



NATIONAL ASSOCIATION OF

Community Health Centers

Important Content Note:

This technical assistance resource was developed prior to the August 2017 release of the Health Center Compliance Manual by the Health Resources and Services Administration's (HRSA) Bureau of Primary Health Care (BPHC). The BPHC Compliance Manual, issued August 2017, indicates where PINS, PALs and other program guidance are now superseded or subsumed by the BPHC Compliance Manual.

See: <https://bphc.hrsa.gov/programrequirements/pdf/healthcentercompliancemanual.pdf>

HR

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Note that in all Information Bulletins:

The term **“health center”** refers to public or private nonprofit entities that: (1) receive grants under Section 330 of the Public Health Service Act (Section 330), including Sections 330(e), 330(f), 330(g) and 330(h) (collectively “Health Center Program Grantees”); and (2) entities that have been determined by the Department of Health and Human Services (DHHS) to meet the Section 330-Related Requirements to receive funding without actually receiving a grant (“health center look-alikes”).

The term **“Section 330-Related Requirements”** refers to requirements set forth in:

- Health Center Program Statute: [Section 330 of the Public Health Service Act \(42 U.S.C. §254b\)](#),
- Program Regulations: [42 CFR Part 51c](#) and [42 CFR Parts 56.201-56.604](#)
- Health Center Program Requirements: <http://www.bphc.hrsa.gov/programrequirements/index.html>

The term **“Grant Requirements”** refers to Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards: 2 CFR Part 200, as adopted by DHHS at 45 CFR Part 75.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is published with the understanding that the publisher is not engaged in rendering legal, financial or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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Accommodating Employee Leave for Parenting Purposes

Employees of health centers, like any other type of employer organization, request and take leave for a variety of reasons. They may become ill, need to care for aging parents, become injured on the job, need to care for injured family members who are or were military service members, or have exigent circumstances due to a family members’ active duty in the military. Often, however, employees may seek to use leave for a variety of parenting reasons. Parental leave typically includes time off for pregnancy, the birth of a baby, adoption or foster care of a child, or caring for a sick child. Whatever the case may be, there are a variety of options for health centers regarding leave policies that can accommodate employee parenting needs, while still ensuring appropriate staffing patterns at the health center.

The legally-recognized reasons for taking parental leave — ranging from receiving perinatal care (before, during and after giving birth) for a normal pregnancy, to coping with pregnancy complications, to needing maternity/ paternity leave after the birth of a child, to welcoming an adopted or foster child into the family, to caring for a sick child — encompass a broad spectrum of parental needs and responsibilities. Health centers must comply with federal and state laws calling for employers to grant parental leave across the spectrum, but can provide greater employee benefits or protections for parental leave beyond what the law requires.

This Information Bulletin:

- ◆ Provides an overview of the Federal Family Medical Leave Act (“FMLA”) including benefits, employee rights, and health center rights
- ◆ Provides an overview of Title VII of the Civil Rights Act of 1964 (“Title VII”)¹ and the Pregnancy Discrimination Act (“PDA”), an amendment to Title VII
- ◆ Suggests ways in which health centers can respond effectively to leave requests for parenting purposes
- ◆ Provides options for ensuring employee income replacement during certain types of parental leave through the purchase of short-term disability insurance
- ◆ Describes best practice considerations for health centers in adopting parental leave policies and reviewing employee requests for taking parental leave.

NOTE: Health centers should consult with qualified local counsel regarding relevant provisions of state law and determine whether federal or state law governs in particular instances.

1 Health centers must also abide by the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act of 1973, Section 504 (“Rehabilitation Act”). The ADA is a federal law that provides broad non-discrimination protection in employment for people with disabilities. An individual with a “disability” is one who has a physical or mental impairment that substantially limits one or more of the major life activities of such individual. The ADA and the Rehabilitation Act (which imposes ADA-like requirements on the recipients of federal grants) will apply only rarely in the context of parental leave (e.g., when a pregnant employee experiences substantial complications during pregnancy or after delivery), and thus will not be addressed further here in.

2 The Family and Medical Leave Act of 1993, P.L. 103-3 (1993), as amended by Section 585 of the National Defense Authorization Act for FY 2008, P.L. 110-181 (2008); Section 565 of the National Defense Authorization Act for FY 2010, P.L. 111-84 (2009); and the Airline Flight Crew Technical Corrections Act, P.L. 111-119 (2009) (hereinafter “FMLA Law”), at Section 101(11).

