beginning and ending dates for the period of incapacity: \_\_\_\_\_

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition?  No  Yes.

If so, are the treatments or the reduced number of hours of work medically necessary?  
 No  Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

\_\_\_\_\_

Estimate the part-time or reduced work schedule the employee needs, if any:

\_\_\_\_\_ hour(s) per day; \_\_\_\_\_ days per week from \_\_\_\_\_ through \_\_\_\_\_

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions?  No  Yes.

Is it medically necessary for the employee to be absent from work during the flare-ups?  
 No  Yes. If so, explain:

\_\_\_\_\_

\_\_\_\_\_

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: \_\_\_\_\_ times per \_\_\_\_\_ week(s) \_\_\_\_\_ month(s)

Duration: \_\_\_\_\_ hours or \_\_\_\_\_ day(s) per episode

**ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



Certification of Health Care Provider for  
Family Member's Serious Health Condition  
(Family and Medical Leave Act)

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



OMB Control Number 1215-0181  
Expires 12/31/2011

**SECTION I: For Completion by the EMPLOYER**

**INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: \_\_\_\_\_

**SECTION II: For Completion by the EMPLOYEE**

**INSTRUCTIONS to the EMPLOYEE:** Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: \_\_\_\_\_  
First Middle Last

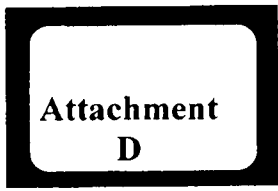
Name of family member for whom you will provide care: \_\_\_\_\_  
First Middle Last

Relationship of family member to you: \_\_\_\_\_

If family member is your son or daughter, date of birth: \_\_\_\_\_

Describe care you will provide to your family member and estimate leave needed to provide care:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Employee Signature \_\_\_\_\_ Date \_\_\_\_\_



**SECTION III: For Completion by the HEALTH CARE PROVIDER**

**INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address: \_\_\_\_\_

Type of practice / Medical specialty: \_\_\_\_\_

Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ Fax: ( \_\_\_\_\_ ) \_\_\_\_\_

**PART A: MEDICAL FACTS**

1. Approximate date condition commenced: \_\_\_\_\_

Probable duration of condition: \_\_\_\_\_

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?  
\_\_\_ No \_\_\_ Yes. If so, dates of admission: \_\_\_\_\_

Date(s) you treated the patient for condition: \_\_\_\_\_

Was medication, other than over-the-counter medication, prescribed? \_\_\_ No \_\_\_ Yes.

Will the patient need to have treatment visits at least twice per year due to the condition? \_\_\_ No \_\_\_ Yes

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?  
\_\_\_ No \_\_\_ Yes. If so, state the nature of such treatments and expected duration of treatment:  
\_\_\_\_\_  
\_\_\_\_\_

2. Is the medical condition pregnancy? \_\_\_ No \_\_\_ Yes. If so, expected delivery date: \_\_\_\_\_

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PART B: AMOUNT OF CARE NEEDED:** When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? \_\_\_ No \_\_\_ Yes.

Estimate the beginning and ending dates for the period of incapacity: \_\_\_\_\_

During this time, will the patient need care? \_\_\_ No \_\_\_ Yes.

Explain the care needed by the patient and why such care is medically necessary:

---

---

---

---

---

---

5. Will the patient require follow-up treatments, including any time for recovery? \_\_\_ No \_\_\_ Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

---

Explain the care needed by the patient, and why such care is medically necessary: \_\_\_\_\_

---

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? \_\_\_ No \_\_\_ Yes.

Estimate the hours the patient needs care on an intermittent basis, if any:

\_\_\_\_\_ hour(s) per day; \_\_\_\_\_ days per week from \_\_\_\_\_ through \_\_\_\_\_

Explain the care needed by the patient, and why such care is medically necessary:

---

---

---

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities?  No  Yes.

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: \_\_\_\_\_ times per \_\_\_\_\_ week(s) \_\_\_\_\_ month(s)

Duration: \_\_\_\_\_ hours or \_\_\_\_\_ day(s) per episode

Does the patient need care during these flare-ups?  No  Yes.

