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# The Family and Medical Leave Act

## Implications for Occupational and Environmental Health Nursing

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### ABSTRACT

The Family and Medical Leave Act (FMLA) was enacted in 1993 to balance the demands of the workplace with the needs of families. Balancing work and family responsibilities will affect most workers as they experience their own serious illness or care for a child or a parent. The FMLA continues to present challenges regarding medical certifications, recordkeeping, intermittent leave management, and lack of understanding by employees and employers about rights and responsibilities under the law. This article discusses the rights and responsibilities of both parties. It also discusses how the occupational and environmental health nurse can bridge the gap between meeting the needs of the employee and those of the employer by serving as educator, advocate, and liaison/collaborator, leading to measurable cost savings for the employer and immeasurable benefits for the employee.

Congress enacted the Family and Medical Leave Act (FMLA) in 1993 to balance the demands of the workplace with the needs of families. Prior to

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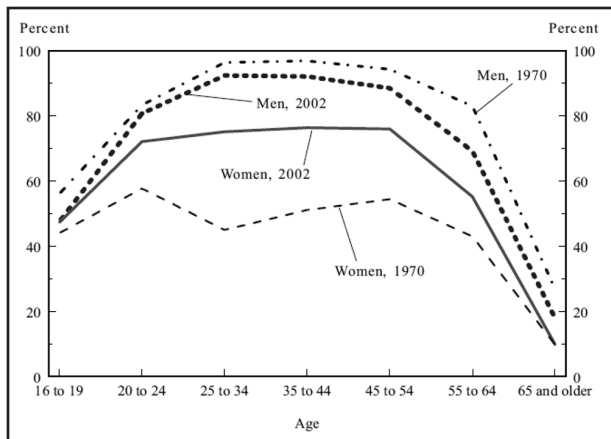
*This article is designed to provide accurate and authoritative information in regard to the subject matter covered. It does not constitute legal advice. If legal advice is needed relating to particular fact situations, the services of an attorney should be sought.*

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this, the United States had no national family and medical leave legislation. Work force demographics have continued to evolve, creating new challenges for employees, families, and employers. According to the U.S. Bureau of Labor Statistics (BLS), work force participation rates have increased dramatically among mothers during the past 31 years, and the proportion of all families headed by men or women with no spouse present has grown substantially (BLS, 2007). As reported by the BLS in 2007, women's participation in the work force by age resembled the pattern of men, although at a lower rate (Fig. 1). The number of women working full-time during the past several decades rose from approximately 37% in 1960 to 60% in 2006, and the proportion of all families maintained by men or women with no spouse present doubled from 13% in 1970 to 26% in 2006 (Fig. 2). Work patterns among married couples with families have also changed. The share of working couples in which both spouses work increased from 46% in 1970 to 57% in 2005. In 2006, about 7 of 10 mothers were labor force participants (BLS).

The FMLA was recently amended, and as a result its scope broadened, by providing new military family leave

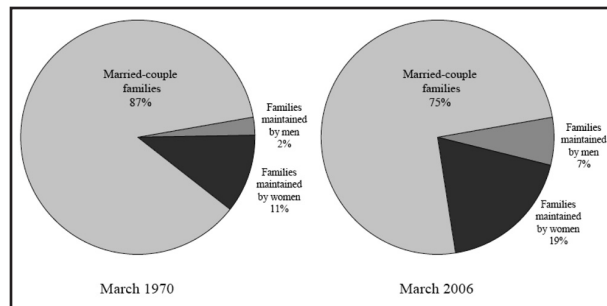


**Figure 1. Women's labor force participation by age compared to men (Bureau of Labor Statistics, 2007).**

entitlements. Additionally, the new regulation provides revisions and clarifications to previous areas of conflict or confusion for employees and employers alike (U.S. Department of Labor [DOL], 2009c). This article reviews the major provisions of the FMLA (FMLA, 1993) and discusses the implications for the occupational and environmental health nurse. Key occupational and environmental health nurse roles of educator, advocate, and liaison/collaborator are described in relation to implementation of the act.

Balancing work and family responsibilities, particularly the responsibilities of child and elder care, is likely to affect most, if not all, workers at some point in their lives, whether in the role of parent, spouse, or caregiver to aging parents. Under the jurisdiction of the DOL, the FMLA is intended to allow employees to take reasonable unpaid leave for personal health-related conditions, the birth of a child, and care of a child, spouse, or parent who has a serious health condition. Consequently, workers do not have to choose between continuing employment and meeting personal and family obligations. The FMLA is designed to benefit employers as well as employees. According to the DOL (2008d), direct correlation has been found between stability at home and productivity at work. When workers can count on returning to their work positions after a health-related absence, they are more committed to their employer.