FAMILY AND MEDICAL LEAVE ACT

The majority of requests for parental leave fall within the purview of the FMLA. The FMLA was enacted by Congress and signed by the President in 1993 to “balance the demands of the workplace with the needs of families.”² The FMLA does not require that the leave be paid.

Reasons for Requesting Leave under the FMLA

The FMLA provides certain employees with job security when they take time off from work for specified familial or medical purposes.

Reasons for requesting leave under the FMLA include:

- ◆ The birth and subsequent care of a child
- ◆ The placement with the employee of a child for adoption or foster care and subsequent care for the child
- ◆ The need to care for an immediate family member with a serious health condition
- ◆ The inability to work because of a serious health condition
- ◆ Because of any “qualifying exigency” arising from the fact that an immediate family member is on covered active duty in the military
- ◆ The need to care for an immediate family member or next of kin of a covered service member with a serious injury or illness³

Under the FMLA, a serious health condition means “an illness, injury, impairment or physical or mental condition”² that includes, among other things, “any period of incapacity due to pregnancy, or for prenatal care.”³ For example, if an employee of the health center (e.g., a physician’s assistant or a billing clerk) has pregnancy complications that would prohibit her from working, she would be entitled to use FMLA unpaid leave during this period.

An example of a complication that would entitle a pregnant employee to use FMLA leave includes pre-term labor when the treating physician requires the woman to be placed on bed rest with anti-contraction medications. The FMLA also allows an employee to take leave for the purpose of caring for an immediate family member (including a child) with a serious health condition. So, if an employee requests leave to care for a child with a serious health condition, this request must be granted under the FMLA, provided the eligibility requirements are met.

Bear in mind that reasons for requesting leave under the FMLA need not hinge solely on medical issues (e.g., pregnancy complications or caring for a sick child), but may focus instead on happier familial purposes, such as the birth of a child and his/her subsequent care, or the placement with the employee of a child for adoption or foster care. Again, if the eligibility requirements are met, health centers should grant leave for these purposes.

Additionally, many states have their own family and medical leave laws, and the FMLA does not “trump” or supersede them.⁴ It is intended as a floor of protection, not a ceiling. In other words, it is possible for a state law to provide employees with greater parental leave rights than the FMLA. For example, some states provide a longer period of leave than the federal law. Health centers must follow the law that is most protective of the employee’s rights and provides the employee with the greatest benefits. As such, health centers should be aware of the parameters of their particular state’s laws.

To Whom Does the FMLA Apply?

The FMLA covers private-sector employers with 50 or more employees or public agency employers regardless of the number of employees. To qualify for FMLA coverage, employees must have worked for the employer for:

- ◆ At least 12 months total (not necessarily 12 consecutive months), and
- ◆ At least 1,250 hours during the immediately preceding 12-month period.

For example, not only would a full-time worker who has worked for the past year for a health center be eligible, but an employee who has been employed by a health center for a year and has worked 25 hours for each of 50 weeks (having taken two-weeks’ vacation during those 12 months) would also be eligible to take time off under the FMLA.⁵

The FMLA covers private-sector employers with 50 or more employees or public agency employers regardless of the number of employees.

3 *Id.* at Section 102. See also U.S. Department of Labor Wage and Hour Division Fact Sheet #28F, “Qualifying Reasons for Leave under the Family and Medical Leave Act” (2013).

4 This Information Bulletin does not address each state’s family and medical leave laws. Health centers with questions regarding their state’s parental leave laws should seek the advice of competent legal counsel.

5 A part-time employee’s leave entitlement should be calculated according to his or her “normal” workweek or, in the case of an employee with a variable schedule, the average number of hours worked per week over the 12 weeks prior to the leave period. See Department of Labor (“DOL”) Opinion Letter, Leave entitlement for part-time/variable hours employees, (May 9, 2002) (FMLA 2002-01).

FMLA Benefits

A health center with 50 or more employees must allow an eligible employee to take up to a total of 12 workweeks of unpaid leave in a 12-month period for any of the medical and familial reasons specified previously.