Explain the care needed by the patient, and why such care is medically necessary: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
**Signature of Health Care Provider**

\_\_\_\_\_  
**Date**

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents 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 information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.  
**DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

Appendix C to Part 825—Notice to Employees Of Rights Under FMLA (WH Publication 1420)

**EMPLOYEE RIGHTS AND RESPONSIBILITIES  
UNDER THE FAMILY AND MEDICAL LEAVE ACT**

**Basic Leave Entitlement**

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- 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.

**Military Family Leave Entitlements**

Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintroduction briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

**Benefits and Protections**

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

**Eligibility Requirements**

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

**Definition of Serious Health Condition**

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

**Use of Leave**

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

**Substitution of Paid Leave for Unpaid Leave**

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

**Employee Responsibilities**

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

**Employer Responsibilities**

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

**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**

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

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.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

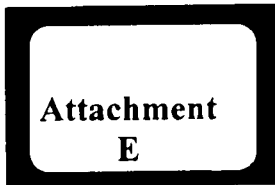


For additional information:  
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627  
[WWW.WAGEHOUR.DOL.GOV](http://WWW.WAGEHOUR.DOL.GOV)



U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

WHD Publication 1420 (Rev. XX-XXXX)



Notice of Eligibility and Rights & Responsibilities  
(Family and Medical Leave Act)

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



OMB Control Number: 1215-0181  
Expires 12/31/2011

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

**[Part A - NOTICE OF ELIGIBILITY]**

TO: \_\_\_\_\_  
Employee

FROM: \_\_\_\_\_  
Employer Representative

DATE: \_\_\_\_\_

On \_\_\_\_\_, you informed us that you needed leave beginning on \_\_\_\_\_ for:

- The birth of a child, or placement of a child with you for adoption or foster care;
- Your own serious health condition;
- Because you are needed to care for your \_\_\_\_\_ spouse; \_\_\_\_\_ child; \_\_\_\_\_ parent due to his/her serious health condition.
- Because of a qualifying exigency arising out of the fact that your \_\_\_\_\_ spouse; \_\_\_\_\_ son or daughter; \_\_\_\_\_ parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.
- Because you are the \_\_\_\_\_ spouse; \_\_\_\_\_ son or daughter; \_\_\_\_\_ parent; \_\_\_\_\_ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

- Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)
- Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):
  - You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately \_\_\_\_\_ months towards this requirement.
  - You have not met the FMLA's 1,250-hours-worked requirement.
  - You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact \_\_\_\_\_ or view the FMLA poster located in \_\_\_\_\_.

**[PART B - RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]**

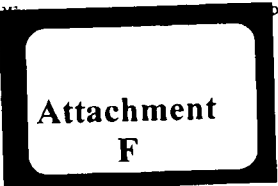
As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by \_\_\_\_\_.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

- Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request \_\_\_\_\_ is/ \_\_\_\_\_ is not enclosed.
- Sufficient documentation to establish the required relationship between you and your family member.
- Other information needed: \_\_\_\_\_

No additional information requested

CONTINUED ON NEXT PAGE

Form WH-381 Revised January 2009



If your leave does qualify as FMLA leave you will have the following responsibilities while on FMLA leave (only checked blanks apply):

- \_\_\_ Contact \_\_\_\_\_ at \_\_\_\_\_ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided 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.
- \_\_\_ You will be required to use your available paid \_\_\_\_\_ sick, \_\_\_\_\_ vacation, and/or \_\_\_\_\_ other leave during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.
- \_\_\_ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As 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. 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.
- \_\_\_ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every \_\_\_\_\_. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

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 be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following rights while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
  - \_\_\_ the calendar year (January – December).
  - \_\_\_ a fixed leave year based on \_\_\_\_\_
  - \_\_\_ the 12-month period measured forward from the date of your first FMLA leave usage.
  - \_\_\_ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.
- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on \_\_\_\_\_
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have \_\_\_\_\_ sick, \_\_\_\_\_ vacation, and/or \_\_\_\_\_ other leave run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

\_\_\_ For a copy of conditions applicable to sick/vacation/other leave usage please refer to \_\_\_\_\_ available at: \_\_\_\_\_

\_\_\_ Applicable conditions for use of paid leave: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

\_\_\_\_\_ at \_\_\_\_\_

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617, 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616, 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents 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 information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Designation Notice  
(Family and Medical Leave Act)

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



OMB Control Number: 1215-0181  
Expires: 12/31/2011

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WHI-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: \_\_\_\_\_

Date: \_\_\_\_\_

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on \_\_\_\_\_ and decided:

Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: \_\_\_\_\_

Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

**Please be advised (check if applicable):**

You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

We are requiring you to substitute or use paid leave during your FMLA leave.