Family or medical leave use is extensive. Surveys by the DOL in 2000 indicated that more than 35 million employees had taken FMLA leave since it was enacted in 1993. Reasons cited for absences included care for their own serious illness (47%), care for a new child (18%), care for a seriously ill parent (11%), care for a seriously ill child (10%), maternity and pregnancy-related issues (8%), and care for a seriously ill spouse (6%). The median length of absence was 10 days (Waldfoegel, 2001). Furthermore, in 2006 the DOL issued a request to the public to comment on experiences with the FMLA. More than 15,000 comments were received from workers, family members, employers, academics, and other interested parties. In general, comments indicated that the FMLA is good for workers and their families, is in the public inter-



**Figure 2. Proportion of all families maintained by men or by women with no spouse present for 1970 and 2006 (Bureau of Labor Statistics, 2007). For March 2006, percentages exceed 100% due to rounding.**

est, and is good workplace policy. Employees expressed a desire for a greater leave entitlement, whereas employers voiced concern about their ability to manage business operations and attendance control issues, particularly when unscheduled, intermittent leave is needed for chronic health conditions (DOL, 2007).

## EMPLOYER COVERAGE

Employers covered by the FMLA (FMLA, 1993) include all public agencies (state, local, and federal), local education agencies (schools), and private sector employers who employ 50 or more employees for at least 20 work weeks in the current or preceding calendar year, including joint employers and successors of covered employers. Joint employers are two or more businesses that exercise some control over the work or working conditions of an employee. For example, a nurse employed by a temporary staffing agency is assigned to work at a hospital. The temporary staffing agency and the hospital are joint employers. Therefore, an employer who jointly employs 15 workers from a temporary staffing agency and 40 permanent workers is covered by the FMLA. In the case of successors of covered employers, employees' entitlements are the same as if the employment by the predecessor and the employment by the successor were continuous employment by a single employer. For example, the successor employer, whether meeting the FMLA coverage criteria or not, must grant leave to eligible employees who provided appropriate notice to the predecessor employer, or continue leave for employees who began employment with the predecessor.

## EMPLOYEE ELIGIBILITY

The FMLA defines an "eligible employee" as an employee of a covered employer who:

1. Has been employed by the employer for at least 12 months.
2. Has been employed for at least 1,250 hours of service (time spent performing any kind of mental or physical work, not including paid and unpaid leaves) during the 12-month period immediately preceding the commencement of the leave.
3. Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick or vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation or group health plan benefits), the week counts as a week of employment.

## LEAVE ENTITLEMENT

The FMLA entitles eligible employees to up to 12 weeks of job-protected leave per year, which is generally unpaid. The FMLA does allow an eligible employee to substitute paid leave for FMLA leave. If an employee does not choose this option, the employer may require it. The employer may elect to use the calendar year, a fixed 12-month leave period or fiscal year, or a 12-month period prior to or after the commencement of leave as the 12-month period. Except in the case of leave to care for a covered service member with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 work weeks of leave during any 12-month period for any one, or more, of the following reasons:

- Birth and care of a newborn child of an employee.
- Placement of a child with the employee for adoption or foster care.
- Care for the employee's spouse, son, daughter, or parent with a serious health condition.
- An employee's own serious health condition that makes the employee unable to perform the essential functions of the job.
- Any qualifying exigency because the employee's spouse, son, daughter, or parent is a covered military member on active duty or called to active duty status in support of a contingency operation.

Spouses who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth and care of the employee's newborn, adoptive, or foster child or care for the employee's parent with a serious health condition. The FMLA was recently amended to permit a spouse, son, daughter, parent, or next of kin to take up to 26 work weeks of leave to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing treatment, recuperation, or therapy for a serious injury or illness.