It is important to remember that the FMLA provides job protection, not compensated leave. This means that an employee, using FMLA leave, can rely on being able to return to his/her job in most circumstances, but wages/salary need not be paid to the employee by the health center while the employee is out on FMLA leave. However, under the FMLA, employees may choose to substitute (or the health center employer may require the employee to substitute) accrued paid leave—including vacation and/or personal leave—for unpaid FMLA leave. Additionally, health centers must make it clear via written notice that such a substitution has taken place.

While an employer may not limit an employee's choice to substitute paid vacation and/or personal leave for unpaid leave, an employer may limit the substitution of paid sick leave in accordance with its policies on the use of such leave. For example, if an employee wanted to take time off to care for a sick child and wished to substitute his or her accrued sick leave for unpaid FMLA leave, whether this would be permissible depends on the health center's regular, non-FMLA requirements for use of such leave.⁶ Regardless of whether paid leave has been substituted for unpaid FMLA leave, the employer need only provide a sum total of 12 weeks leave for FMLA purposes.

In drafting an employee leave policy, health centers should address how the 12-month period in which an employee can exercise his or her FMLA rights will be calculated. If an employer neglects to specify a method of calculation in its eligibility policy, the employer may then choose which method to use.

There are a range of possible methods of calculation, including:

- ◆ The calendar year⁷
- ◆ Any fixed 12 month period⁸
- ◆ A 12 month period rolling forward from the date any employee's first FMLA leave begins
- ◆ A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave⁹

The method most protective of the health center's interest in maintaining adequate staffing patterns and preserving workplace function is the "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Under this method of calculation, each time an employee takes FMLA leave, he or she is entitled to any balance of the 12 weeks that has not been used during the immediately preceding 12 months. For example, if an employee used 8 weeks of leave during the past 12 months, an additional 4 weeks of leave could be taken. If the employee used 8 weeks beginning January 30, 2015, and 4 weeks beginning July 30, 2015, the employee would not be entitled to any additional leave until January 30, 2016. However, beginning on January 30, 2016, the employee would be entitled to 8 weeks of leave and on July 30, 2016 would be entitled to an additional 4 weeks of leave.

6 See 29 C.F.R. § 825.207(a),(c).

7 Note that if the precipitating event occurred at the end of the calendar year and the reason for being out on FMLA leave lasted into the following year, this method might allow an employee to take 12 weeks at the end of the year and then another 12 weeks at the beginning of a calendar year – resulting in a total of 24 weeks of continuous leave.

8 This could have the same effect as the calendar year method.

9 See 29 C.F.R. § 825.200(b), (c) and U.S. Department of Labor Wage and Hour Division Fact Sheet #28H, "12-month period under the Family and Medical Leave Act" (2013).

Employees' Rights under the FMLA

Job Reinstatement

At the end of a period of FMLA leave, employees are entitled to return to a job at the health center, with limited exceptions.¹⁰ While an able employee need not necessarily be restored to the same job held prior to leave, the job must be an equivalent one in terms of pay and other employment terms and conditions. In contrast, the health center is not required to reinstate certain "key" employees — those salaried, FMLA-eligible employees who are among the highest paid 10 percent of all persons employed by the health center — if the health center has notified the employee in writing of his or her key employee status under the FMLA and the reasons for denying job restoration, and the health center can demonstrate that reinstatement would cause it "substantial and grievous economic injury" to its operations.¹¹

In addition to the job protection that the FMLA provides, the employee has a few other rights under the FMLA. It should be noted, however, that this Information Bulletin highlights only the minimum requirements. Again, health centers may have more liberal leave policies than what the FMLA requires.

Written Notice

The employee is entitled to receive written notice from the health center that the leave he or she is about to take will be considered FMLA leave. This written notice is important because it lets the employee know that the leave will be counted against his or her annual FMLA leave entitlement and informs the employee of any additional rights and requirements associated with FMLA leave — such as the substitution of paid leave for unpaid leave, and the employee's obligation, if any, to make premium payments out-of-pocket to maintain health benefits.

