



RIDDELL  
WILLIAMS P.S.

# Mastering the Maze: Navigating the Family Medical Leave Act

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## Who is a Covered Employer?

- ◆ Employers with 50 or more employees for twenty or more weeks in the current or preceding calendar year
- ◆ To employ means to maintain on the payroll and includes part-time employees, temporary employees, and employees on leave



## Who is an “Eligible Employee”?

- ◆ An employee is eligible for FMLA leave if:
  - ◆ He or she has worked a total of at least 1250 hours during the year before leave is requested
  - ◆ Worked for the employer for a cumulative total of 12 months
  - ◆ Does not report to a worksite where the employer employs less than 50 people within 75 miles of the site



# Worksite For Distance Employees

- ◆ The worksite for employees who work in the field (sales representatives, those who work from home) is either:
  - ◆ The site to which the employee reports, or
  - ◆ The site from which the employee receives his or her assignments



## Key Employee Exception

- ◆ A **key employee** is a salaried employee who is among the highest paid 10 percent of all employees employed within 75 miles of the worksite
- ◆ Employer only relieved of reinstatement if it would cause substantial and grievous economic injury (more demanding than undue hardship)
- ◆ Key employee must be advised in writing of the potential consequences upon request for leave and return from leave

29 C.F.R. § 825.219



# When May an Employee Take Leave?

- ◆ An **eligible employee** may take leave for the following reasons:
  - ◆ the birth or placement for adoption or foster care of a child
  - ◆ to care for an employee's spouse, son, daughter or parent with a serious health condition
  - ◆ the employee's own serious health condition that prevents him or her from performing their job



## How Much Leave is Available?

- ◆ 12 work weeks of unpaid family leave every 12 months



## What is a “Serious Health Condition?”

- ◆ An illness, injury, impairment, or physical or mental condition that involves:
  - ◆ (A) inpatient care in a hospital, hospice, or residential medical care facility, or
  - ◆ (B) continuing treatment by a health care provider

FMLA Sec. 101(11)



# Serious Health Condition: Inpatient Care

- ◆ **Inpatient** care refers to:
  - ◆ Any overnight stay in a hospital, hospice or residential medical care facility, or
  - ◆ Any period of incapacity or any subsequent treatment in connection with such inpatient care

FMLA Reg. 825.114(a)(1)



# Serious Health Condition: Continuing Treatment

- ◆ **Continuing treatment** by a healthcare provider includes:
  - ◆ A period of incapacity of 3 consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:
    - ◆ treatment 2 or more times by a health care provider or
    - ◆ treatment on a least one occasion which results in a regiment of continuing treatment under the supervision of a healthcare provider

FMLA Reg. 825.114(a)(2)



## Continuing Treatment, cont.

- ◆ PLUS, any period of incapacity for:
  - ◆ Pregnancy or
  - ◆ Due to a chronic serious health condition



# What is a Chronic Serious Health Condition?

- ◆ Chronic serious health condition is one that:
  - ◆ Requires periodic visits for treatment by a health care provider
  - ◆ Continues over an extended period of time (including recurring episodes of a single underlying condition), and
  - ◆ May cause episodic rather than a continuing period of incapacity



## Serious Health Condition

- ◆ Only treatment of substance abuse, not missing work for substance abuse
- ◆ Pregnancy related complications
- ◆ Complications from cosmetic surgery
- ◆ Dental or plastic surgery after an injury
- ◆ Removal of a cancerous growth



# Leave to Care for Another

- ◆ FMLA leave to care for a child, spouse or parent includes:
  - ◆ Physical and psychological care
  - ◆ Family member cannot care of herself, such as transportation to a doctor
  - ◆ Providing comfort or reassurance to a child
  - ◆ Filling in for other family members or making arrangements for other care
  - ◆ Intermittent leave for intermittent family member needs



## Case Law on “Caring For”

### Marchischeck v. San Mateo County (9th Cir. 1999)

- ◆ Employee’s son had emotional and behavior problems, including drug use. When the son was beaten, employee sought leave under the FMLA in order to help him move to the Philippines to live with a relative.
- ◆ Court found that the purpose of the move was to keep son safe, not seek medical or psychological treatment. Therefore, the purpose of the leave was not to “care for” him under the FMLA.