Under certain circumstances, FMLA leave may be taken "intermittently or on a reduced leave schedule." Intermittent leave can be taken in separate blocks of time due to a single qualifying reason such as absence for cancer chemotherapy treatment, kidney dialysis, or prenatal care. A reduced leave schedule decreases an employee's usual number of working hours per work week, or hours per workday. An example of reduced leave is an employee recovering from a serious health condition who is unable to work a full-time schedule. Intermittent leave or a reduced leave schedule can be used for an employee's own serious health condition,

to care for a family member or covered service member whose condition is intermittent, or when the employee is only needed intermittently (i.e., when other care is normally available or care is shared with others). For leave to be taken, it must be deemed necessary (not voluntary treatment) and best accommodated through an intermittent or reduced leave schedule.

Leave for birth or placement for adoption or foster care may be taken intermittently only if the employer agrees and must conclude within 12 months of the birth or placement. However, if intermittent leave is requested because of a health condition of the employee, spouse, or child, the leave must be granted. Employees needing intermittent FMLA leave or a reduced leave schedule must attempt to schedule leave so as not to disrupt the employer's operation. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced schedule. The regulations permit an employer to transfer an employee only when the employee's need for leave is foreseeable based on planned treatment as opposed to a chronic need for unscheduled leave.

Many employees still do not understand their rights under the law and the procedures they must follow when seeking FMLA leave. Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under the FMLA. Additionally, if the covered employer has any FMLA-eligible employees, this general notice must be included in an employee handbook, included in other written guidance to employees concerning their leave rights, or provided to employees upon hire. Also, covered employers must inform employees of their rights and responsibilities, including giving specific written information on what is required of the employee and what might happen under certain circumstances, such as an employee's failure to return to work after FMLA leave. It is the employer's responsibility to designate leave as paid or unpaid and as FMLA qualifying and to give notice of the designation to the employee. If employees believe their rights under the FMLA have been violated, they may file a personal lawsuit pursuant to section 107 of the FMLA, or employees or employee designates may file a complaint with the Secretary of Labor (FMLA, 1993).

Employee requests for medical leave are often covered under more than one statute, so it is important to know the stipulations and parameters of these regulations as well. The FMLA intersects with other legislation such as the Americans with Disabilities Act (ADA). The ADA is intended to ensure that qualified individuals with disabilities have equal opportunities to work, whereas the FMLA's purpose is to provide reasonable leave from work. Under the ADA, employees who need leave related to disabilities are entitled to such leave if there is no other effective accommodation and the leave will not cause an "undue hardship" on employers' business operations (DOL, 2007).

An FMLA "serious health condition" is not necessarily an ADA disability. A serious health condition may

be temporary and would qualify for FMLA, but would not necessarily qualify as a disability under the ADA. If an employee is eligible for leave under the FMLA, the employer must grant the request even if the employee could continue to work with an effective reasonable accommodation. Although the FMLA does not prevent an employee from accepting an alternative to leave, the acceptance must be voluntary.

If the serious health condition qualifies as a disability under the ADA, the employee may be entitled to health-related leave in addition to the 12 work weeks under the FMLA, if this is considered a reasonable accommodation that will not cause undue hardship on the employer's business operations. The FMLA does not include provision for reasonable accommodation nor does it limit leave to situations where the employee's absence would not cause an undue hardship for the employer. Under the FMLA rule, an employer must provide leave under whichever statutory provision offers the greater rights to employees (DOL, 2007). The FMLA provides that a serious health condition may result from injury to the employee "on or off" the job. If the health care provider treating the employee for a workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light duty job. As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the FMLA leave entitlement is exhausted (DOL, 2008f).

## CERTIFICATION

An employer may require that the need for FMLA leave for a serious health condition of an employee, a covered service member, or an employee's immediate family member be supported by a certificate issued by a health care provider of the employee or the employee's ill family member. Employees seeking to use FMLA leave, and the need is foreseeable, are required to provide the employer at least 30 days' advance notice. When this is not possible, the employee must provide employer notification as soon as is practicable, which the DOL has defined as the employer's current leave policy. The employer must allow the employee at least 15 calendar days to obtain the health care provider certificate. The FMLA states that the employer may also require that the eligible employee secure subsequent recertifications on a reasonable basis. An employer may not request recertification more often than every 30 days. If the certificate indicates that the minimum duration of the condition is more than 30 days, the employer must wait until that minimum duration expires before requesting another recertification. However, if the circumstances described by the previous certificate change significantly or if the employer receives information casting doubt on the continuing validity of the certification, the employer may request recertification in less than 30 days. For health-related conditions in which the employee will need intermittent or reduced schedule leave for longer than 6 months, the employer is permitted to request recertification every 6 months in connection

with an absence. An example where recertification may be required by the employer is when employees request extensions of their original leave due to complications of the illness.