You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position  is  is not attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

**Additional information is needed to determine if your FMLA leave request can be approved:**

The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than \_\_\_\_\_, unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.  
(Provide at least seven calendar days)

(Specify information needed to make the certification complete and sufficient)

We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

Your FMLA Leave request is Not Approved.

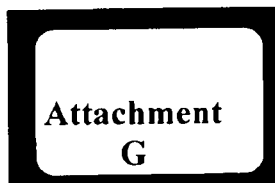
The FMLA does not apply to your leave request.

You have exhausted your FMLA leave entitlement in the applicable 12-month period.

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617, 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616, 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 - 30 minutes for respondents 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 information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Form WHI-382 January 2009



# **Americans With Disabilities Act, Amendment Act**

Comparison of the ADA and the ADAAA, As Amended<sup>1</sup>

Issue	ADA (as construed by the courts)	ADA, As Amended by the ADA Amendments Act
<b>Definition of Disability</b>	<p>The first prong of the definition of a “disability” requires a physical or mental impairment that substantially limits a major life activity of an individual.</p> <p>The Supreme Court has narrowly construed this definition. This caused lower courts to exclude a broad spectrum of plaintiffs from coverage, including individuals with diabetes, epilepsy, cancer, muscular dystrophy, and artificial limbs.</p>	<p>The ADAAA defines a “disability” as a physical or mental impairment that substantially limits a major life activity of an individual. This is the first prong of the definition of disability.</p> <p>The ADAAA rejects the Supreme Court’s interpretation of “substantially limits” by providing a rule of construction stating that the term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADAAA.</p> <p>Congress intended to apply a less demanding standard than the one previously used by the courts, and to cover a broad range of individuals.</p> <p>The ADAAA includes a rule of construction providing that the definition of “disability” shall be construed in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA.</p>

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<sup>1</sup> The chart is adopted from material in an ABA webcast concerning the A.D.A.A.A.

<p><b>Mitigating Measures</b></p>	<p>The Supreme Court limited the group of people covered under the ADA by ruling, in the case of <i>Sutton v. United Airlines</i>, 527 U.S. 471 (1999), that mitigating measures such as medication or devices were to be taken into account in determining whether a person was substantially limited in a major life activity.</p>	<p>The ADAAA provides that the ameliorative effects of mitigating measures should not be considered in determining whether an individual has an impairment that substantially limits a major life activity.</p> <p>An exception is made for “ordinary eyeglasses or contact lenses,” which may be taken into account.</p>
<p><b>“Substantially Limits”</b></p>	<p>The Supreme Court held in <i>Toyota Motor Mfg. of Kentucky v. Williams</i>, 534 U.S. 184, (2002), that an impairment “substantially limits” a “major life activity” if it “prevents or severely restricts the individual” from doing activities that are of central importance to most people’s daily lives”, <i>Id</i> at 198.</p>	<p>The ADAAA requires that the term “substantially limits” be interpreted consistently with the findings and purposes of the Act. According to the House Committee Reports and the Senate’s Statement of the Managers Report, the Supreme Court’s holding in <i>Williams</i> set an inappropriately high test for employees to establish coverage under the ADA by defining “substantially limits” to mean “prevents or severely restricts.” The Senate’s Statement of Managers Report emphasizes the test is not to be a demanding standard but rather one that ensures “appropriately broad coverage under this Act.”</p>
<p><b>The “Major Life Activity” Requirement</b></p>	<p>In <i>Williams</i>, the Supreme Court ruled that a “major life activity” must be an activity that is “of central importance to most people’s daily lives.” 534 U.S. 184.</p>	<p>The ADAAA now provides a nonexclusive list of major life activities, including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.” “Major life</p>