Continuance of Health Benefits

The employee is entitled to continue to receive group health insurance coverage (including dependent coverage) on the same terms as if the employee had continued to work, if he or she received such coverage from the health center prior to requesting leave. If an employee will be taking unpaid leave under the FMLA and health insurance premiums are usually deducted from his or her paycheck, the health center can require the employee to pay his or her usual portion of the premiums. If, while out on FMLA leave, the employee does not pay the health center for his or her premiums, the health center is not required to continue his or her health benefits (See below under Health Centers' Rights, Termination of health benefits.)

Intermittent Leave

In certain cases the employee may take leave on an intermittent basis or may be permitted to work a reduced schedule. Among other reasons, an employee may take intermittent/reduced schedule leave for foreseeable medical treatment — either the employee's own or that of his or her child— but must attempt to schedule the leave so as not to "disrupt unduly" the health center's operations.

¹⁰ See 29 C.F.R. § 825.214, .216. Further, if an employee exhausted her 12 weeks of FMLA leave in a 12-month period because of a serious health condition (e.g., severe pregnancy complications) and is then unable to return to work because of a physical or mental condition (including the continuance of a serious health condition), she would no longer have the FMLA protection of job reinstatement.

¹¹ See 29 C.F.R. §§ 825.217 – 219.

When an employee requests intermittent/reduced schedule leave for purposes of taking care of a healthy newborn or a newly placed adopted or foster care child, intermittent leave is subject to the health center's approval.¹² In situations involving intermittent leave, the health center is permitted temporarily to transfer the employee to an alternative job with equivalent pay and benefits that would accommodate recurring periods of leave better than the employee's usual job. Only time actually taken as intermittent leave can be charged against the employee's leave entitlement.¹³

Health Centers' Rights under the FMLA

Advance Notice

The health center is entitled to 30 days advance notice from the employee when the need for leave is foreseeable. For unforeseeable leave, notice must be given "as soon as," typically within one or two business days of when the need for leave becomes known.¹⁴ If an employee fails to give 30 days' notice for a foreseeable leave with no reasonable excuse for the delay, and the employee knew of the FMLA notice requirements, the employer may deny the taking of leave until at least 30 days after the employee provides notice.¹⁵

In the context of parental leave requests incident to a normal pregnancy or adoption, 30 days advance notice will usually be possible. However, a health center should be sensitive to the fact that births and adoption arrangements are not always predictable events and sometimes take place prematurely or on very short notice. Thus, health centers should take such extenuating circumstances into account when evaluating employee compliance with the reasonable notice requirement under the FMLA.

Medical Certification

If the employee is requesting leave for a serious health condition (e.g., complications related to pregnancy) the health center can, and should, require a medical certification to be issued by a health care provider.¹⁶ (Importantly though, the health center may not request a certification for leave to bond with a newborn child or a child placed for adoption or foster care.) The default rule for medical certification is every 30 days in most situations involving certain medical conditions (including pregnancy) of an unknown duration, provided that the request is made in conjunction with an employee's absence. In situations where doubt has been cast on the employee's grounds for being absent, or if circumstances have changed significantly, an employer is permitted to request medical recertification even more often than once every 30 days.¹⁷ An employee is entitled to at least 15 days to obtain the medical certification.

12 See 29 C.F.R. § 825.202(c). Further, it should be noted that a request for intermittent leave for routine childcare purposes — not incident to birth or adoption — is not within the purview of FMLA. For example, if an employee wanted to leave at 1 p.m. every Friday to accommodate his or her child's school schedule, this would not be considered permissible leave under FMLA.

13 See 29 C.F.R. § 825.205(a).

14 See 29 C.F.R. § 825.302(a),(b).

15 See 29 C.F.R. § 825.304(b).

16 While the employee must provide a medical certification, he or she need not turn over his or her medical records to the health center under the FMLA. An employee may comply with a medical certification request by using DOL's "Certification of Health Care Provider" form or by using an employer's own form as long as no additional information is requested than what is on the DOL form. See <http://www.dol.gov/whd/forms/WH-380-E.pdf> and <http://www.dol.gov/whd/forms/WH-380-F.pdf>

17 See 29 C.F.R. § 825.308(c).

Clarification and Second Opinions

When an employee fails to provide adequate medical certification, an employer is allowed to seek clarification regarding an employee's request for leave. The following is an example, involving a pregnant employee who requests intermittent leave under the FMLA, and provides the health center with a certification form indicating that she cannot be on her feet for more than 4 hours a day until she gives birth.