The certificate provision for an employee to care for a family member or covered service member encompasses both physical and psychological care. This can include situations where a family member is unable to meet basic health, hygienic, nutritional, or safety needs or transportation to the health care provider. It also includes providing psychological comfort and reassurance beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient treatment or home care. The DOL (2009a) provides an optional model certification form, Certification of Health Care Provider for Employee's Serious Health Condition (Appendix). Additional forms, Certification of Health Care Provider for Family Member's Serious Health Condition (DOL, 2009b) and Certification for Serious Injury or Illness of Covered Service Member—for Military Family Leave (DOL, 2009c), are provided on the DOL website.

An employer may, at its own expense, require an employee to obtain a second certificate from a health care provider of its choosing. However, in most cases, the employer may not regularly contract with or otherwise regularly use the services of this health care provider. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain a certificate from a jointly approved third health care provider, again at the employer's expense. This third opinion shall be final and binding. The employer may also require that the employee present a certificate of fitness to return to work when the absence was caused by a serious health condition.

## MAINTENANCE OF HEALTH BENEFITS/JOB RESTORATION

Employees' benefits accrued prior to the start of the leave, including health benefits, must be maintained while on FMLA leave. If employees are paying all or part of health premium payments prior to taking FMLA leave, they continue to pay their share during the leave period. Furthermore, employees are generally entitled to return to the same or comparable jobs with the same pay, benefits, and working conditions at the conclusion of the leave. If employees are terminated during the course of taking FMLA leave, the employer's responsibility to continue FMLA leave, maintain group health plan benefits, and restore employees' jobs ceases at the time the employees are terminated.

## RECORDKEEPING

In addition to records required by the Fair Labor Standards Act, the FMLA requires that covered employers designate time taken as FMLA by eligible employees as such, and preserve certain notices to and from employees concerning FMLA leave. Covered employers who have eligible employees must maintain records that must disclose the following information:



- Basic payroll and identifying employee data.
- Dates FMLA leave is taken by FMLA-eligible employees (e.g., available from time records or requests for leave, if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under state law or an employer plan that is not also covered by the FMLA.
- The hours of the leave taken by eligible employees in increments of less than 1 full day.
- Copies of employee notices of leave furnished to the employer under the FMLA, if in writing, and copies of all general and specific written notices given to employees as required under the FMLA and these regulations.
- Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding paid and unpaid leaves.
- Premium payments of employee benefits.
- Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

The Sidebar provides important terms as defined by the FMLA (DOL, 2008a, 2008b, 2008c, 2008e).

## THE ROLE OF OCCUPATIONAL AND ENVIRONMENTAL HEALTH NURSES

The framework for occupational and environmental health nursing practice is guided by several documents from the American Association of Occupational Health Nurses, Inc. (AAOHN), including the Code of Ethics, Standards of Occupational and Environmental Health Nursing, and Competencies in Occupational and Environmental Health Nursing (AAOHN, 2008). They provide the basis for the delivery of occupational health programs and services, health promotion, prevention and management of illnesses and injuries at the work-site, and compliance with laws, regulations, and standards.

Occupational and environmental health nurses make independent nursing decisions while designing health care for and delivering it to employee populations. Employers look to occupational and environmental health nurses to maximize employee productivity and decrease work-related health care costs through reduced disability claims and work-related injuries and illnesses and health improvement. Consequently, the management of health-related leave is important to companies. The occupational and environmental health nurse can best assist the employee and the employer as an educator, liaison/collaborator, and advocate in helping all parties better understand the FMLA and its implementation. The application of the regulations may vary by state or organization due to policy decisions.

### **Educator**

The role of the occupational and environmental health nurse in managing health-related leave is multifaceted, involving educating the employee, the family when necessary, and the employer. The occupational and

environmental health nurse must remain current about FMLA regulations to navigate through the rules with the employee and the employer. Although employers must be compliant with FMLA regulations, some are concerned that employees might be absent from work for minor ailments or unclear situations. As educators, occupational and environmental health nurses play a vital role in helping workers and employers comprehend FMLA rules and recognize their responsibilities.