## Case Law on “Caring For”

### Scamihorn v. General Truck Drivers (9th Cir. 2002)

- ◆ Court of Appeals reversed summary judgment
- ◆ Employee’s father depressed after murder of employee’s sister
- ◆ Psychological care a valid basis for leave
- ◆ The son provided evidence of care for father’s basic needs, even though father worked throughout



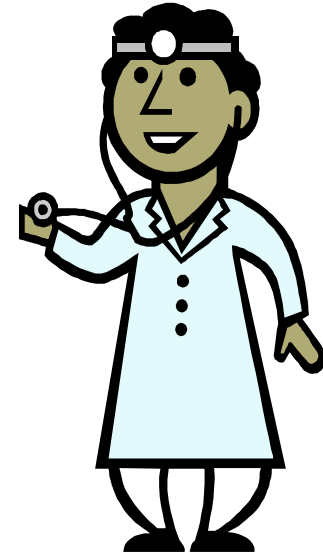
## Certification

- ◆ An employer can require an employee to provide medical certification from a health care provider to justify the medical leave
- ◆ Request for certificate should be made when the employee gives notice of the need for leave, or within two days thereafter



# Who is a Health Care Provider?

- ◆ A health care provider can be a:
  - ◆ doctor of medicine or osteopathy
  - ◆ podiatrist
  - ◆ dentist
  - ◆ clinical psychologist
  - ◆ optometrist
  - ◆ chiropractor
  - ◆ nurse practitioner
  - ◆ nurse-midwife
  - ◆ clinical social worker, or
  - ◆ Christian Science practitioner