		<p>activities” now also include the “operation of major bodily functions,” such as functions of the “immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.” The ADAAA makes it easier for people with disabilities to be covered because it expands the definition of “disability” to include more major life activities as well as creating a new subcategory of major bodily functions.</p>
<p><b>Episodic Conditions and Multiple Major Life Activities</b></p>	<p>Some courts have held that individuals must be limited in more than one major life activity in order to have a disability under the law.</p> <p>Some courts have held that episodic or intermittent impairments, such as epilepsy or post-traumatic stress disorder, are not covered under the law.</p>	<p>The ADAAA’s Disability Rules of Construction expressly provide that an impairment need only substantially limit <i>one</i> major life activity to be considered a disability. The ADAAA rejects that part of the Supreme Court’s holding in <i>Sutton v. United Airlines</i>, 527 U.S. 471 (1999) (“<i>Sutton</i>”) to the effect that an individual must be unable to work in a broad class of jobs in order to be considered substantially limited.</p> <p>The ADAAA clarifies that impairments that are episodic or in remission are considered disabilities if the impairment would substantially limit a major life activity when the condition is considered in its active state.</p>
<p><b>Regarded as Having a Disability</b></p>	<p>In the third prong of the definition of disability, the ADA covers people with impairments who are “regarded as” disabled. In the <i>Sutton</i> case, the Supreme Court established a test for an individual</p>	<p>The ADAAA law clarifies that an individual is protected under the “regarded as” prong so long as that individual proves that he or she has been subjected to prohibited action based</p>

	<p>to show that he or she is substantially limited in working – requiring the individual to prove that the covered entity that engaged in the discrimination also believed that many other employers would have discriminated against that individual as well.</p>	<p>on an actual or perceived physical or mental impairment. An individual need <u>not</u> establish he or she is substantially limited in a major life activity to be protected under the “regarded as” prong of “disability.” This section of the legislation expressly rejects the Supreme Court’s decision in <i>Sutton</i>, which held that an employer “must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting” to be liable under the “regarded as” prong of the ADA.</p> <p>The ADAAA says that individuals who are “regarded as” having impairments that are minor and transitory (an actual or expected duration of six months or less) are not protected. The ADAAA makes clear that employers need <i>not</i> provide a reasonable accommodation to those “regarded as” having an impairment.</p>
<p><b>Findings and Narrow Construction</b></p>	<p>In the <i>Sutton</i> case, the Supreme Court based its reading of the definition of disability in the ADA partly on the ADA’s findings that “some 43,000,000 Americans have one or more physical or mental disabilities” and that “individuals with disabilities are a discrete and insular minority.” <i>Sutton</i>, 527 U.S. at 484; 527 U.S. at 494 (Ginsburg, J. concurring).</p>	<p>The ADAAA adds two new findings. It says that <i>Williams</i> interpreted the term “substantially limits” to require a greater degree of limitation than Congress had intended and that the EEOC’s regulations defining “substantially limits” as “significantly restricted” were inconsistent with congressional intent by expressing too high a standard.</p>

	<p>In the <i>Williams</i> case, the Court used the finding regarding 43 million Americans with disabilities to confirm its conclusion that the terms “substantially limits” and “major life activity” must be “interpreted strictly to create a demanding standard for qualifying as disabled.” 534 U.S. at 197.</p>	<p>The ADAAA adds two new purposes. It instructs the EEOC to revise that portion of its regulations that defined “substantially limits” as having too high a level of severity and conveying Congress’ intent that the primary object of courts’ attention in ADA cases should be whether covered entities have complied with their obligations and that the question of whether an individual’s impairment is a disability should not demand extensive analysis. Thus, the 2008 amendments delete two findings in the ADA which led the Supreme Court to narrow the definition of “disability.” The findings, now eliminated, are the references that some 43 million Americans suffered from some disabling condition and that individuals with disabilities are a discrete and insular minority.</p> <p>The ADAAA also provides in its Rules of Construction Regarding the Definition of Disability (“Disability Rules of Construction”) that “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”</p>
<p><b>Regulatory Authority</b></p>	<p>In <i>Sutton</i>, the Court held that “no agency has been delegated authority to interpret the term ‘disability’” through regulations. 527 U.S. 15 479.</p>	<p>Title V of the ADA (42 U.S.C. 12201) is amended to grant the EEOC, the Attorney General, and the Secretary of Transportation authority to issue regulations interpreting the definition of disability under the ADA.</p>