The occupational and environmental health nurse can guide the employee to gather applicable information for FMLA eligibility and leave and can communicate the health-related necessities to the employer while maintaining confidentiality of health information. For example, the occupational and environmental health nurse can provide educational sessions to employees, their families, and management and develop and distribute fact sheets on eligibility criteria, leave entitlement, and leave that may be needed for a serious health condition. In addition, education is critical when an employer is faced with finding alternative ways to maintain the work when an employee is absent. Some alternatives include hiring temporary workers or covering the workload by using internal resources, potentially placing strain on already stressed employees. In this case, the occupational and environmental health nurse can identify ways to reduce stress (e.g., encouraging on-site fitness opportunities, providing verbal recognition or financial bonuses, and recommending additional or extended break times).

The occupational and environmental health nurse can educate both the employer and the employee about conditions under which FMLA can be used. For example, a pregnant employee in her second trimester may be at risk for complications and her obstetrician may recommend she be evaluated weekly until her delivery. The occupational and environmental health nurse educates the employee about health-related documentation needed to qualify for FMLA, assists the employee in obtaining the documentation, and, at the same time, educates the employer about the employee's need to be absent from work 7.5 hours per week for 6 months, validating this need with appropriate documentation. The occupational and environmental health nurse helps the employer initiate a plan to manage work needs during absence times.

The occupational and environmental health nurse can provide information and education critical to leave management and workload coverage. For example, an employee may need to be absent from work on Wednesdays and Fridays for 3 months to receive chemotherapy. The occupational and environmental health nurse conveys to the employer the documented and substantiated health-related need for the employee's absence. The occupational and environmental health nurse should develop and present a plan to discontinue monitoring the employee's needs until a permanent date of return to work is determined, including whether the employee can return to the same position full-time and in what capacity.

The occupational and environmental health nurse

## Family and Medical Leave Act Definitions

**Health care provider** means:

- (1) Doctors of medicine or osteopathy;
- (2) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors;
- (3) Nurse practitioners, nurse-midwives, clinical social workers, and physician assistants;
- (4) Christian Science practitioners listed with the First Church of Christ, Scientists in Boston, Massachusetts; or
- (5) Any health care provider recognized by the employer or the employer's group health plan benefits manager.

**Spouse** means a husband or wife as defined or recognized under State law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized.

**Parent** means biological, adoptive, step, or foster father or mother or any other individual who stands or stood in loco parentis to the employee when the employee was a son or daughter.

**Son or daughter** means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either younger than age 18, age 18, or older and "incapable of self-care because of a mental or physical disability."

**"Serious health condition"** means an illness, injury, or impairment or physical or mental condition that involves one of the following:

- Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with inpatient care; or
- Continuing treatment by a health care provider, which includes:
  - (1) A period of incapacity lasting more than 3 consecutive, full calendar days and any subsequent treatment or period of incapacity relating to the same condition that also includes:
    - Treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or
    - One treatment by a health care provider (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication or physical therapy); or
  - (2) Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or
  - (3) Any period of incapacity or treatment for a chronic serious health condition that continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or
  - (4) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or
  - (5) Any absence to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity for more than 3 days if not treated.

**"Next of kin" of a covered service member** means the nearest blood relative other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member's only next of kin.

A **"qualifying exigency"** is defined by the DOL as any of the following for which employees can use FMLA leave: short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities not encompassed in the other categories, but agreed to by the employer and employee.

*From: U.S. Department of Labor, Wage and Hour Division, 2008a, 2008b, 2008c, 2008d, 2008e.*

disseminates information regarding revisions and changes in the FMLA. In the recently amended FMLA (DOL, 2008c), new military family leave entitlements have implications for military families. For example, amendments include family member provisions to take leave to care for a National Guard or Reservist family member (i.e., if a National Guardsman needs surgery, his wife may be entitled to FMLA leave while caring for him). The occupational and environmental health nurse is the link in dispersing information to families and employers, who otherwise might not be aware of changes. Neither lack of knowledge nor lack of understanding exempts employers from acting on their responsibility for giving employees notice of their benefits.

### ***Liaison/Collaborator***

As a liaison/collaborator, the occupational and environmental health nurse works with management and employees to identify strategies to balance the employer's work demands and the employees' health, case management, and family needs, thereby creating more flexible and open work environments. The occupational and environmental health nurse must integrate health management into an absence management program. This will involve policy and procedure development, employee communication, evaluation of leave requests, compliance assessment, outcome measurements, and job transitions (Morris, 2008).