- ◆ If the health center finds information on the form to be ambiguous or incomplete, it must provide the employee an opportunity to correct the deficiency within 7 calendar days.
- ◆ If, after receiving a completed medical certification, the health center still questions the adequacy of the information on the form, the health center may ask the employee for permission to seek clarification from the employee's health care provider regarding the information on the form.
 - If the employee consents to the clarification request, a health care provider chosen by the health center may contact the employee's health care provider for this purpose.
 - If the employee does not consent to the clarification request or if the validity of the certification is still questioned, the health center may obtain a second, and in some cases a third, opinion at its expense.
- ◆ If the certifications and clarifications do not ultimately establish the employee's entitlement to FMLA leave, the health center may choose not to designate the leave as FMLA leave and the leave may be treated as paid or unpaid leave under the health center's established leave policies.¹⁸

Termination of Health Benefits

In very limited circumstances, the health center can terminate health benefits. If an employee on FMLA leave gives notice to the health center that he or she does not intend to return to work at the end of the FMLA period, or if the employee fails to return to work at the end of the FMLA period, the health center's obligation to continue providing group health benefits ceases. Further, if the employee is overdue on premium payments by more than 30 days and has received written notice from the health center at least 15 days in advance of the prospective termination date, then the health center is allowed to terminate health benefits.¹⁹

Non-Accrual of Other Benefits

Additionally, some earned benefits, such as seniority or paid leave, need not continue to accrue during FMLA unpaid leave if these types of benefits do not accrue for employees on other types of unpaid leave. Nonetheless, the health center and the employee may make arrangements to continue other benefits during FMLA unpaid leave, such as life insurance, to ensure the employee will be eligible to be restored to the same benefits upon his or her return to work. In these situations, the health center is entitled to be repaid by the employee for his or her share of non-health benefit premiums upon return to work. A health center should have a clearly-written policy to this effect.

¹⁸ See 29 C.F.R. § 825.305, .306, .307, .308.

¹⁹ See 29 C.F.R. § 825.212(a)(1), .311(b).

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII mandates that employers refrain from discriminating against any person, either intentionally or in effect, with respect to the terms and conditions of his or her employment, on the basis of race, color, religion, sex or national origin. Title VII applies to private employers with 15 or more employees, where employees are protected immediately upon employment. For the purposes of accommodating parental leave requests, discrimination on the basis of pregnancy, childbirth, or a pregnancy-related condition constitutes unlawful sex discrimination under the PDA, an amendment to Title VII.²⁰

Rights and Responsibilities under Title VII

Granting of Leave

Under Title VII, requests for voluntary leave for parenting purposes must be granted to employees to the same extent as voluntary leave is usually given to employees for other reasons. If the health center does not offer benefits such as job modifications, alternate assignments, disability leave, or leave without pay to other workers seeking voluntary leave, Title VII does not require it to do so for employees requesting leave associated with parenting (from pregnancy-related leave to regular time off to care for a newly adopted or foster care child).

Job Reinstatement

If a pregnant woman has taken leave because of a pregnancy-related condition (e.g., pre-eclampsia) and recovers, she must be allowed to return to work.

Health centers are not allowed to require a pregnant employee who has taken temporary leave to remain on leave until the child is born, and may not have a policy prohibiting employees from returning to work for a specified amount of time after the birth of a child. Health centers must hold open a job for a pregnancy-related absence the same length of time as jobs are held open for those on sick or disability leave. Title VII also requires health centers to allow an employee on pregnancy leave to return to her job on the same basis as other employees returning to work from sick or disability leave. For example, an employee returning from pregnancy leave cannot be required to certify her ability to return to work unless such certification is required of all employees returning from comparable leaves.²¹

Title VII applies to private employers with 15 or more employees, where employees are protected immediately upon employment.

20 Gender-based examples will be used to illustrate the provisions of Title VII when possible. However, there are certain situations where the provisions of the PDA (which is only applicable to women) will be most relevant, and the examples contained herein will reflect this.

21 See "Pregnancy Discrimination," (2011) U.S. Equal Employment Opportunity Commission Fact Sheet, available at <http://www.eeoc.gov/eeoc/publications/upload/fs-preg.pdf>.