**Questions and Answers on the Notice of Proposed Rulemaking  
for the ADA Amendments Act of 2008**

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. This law made a number of significant changes to the definition of “disability.” Congress directed EEOC to amend its ADA regulation to reflect the changes made by the ADAAA, which is why EEOC has approved a Notice of Proposed Rulemaking (NPRM). The NPRM was published in the Federal Register on September 23, 2009.

The NPRM proposes changes both to the ADA regulation itself and to the Interpretive Guidance (also known as the Appendix) that was published at the same time as the original ADA regulation. The Appendix provides further explanation on how the regulation should be interpreted.

Answers to some of the questions below provide citations to specific sections of the proposed regulation and the corresponding section of the proposed Appendix (29 C.F.R. section 1630), or to portions of the current ADA regulation that have not changed as a result of the ADAAA. These citations permit you to see where particular issues are addressed in the proposed regulation or clarify what parts of the current regulation are unaffected by the proposed regulation.

***1. Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?***

No. The ADAAA does not apply retroactively. So, for example, the ADAAA would not apply to a situation in which an employer allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodations where a request was made, or an earlier request was renewed, on or after January 1, 2009.

***2. What is the purpose of the ADAAA?***

The ADAAA states that its purpose is “to reinstate a broad scope of protection” by expanding the definition of the term “disability.” Congress found that persons with many types of impairments – including epilepsy, diabetes, multiple sclerosis, intellectual disabilities (formerly called mental retardation), major depression, and bipolar disorder – had been unable to bring ADA claims because they were found not to meet the ADA’s definition of “disability.” Yet, Congress thought that individuals with these and other impairments should be covered and revised the ADA accordingly. Congress explicitly

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rejected certain Supreme Court interpretations of the term “disability” and a portion of the EEOC regulation that it found had inappropriately narrowed the definition of disability. As a result of the ADAAA, it will be much easier for individuals seeking the law’s protection to demonstrate that they meet the definition of “disability,” and far more ADA cases will focus on whether discrimination actually occurred.

**3. Do all of the changes in the ADAAA apply to provisions of the Rehabilitation Act prohibiting discrimination by federal agencies, federal contractors, and recipients of federal financial assistance?**

Yes. The ADAAA specifically states that all of its changes also apply under sections 501 (federal employment), 503 (federal contractors), and 504 (recipients of federal financial assistance and services and programs of federal agencies) of the Rehabilitation Act. Similarly, the changes to the definition of disability apply to all of the ADA’s titles, including Title II (programs and activities of State and local government entities) and Title III (private entities that are considered places of public accommodation). A few provisions of the ADAAA affect only the employment provisions of the ADA and the Rehabilitation Act (e.g., a provision that requires employers to show that qualification standards based on uncorrected vision are job-related and consistent with business necessity).

**4. How does the ADAAA define “disability”?**

The ADAAA defines a disability as:

1. a physical or mental impairment that substantially limits a major life activity; or
2. a record of a physical or mental impairment that substantially limited a major life activity; or
3. when an entity (e.g., an employer) takes an action prohibited by the ADA based on an actual or perceived impairment.

In the questions below, we address each of these three definitions and changes the ADAAA makes to some of the key terms they use.

**5. What are “major life activities”?**

They are basic activities that most people in the general population can perform with little or no difficulty. The ADAAA provides a non-exhaustive list of examples of major life activities. Many are drawn from the 1991 ADA regulation and subsequent EEOC guidances, or from ADA and Rehabilitation Act court cases. Examples of major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Three of these examples – sitting, reaching, and interacting with others – are not specifically included in the ADAAA’s non-exhaustive list of major life activities, but are included in the proposed regulation.