29 CFR 825.118

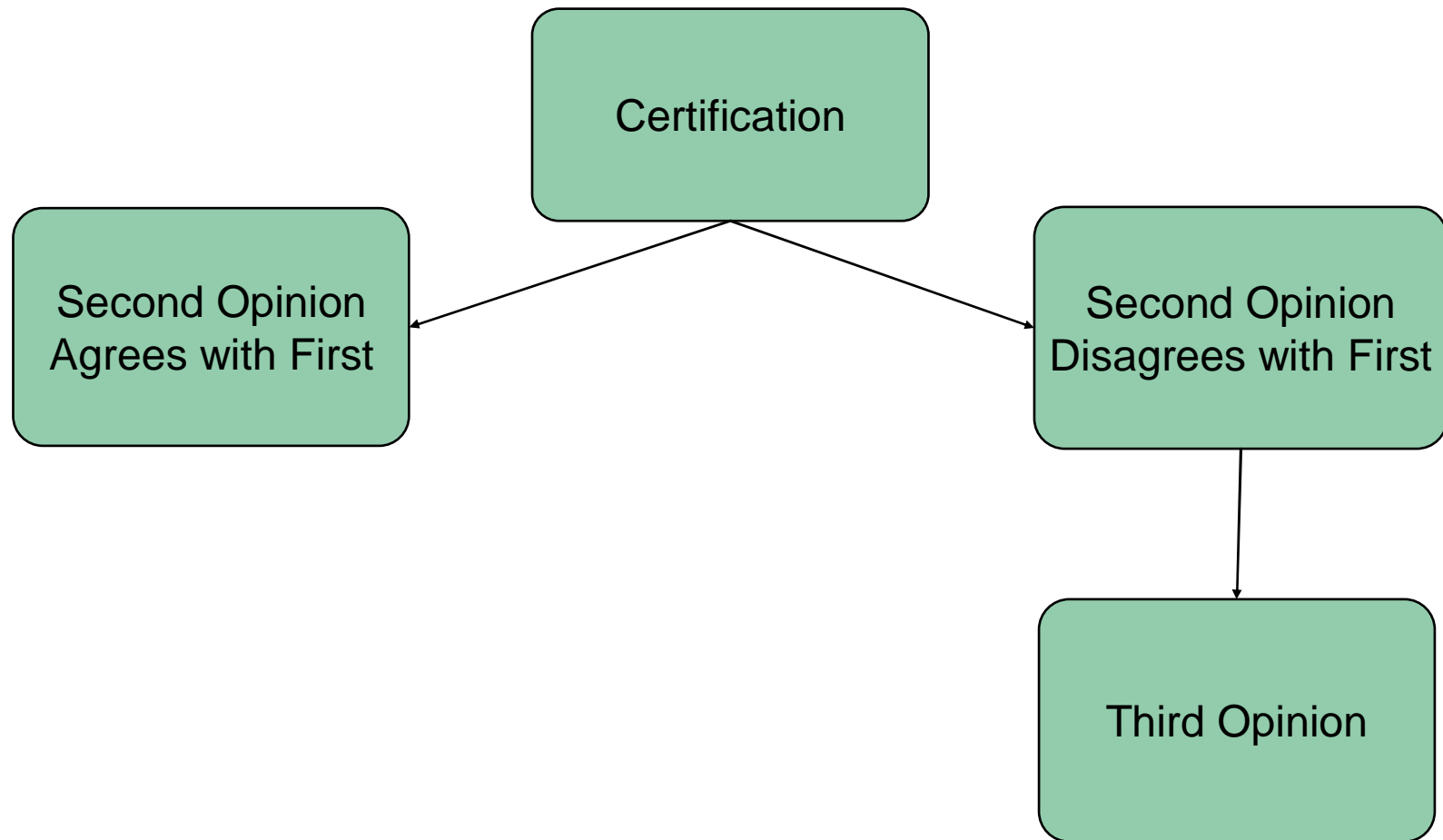


## What May the Certification Form Request?

1. The medical facts that support the identification of a serious medical condition
2. The date the medical condition began and its expected duration
3. Whether leave will be intermittent
4. The duration of the leave
5. If the condition is a pregnancy or chronic condition, the duration and expected frequency of incapacity
6. An estimate of probable number of additional treatments



# What May an Employer Require?





## When Can an Employer Ask for Recertification?

- ◆ 30 days after the original certification
- ◆ May request additional certification if additional leave is requested
- ◆ May require certification of the employee's ability to return to work if the employer does so for all employees returning from medical leave



# Contact with Health Care Providers

- ◆ FMLA:
  - ◆ Health care providers may contact employee's provider to clarify condition or fitness to return to work
  - ◆ Direct contact by employer prohibited
  - ◆ Clarification limited to condition for which leave taken
  - ◆ Provisions for seeking second and third opinions
  - ◆ Cannot use doctor employed on regular basis



## Recent Case Law on Certification

### Brumbalough v. Camelot Care Centers (6th Cir. 2005)

- ◆ Employee's doctor submitted a two line statement that the employee was fit to return to work
- ◆ Employer's fitness for duty form required more information and it terminated her employment
- ◆ FMLA regs only require a "simple statement of an employee's ability to return to work" - employer may not delay return to work while contact with the health care provider is being made



## Recent Case Law on Certification

### Frazier v. Honda of America (6<sup>th</sup> Cir. 2005)

- ◆ Court held that employer did not violate the FMLA by terminating the employment of an employee who failed to submit the requested certification within 15 days of the request



## Recent Case Law on Certification

### Sorrell v. Rinker Materials Corp. (6<sup>th</sup> Cir. 2005)

- ◆ If an employee's medical certification incomplete, employer has a duty to advise the employee of this fact and provide a reasonable opportunity to cure
- ◆ Unless employer advises employee of the certificate's deficiencies, it cannot use these deficiencies as grounds for disciplining an employee



## Employee Obligations Prior to Leave

- ◆ If the leave is foreseeable, the employee must give notice as soon as practicable
- ◆ The employee must schedule planned medical treatments so as not to disrupt the employer's operations

FMLA Sec. 102(e)(2)



## What Constitutes Employee Notice?

- ◆ The employee does not need to use the magic word “FMLA.” An employee must only provide:
  - ◆ Verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave
  - ◆ Burden on employer to inquire further

29 CFR § 825.302



## Recent Case Law on Employee Notice

### Cruz v. Publix Super Markets, Inc. (11th Cir. 2005)

- ◆ Employee wanted to take leave to care for her daughter during childbirth but did not inform her employer that her daughter was having pregnancy-related complications
- ◆ Employer denied request
- ◆ Court held that because employee did not inform her employer of daughter's serious health condition, the notice was inadequate



## Employer's Obligations

- ◆ Post notices, including advance notice requirement
- ◆ Have an FMLA policy
- ◆ Provide notice of FMLA entitlement and employee obligations within 2 days of notice of need for leave
- ◆ Designate leave as FMLA leave and notify the employee in writing
- ◆ Record keeping requirements



## Ragsdale v. Wolverine World Wide, Inc.

- ◆ Supreme Court (2002)
- ◆ Employer granted 30 weeks of leave, but failed to designate as FMLA
- ◆ Employee sued for 12 more weeks, citing DOL regulation that the employer must notify the employee that the leave is counted against FMLA leave or provide 12 additional weeks of leave
- ◆ SCT found regulation invalid