The occupational and environmental health nurse can conduct job analyses to determine if changes in jobs or tasks may be necessary to keep the employee productive and safe in the workplace, and can encourage and support an open dialogue between the employee and the employer to foster seamless transitions between the needs of both. The employee should notify the occupational and environmental health nurse about impending health-related issues affecting current job tasks and work hours and of any absence time needed, which should be communicated to the employer in a timely manner while upholding employee confidentiality. It can be a confusing period not only for the employee but also for the employer, who may have the difficult task of defining potential employee accommodations when the employee returns to work after a health-related absence.

The occupational and environmental health nurse can be a valuable link in bridging the gap between deciphering health and family needs of the employee and recommending accommodations and meeting the business needs of the employer. Although health-related issues and decisions can be ambiguous and may change, ongoing collaboration and communication among the employee, the employer, and health care providers will ease the stress related to potential job changes.

The occupational and environmental health nurse can work with the employer to develop policies and practices to address employee absences and work return under the FMLA and a computerized tracking system for leave management and monitoring. Although companies must comply with FMLA regulations, Bridgeford (2008) reports that between 40% and 50% of employers

believe employees may abuse FMLA leave (e.g., leaving work early or trying to secure a preferred shift) and that tracking and managing intermittent leave is problematic (Hewitt Associates LLC, 2007).

The occupational and environmental health nurse can develop a template to identify information needed from certifying physicians, including a schedule of dates and times for treatment and the minimum amount of leave needed, so the employer has as much advance notice as possible to plan for employee absences. For example, if an employee has a diagnosis of prostate cancer and needs intermittent leave every week for radiation therapy, the employer is required by law to retain a 4-day per week employee for a 5-day per week job on a long-term basis, which may be challenging for the employer.

The occupational and environmental health nurse can counsel the employer about what to expect during repeated illness episodes while protecting the confidential health information of the employee by discussing the illness in general terms. Knowledge can change potential employer frustration into comprehension and the employer can then focus on how to manage the business seamlessly while supporting the employee during intermittent leave. If the employee needs to change job roles to accommodate recurring absences, the occupational and environmental health nurse can identify jobs the employee can do without compromising the employee's health condition. However, regulations only permit an employer to transfer an employee to a different job when the employee's need for leave is foreseeable based on planned treatment as opposed to repeated need for unscheduled leave. In this role, the occupational and environmental health nurse can build a foundation of trust between the employer and the employee.

The occupational and environmental health nurse can conduct research on program effectiveness by monitoring FMLA use before and after program implementation to show the end result in effectively administering a resilient FMLA program at the worksite. Using a monitoring program, the occupational and environmental health nurse can demonstrate that the FMLA is providing job protection for employees who need work absence to handle major life events for themselves or their families. This will also aid the employer in anticipating future work needs.

### ***Advocate***

Employers are responsible for providing written notice to employees about the FMLA by conveying the company leave policy and FMLA leave entitlement. The occupational and environmental health nurse can advocate for and help employees better understand the application of the FMLA so it can be used by employees as the benefit it was intended.

The occupational and environmental health nurse can determine whether an FMLA request is acceptable by ascertaining certifications are complete and documenting treatment necessity. This can avoid delays in FMLA approval for the employee and prevent unnecessary administrative burden for the employer.

The occupational and environmental health nurse can provide consultative health expertise by assisting employees to identify missing information that must be provided to the employer and writing a letter to the health care provider giving a reasonable date for return of information. If a second opinion is necessary, the occupational and environmental health nurse can assist both the employee and the employer in identifying appropriate health care providers. The occupational and environmental health nurse can develop a list of preferred providers who are aware of the company's job descriptions. This list can then be reviewed with the employee to assist in selecting a provider the employee is comfortable seeing, giving the employee an opportunity to become a proactive and willing participant.

The occupational and environmental health nurse can be instrumental in creating company-specific forms and flow charts to manage FMLA leave and can research forms already developed by the DOL or ask other companies to share their forms. Materials can then be reviewed and developed specifically meeting the needs of the employing company. This process will ultimately be more cost-effective and efficient and will provide uniform information categories that can later be used in audits or evaluations.

The occupational and environmental health nurse can be an advocate for employees as they fear job loss, decreased income, and potential loss of good health. Through partnering with the occupational and environmental health nurse, the employee can continue to be a productive member of the work force.