The ADAAA also says that major life activities include the operation of major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, and reproductive functions. The proposed ADA regulation adds several other examples -- hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular. The purpose of adding major bodily functions to the list of major life activities is to make it easier to find that individuals with certain types of impairments have a disability. For example, cancer affects the major bodily function of normal cell growth and diabetes affects the major bodily function of the endocrine system. (See proposed regulation section 1630.2(i) and its corresponding Appendix section.)

To meet one of the first two definitions of “disability,” an individual must either have an impairment that substantially limits performance of one major life activity or have a record of an impairment that substantially limited one major life activity. It does not matter if the major life activity is from the first list (such as hearing or lifting) or the new list of major bodily functions. It is possible in many situations that an individual will be substantially limited (or have a record of such a limitation) in more than one major life activity.

#### **6. *When does an impairment “substantially limit” a major life activity?***

To have a disability (or to have a record of a disability) an individual must be substantially limited in performing a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual in performing a major life activity to be considered “substantially limiting.” All of these tests of substantial limitation were deemed by Congress to be too demanding. Rather, determination of whether an individual is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing an individual’s ability to perform a specific major life activity (which could be a major bodily function) with that of most people in the general population. However, the proposed regulation says that temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered disabilities. (See proposed regulation section 1630.2(j) and its corresponding Appendix section.)

#### **7. *What are mitigating measures?***

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The ADAAA provides a non-exhaustive list of examples of mitigating measures, which EEOC has included in the proposed regulation. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), reasonable accommodations, and even behavioral modifications. In addition, the EEOC’s proposed regulation includes as another example of a mitigating measure surgical interventions that do not permanently eliminate an impairment.

**8. *May the effects of mitigating measures be considered when determining whether someone has a disability?***

The ADAAA directs that the positive effects from an individual's use of one or more mitigating measures be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure.

**9. *Does the rule concerning mitigating measures apply to people whose vision is corrected with eyeglasses or contact lenses?***

No. "Ordinary eyeglasses or contact lenses" – defined in the ADAAA and the proposed regulation as lenses that are "intended to fully correct visual acuity or eliminate refractive error" – are considered when determining whether someone has a disability. (See proposed regulation section 1630.2(j)(3) and corresponding Appendix section 1630.2(j).)

**10. *Can the negative effects of a mitigating measure be taken into account in determining if an individual meets the definition of "disability"?***

Yes. The ADAAA allows consideration of the negative effects from use of a mitigating measure in determining if a disability exists. For example, the side effects that an individual experiences from use of medication for hypertension may be considered in determining whether the individual is substantially limited in a major life activity.

**11. *Can the positive or negative effects of mitigating measures be considered when assessing whether someone is entitled to reasonable accommodation or poses a direct threat?***

Yes. The ADAAA's prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of "disability." All other determinations – including the need for a reasonable accommodation and whether an individual poses a direct threat – can take into account the positive and negative effects of a mitigating measure. For example, if an individual with a disability uses a mitigating measure which eliminates the need for a reasonable accommodation, then an employer will have no obligation to provide one.

**12. *Can impairments that are episodic or in remission be considered disabilities?***

Yes. The ADAAA and the proposed regulation specifically state that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. This means that chronic impairments with symptoms or

effects that are episodic rather than present all the time can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. The proposed regulation says that examples of impairments that are episodic include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, and schizophrenia.

Similarly, if an impairment such as cancer is in remission, but there is a possibility that it could return in a substantially limiting form, then under the ADAAA this would meet the definition of “disability.” (See proposed regulation section 1630.2(j)(4) and corresponding Appendix section 1630.2(j).)

**13. Are there impairments that will consistently meet the definition of disability?**

Yes. The proposed regulation says that some impairments due to certain characteristics associated with them will consistently meet the definition of disability when analyzed in light of the ADAAA’s directives that:

- the term “disability” shall be construed broadly
- an impairment’s substantial limitation on a major bodily function is sufficient to constitute a disability
- the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) shall be disregarded
- impairments that are episodic or in remission are disabilities if they would be substantially limiting when active

The proposed regulation identifies the following as examples of impairments that consistently will meet the definition of “disability”: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair (a mitigating measure), autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia. The individualized assessment of whether a substantial limitation exists can be done very quickly and easily with respect to these types of impairments, and will consistently result in a finding of disability. This is not an exhaustive list of examples, which means that impairments not listed in the proposed regulation could still consistently meet the definition of disability.