## Post-Ragsdale Decisions

### Farina v. Compuware Corp. (D. Arizona 2003)

- ◆ Employer incorrectly tells employee FMLA leave expired in May when it in fact expired in February
- ◆ Employee had taken 12 weeks of leave as of February, claims entitled to more
- ◆ No cause of action without proof that Employee would have returned in February absent defendant's actions



## Post-Ragsdale Decisions

- ◆ Schoor v. Publications International (N.D. Ill 2005) (unpublished)
- ◆ Employer failed to designate first 12 weeks of paid disability as FMLA leave
- ◆ After four months of leave, the employee asked for an additional four weeks of FMLA leave, which employer denied
- ◆ The court found that as employee could not have returned to work after the first 12 weeks of leave, employer's failure to notify her that the leave was counted against her FMLA leave was not detrimental to her rights



## May an Employee Waive their FMLA Rights?

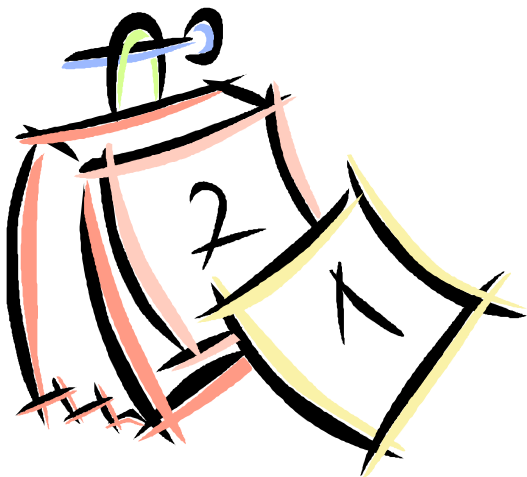
- ◆ Employees may not waive, nor may employers induce employees to waive, their rights under the FMLA  
29 C.F.R. 825.220(d)
- ◆ Taylor v. Progress Energy, Inc. (4th Cir. 1999)  
A waiver signed after end of employment was invalid



# The “Leave Year”

May calculate a leave year using any of 4 methods:

1. Calendar year
2. Any fixed month period such as a fiscal year
3. A 12 month period measured forward from the time FMLA leave is taken
4. A “rolling” 12-month period measured backward from the date an employee uses FMLA leave





## The “Leave Year”

- ◆ Method must be applied uniformly.
- ◆ In the Ninth Circuit, employer must notify employees in writing of the method chosen.  
Bachelder v. America West Airlines, Inc. (9th Cir. 1991)
- ◆ 60 day notice of change required
- ◆ Failure to select a method results in leave year most beneficial to the employee



## Intermittent Leave

- ◆ May take intermittent leave or on a reduced leave schedule for own or child, parent or spouse's serious health condition
- ◆ A reduced leave schedule is a change in the employee's schedule over several weeks or months, normally from full time to part time



## Qualifying for Intermittent Leave

- ◆ When medically necessary for planned and/or unplanned medical treatment of a related serious health condition
- ◆ Employer can require certification to explain medical necessity for intermittent leave and the approximate duration of the leave



## Periods of Intermittent Leave

- ◆ Intermittent leave may taken for periods as short as one hour or more to several weeks
- ◆ Examples:
  - ◆ Leave for medical appointments
  - ◆ Leave for several days at a time for chemotherapy
  - ◆ Leave for prenatal exams or severe morning sickness
  - ◆ Leave when employee or family member is incapacitated due to a chronic serious health condition



## Alternative Position

- ◆ If an employee is on foreseeable intermittent leave (i.e. planned treatment, birth/adoption of a child), an employer may move employee to an alternative position, with equivalent pay and benefits, that better accommodates recurring periods of leave



## Intermittent FMLA Leave and Exempt Employees

- ◆ Pay deducted from the salary of an otherwise exempt employee, even on an hourly basis, will not affect that employee's exempt status

29 C.F.R. 825.206

- ◆ See also Rowe v. Laidlaw Transit (9th Cir. 2001)



## Pay During Leave

- ◆ Leave may be unpaid
- ◆ Employer may require substitution of accrued vacation, personal or family leave for any unpaid FMLA leave
- ◆ Employer may also require substitution of accrued sick leave when FMLA is to care for a spouse, child or parent with a serious health condition or for the employee's own serious health condition

Sec. 102(d)(2)(b)



## Benefits During Leave

- ◆ Employee must receive **the same** health care benefits as if he or she was still working.
- ◆ No right to accrual of benefits, such as vacation and sick leave
- ◆ Employer policy determines entitlement to non-healthcare benefits