In 2007, the *Wall Street Journal* (Maher, 2007) reported on an FMLA case that had a disastrous outcome for the employee and the employer. An employee who worked as an agent for an insurance company requested FMLA leave for surgical repair of a herniated disc following an automobile accident in 2004. The employer had requested the employee secure FMLA certification by a specific date. The employee stated the required documentation had been given to the employer in the appropriate time frame, but the employer denied ever receiving it. The employee was fired from his job, stating the company claimed he was unable to perform his duties because of health-related absence from work. As a result, the employee did not have surgery and had to use his retirement savings to support his family. The employee filed a lawsuit against the employer for back pay and benefits, and the company filed a formal answer to the lawsuit denying the allegations of FMLA-related discrimination (Maher). This case is still pending in federal court.

In this case, the company did not have an occupational and environmental health nurse, but both the employee and the employer could have clearly benefitted from a nursing intervention. For example, the occupational and environmental health nurse could have intervened on behalf of the employee to discuss with the employer the need for health-related leave while protecting the employee's confidentiality, and the employer could have planned ways to cover the employee's job until his return to work.

The occupational and environmental health nurse would have provided appropriate education, direction, and guidance to navigate the FMLA regulations and clarified the rights of the employer and the employee immediately. If issues with documentation had occurred, the occupational and environmental health nurse could have investigated and resolved them.

Employees often believe the FMLA is too confusing for workers and companies (Maher, 2007). Although the FMLA is supposed to protect workers from losing their jobs, it is often up to the employee to file suit against an uncooperative employer, which many employees may not have the energy or the resources to do. As reported by Maher, the most common complaint among workers seeking legal representation is that they have been fired or demoted for taking leave. For example, the U.S. median expected annual salary for an insurance agent is approximately \$42,844 (Salary Wizard, 2009) and the average lost time for an uncomplicated herniated disc surgery is approximately 12 weeks (\$10,305). The U.S. national average cost of an uncomplicated spinal fusion without physical therapy is approximately \$100,000 (Rush University Medical Center, 2008), and, as an employee, the insurance coverage would likely pay a significant portion of the claim. However, if an employee is terminated and chooses to seek legal remedy, litigation fees including filing fees, remedies and damages for back pay, actual monetary losses sustained, liquidated damages, expert witness fees, injunctive relief, and court costs can far exceed these health care and related costs.

The occupational and environmental health nurse has a vital role in assisting employees and employers in understanding the FMLA and its implementation. As educators, collaborators, and employee advocates, occupational and environmental health nurses can work to bridge the gap between meeting the health-related and family needs of employees and meeting the business needs of employers to maximize employee productivity while decreasing work-related health care costs.

## SUMMARY

In the more than 15 years since the FMLA was implemented, millions of American workers have had reason to take FMLA leave. Employers and employees agree that FMLA leave is a valuable benefit that has enhanced opportunities for job-protected leave for absences due to birth or adoption of a child, or a serious health condition of an employee or family member. However, the FMLA continues to present challenges with certifications, recordkeeping, intermittent leave management, and lack of employee and employer understanding regarding rights and responsibilities of all parties. The occupational and environmental health nurse must keep abreast of ongoing regulatory changes that affect the workplace to continue to play an integral and evolving role in assisting employees and employers with implementing the FMLA. Ultimately, this will provide a work environment that balances the health needs of workers and the work demands of employers, resulting in increased employee morale, lower presenteeism costs, and more productive workers.



## IN SUMMARY

### The Family and Medical Leave Act

Implications for Occupational and Environmental Health Nursing

Rogers, B., Franke, J. V., Jeras, J., Gravitte, J. T., Randolph, S. A., & Ostendorf, J. S.

*AAOHN Journal* 2009; 57(6), 239-250.

- 1 The Family and Medical Leave Act (FMLA) was created to assist employees in balancing the demands of work and family.
- 2 The FMLA allows certain employees up to 12 weeks of unpaid, job-protected leave per year for specific family and health-related issues.
- 3 Employers are required to provide employees with both written guidance concerning their rights and obligations under the FMLA and written notice detailing expectations and consequences of failing to meet their obligations. Additionally, employers are required to create, retain, and protect records pertaining to their obligations under the FMLA.
- 4 By functioning as an educator, liaison/colaborator, and advocate, the occupational and environmental health nurse can assist both the employee and the employer to better understand the FMLA and its implementation.

The psychological benefit to employees is immeasurable.

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## APPENDIX

### Certification of Health Care Provider for Employee's Serious Health Condition

(Family and Medical Leave Act)

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 function?  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.**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**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.**



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