The proposed regulation also provides examples of impairments that may be substantially limiting for some individuals but not for others. These types of impairments, which include asthma, back and leg impairments, and learning disabilities, may require somewhat more analysis to determine whether they are substantially limiting for a particular individual than those impairments that consistently meet the definition of “disability,” although the level of analysis required still should not be extensive. (See proposed regulation sections 1630.2(j)(5) and (6), and corresponding Appendix section 1630.2(j).)

**14. What does the NPRM say about how to determine if someone is substantially limited in working?**

An individual with a disability will usually be substantially limited in another major life activity, therefore generally making it unnecessary to consider whether the individual is substantially limited in working. However, there may be situations in which an impairment substantially limits a person's ability to meet certain job-related requirements, even though it does not impose substantial limitations outside the workplace. The proposed regulation says that an impairment substantially limits the major life activity of working when it substantially limits an individual's ability to perform, or to meet the qualifications for, a "type of work."

The concept of a "type of work" replaces the concepts of a "class" or "broad range" of jobs from the 1991 ADA regulation. A type of work may include jobs such as commercial truck driving (i.e., driving those types of trucks specifically regulated by the U.S. Department of Transportation as commercial motor vehicles), assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. A type of work may also be determined by reference to job-related requirements, such as: jobs requiring repetitive bending, reaching or manual tasks; jobs requiring frequent or heavy lifting; and jobs requiring prolonged sitting or standing. The Commission believes the concept of a "type of work" provides a more straightforward approach to determining whether someone is substantially limited in working.

**15. What impairments would generally not be considered substantially limiting (i.e., would not meet the first or second definitions of disability)?**

The EEOC's proposed regulation provides several examples of temporary, non-chronic impairments of short duration with little or no residual effects that are usually not disabilities, including (but not limited to) the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely. The appendix to the proposed regulation also states that appendicitis and seasonal allergies that do not substantially limit a person's major life activities even when active are not disabilities. Additionally, the fact that an impairment is permanent or of long duration or chronic in nature would not automatically make it a disability if it otherwise does not substantially limit a major life activity. (See proposed regulation section 1630.2(j)(8) and corresponding Appendix section 1630.2(j).)

**16. Does the ADA still exclude from coverage a person who is illegally using drugs?**

Yes. The ADA still excludes from coverage a person who currently engages in the illegal use of drugs. However, the ADAAA also did not change the ADA regulation that

a person who no longer engages in the illegal use of drugs could meet the definition of “disability” if he:

- has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully, or
- is participating in a supervised rehabilitation program (e.g., alcoholics or narcotics anonymous). (See current regulation section 1630.3(a)-(b).)

**17. Did the ADAAA affect any of the ADA's other exclusions from the definition of “disability”?**

No. The ADA still excludes from coverage transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. (See current regulation section 1630.3(d).)

**18. Is pregnancy a disability under the ADAAA?**

No. Pregnancy is not an impairment and therefore cannot be a disability. (See current Appendix section 1630.2(h).) Certain impairments resulting from pregnancy, however, may be disabilities if they substantially limit a major life activity.

**19. When does an individual have a “record of” a disability?**

An individual generally meets the “record of” definition of disability when in the past, although not currently, she had an impairment that substantially limited her in performing one or more major life activities. An individual also can meet the “record of” definition of disability if she was once misclassified as having a substantially limiting impairment. All of the changes to the first definition of disability discussed in the questions above – the expanded list of major life activities, the lower threshold for finding a substantial limitation, the clarification that episodic impairments or those in remission may be disabilities, the directive to disregard the positive effects of mitigating measures – will apply to evaluating whether an individual meets the “record of” definition of disability.

The proposed regulation clarifies the point that coverage under the “record of” prong of the definition of “disability” does not depend on whether an employer relied on a record (e.g., medical, vocational, or other records that list the person as having a disability) in making an employment decision. An employer’s knowledge of an individual’s past substantially limiting impairment relates to whether the employer engaged in discrimination, not to whether an individual is covered. (See proposed regulation section 1630.2(k) and corresponding Appendix section.)