29 CFR 825.209



## FMLA and Workers' Compensation

- ◆ If an employee is on workers' compensation due to a serious health condition, FMLA and workers' compensation may run concurrently

29 C.F.R. 825.702(d)(2)



## The FMLA and the ADA

- ◆ Analyses under each law should be conducted separately
- ◆ Leaves of absence can be a reasonable accommodation under the ADA



## Rights Upon Return

- ◆ Employee has an (almost) absolute right to be reinstated to the same or (if necessary) equivalent position if able to return before FMLA leave expires
- ◆ Equivalent means equivalent



## Case Law on Reinstatement

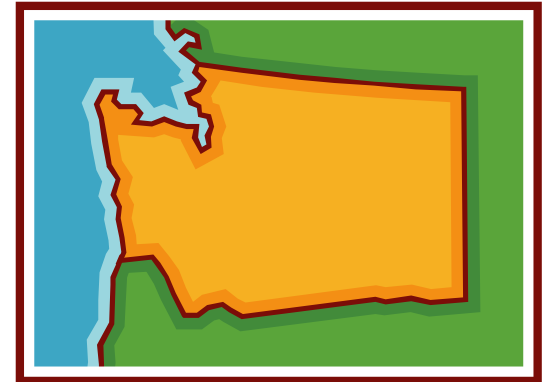
### Hoge v. Honda of America (6th Cir. 2004)

- ◆ Court rejected employer's argument that the FMLA provided for a reasonable time to reinstate an employee
- ◆ Instead, the court held that the employee must be reinstated immediately



# Washington Family Leave Law

- ◆ WFLL is not enforced except for:
  - ◆ 12-week entitlement for caring for a newborn shall be in addition to any leave for sickness or temporary disability due to pregnancy or childbirth
  - ◆ Employee has the right to be returned to an equivalent position within 20 miles of the employee's previous workplace





# Oregon Law

- ◆ The Oregon Family Leave Act is similar in many respects to the FMLA, but is generally broader
- ◆ Covered employers are those who employ more than 25 persons in the state of Oregon
- ◆ Employees are generally eligible if they have been employed for the preceding 180 days and have worked more than an average of 25 hours a week for the preceding 180 days



(ORS 659A.152-153)



# Oregon Family Leave

- ◆ An employee may take 12 weeks leave in any 12 month period for defined reasons ORS 659A.159
- ◆ In addition, a woman may take up to 12 weeks in any one year period for pregnancy or child-birth related disability
- ◆ An employee may also take 12 weeks of leave to care for child suffering from an illness or injury or condition that is not serious health condition, but requires home care.

ORS 659A.159(2)(b)



## Family Member Broadly Defined

- ◆ Family member includes “the spouse, same-sex domestic partner, custodial parent, non-custodial parent, adoptive parent, foster parent, biological parent, parent-in-law, parent of same-sex domestic partner or a person with whom the employee is in a relationship of *in loco parentis*.”

OAR 839-009-0210





# Alaska Family Leave Law

- ◆ The Alaska Family Leave Act covers only public employers





# California Family Rights Act

- ◆ CFRA allows leave for the most of the same reasons as the FMLA

Cal. Gov't Code 12945.2 (c)(3)

- ◆ CFRA excludes disabilities for pregnancy, child care or related conditions, as those are covered by California's pregnancy disability leave law





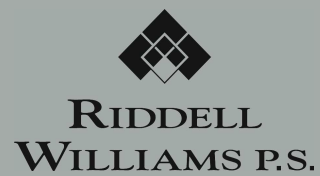
## Differences Between FMLA and CFRA

- ◆ Leave to care for a new child or child placed with an employee for adoption or foster care need not be taken all at once
- ◆ No second medical opinion may be required with respect to the existence of a serious health condition of a family member
- ◆ Medical certification forms cannot ask for diagnoses
- ◆ Paid sick leave can be used during leaves to care for a family member with a serious health condition only when mutually agreed to by employer and employee (contrast with Washington)



## Pregnancy Leave under California Law

- ◆ Four months of leave allowed for pregnancy related disability is **in addition** to leave to care for a newborn under the CFRA
- ◆ There are no length of service requirements
- ◆ No employer right to a second medical opinion
- ◆ Employer may not require an employee to exhaust vacation time or unpaid personal time off during a pregnancy disability leave



# Questions?

Please contact us any time with additional questions.

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