Equivalent Treatment as Other Employees

Pregnant employees must be treated in the same fashion as other, nonpregnant employees with a similar ability or inability to work. For example, if a pregnant employee's attendance is suffering because of morning sickness, the PDA requires only that she be treated the same as would any other employee with a temporary medical condition causing frequent tardiness or absence.²²

Note that the PDA does not require employers to make it easier for pregnant women to work.

Compliance with Title VII

To ensure compliance with Title VII, a health center should have clearly written policies in place regarding voluntary leave. When developing these policies, health centers should consider issues such as:

- ◆ Whether the leave will be paid or unpaid
- ◆ The permitted duration of such leave
- ◆ The kind of notice is required of the employee requesting leave

It is important to make sure that these policies do not single out any particular medical condition or class of person. All Human Resource professionals should receive comprehensive and regular training in the proper application and implementation of these policies.

For an employee or job applicant to claim successfully that a health center has discriminated against him or her, the employee must demonstrate that the health center:

- ◆ Intentionally discriminated against him or her (referred to as "disparate treatment") or
- ◆ Had a policy or procedure that resulted in discrimination, even if unintentional (referred to as "disparate impact") or
- ◆ Created or condoned a hostile work environment.

Although all three are important, health centers should be especially alert to the disparate impact issue, because even a policy seemingly neutral on its face could violate Title VII if it has a greater effect on one sex. For example, a policy granting only women time off to care for a child would have a disparate impact on men who wanted to take leave under the same circumstances.

Not only should health centers have clear leave policies in place, but also they must be prepared to document their actions and non-actions carefully. To prepare for potential Title VII claims, health centers should document thoroughly any disciplinary actions taken, as well as the precipitating incidents and reasons. Of course, health centers should make routine practice of keeping detailed records regarding employment actions for all employees, so that if a claim is investigated, the health center will be able to demonstrate a consistent and comprehensive documentation system. Once a health center is able to establish a non-discriminatory reason for the action in question, the employee will have the difficult burden of showing that the health center's action was merely a pretext for its discrimination.

²² Keep in mind that if FMLA applies, the employee's pregnancy will have to be considered by the health center if her attendance problems are caused by pregnancy-related medical conditions. Absences that qualify for FMLA leave may not be considered in a determination of whether to discipline an employee because of attendance problems.

COMPARISON OF PARENTAL LEAVE RIGHTS UNDER THE FMLA AND TITLE VII

Health centers must be aware of an employee's parental leave rights under both the FMLA and Title VII, and consider their obligations under each. Also, Human Resource professionals should be careful to review the precise definitions under each applicable statute when evaluating an employee's request for parental leave. The key provisions of each statute for parenting purposes are compared below.²³

General Right to Leave

FMLA: An eligible employee has a right to 12 weeks of unpaid leave in a 12 month period for purposes relating to pregnancy, adoption or foster care, and to deal with his or her serious health condition or that of his or her child.²⁴

Title VII: Voluntary leave requests for pregnancy, childbirth, or parenting must be granted to the same extent as voluntary leaves are normally granted to employees for temporary or non-disability reasons.

Paid Leave

FMLA: FMLA does not mandate paid leave. Instead, employees may choose to use, or employers may require the employee to use, accrued paid leave, including vacation and/or personal leave, to cover some or all of the unpaid FMLA leave taken. The substitution of accrued sick leave is limited by the employer's policies on the use of such leave.

Title VII: Paid leave must be granted to employees requesting voluntary leave for parenting purposes only to the same extent as paid leaves are normally provided to employees of the opposite sex.

Modified or Part-Time Schedules

FMLA: An eligible employee may take intermittent or part time leave for purposes relating to his or her serious health condition or the serious health condition of his or her child. When intermittent leave is requested for foreseeable medical treatment, the employer is permitted temporarily to transfer the employee to an alternative job with equivalent pay that suits recurring periods of leave better than the employee's usual job.

Title VII: Employers must treat employees requesting leave for pregnancy-related reasons the same as those requesting leave for other types of temporary disabilities.

Medical Certifications and Inquiries

FMLA: An employer may use any certification form, but is limited to requesting only the information contained in the DOL's "Certification of Health Care Provider Form" (WH-380-E or 380-F, depending on the circumstance). If an employee submits a medical certification form that the employer finds ambiguous or incomplete, the employer must give the employee an opportunity to correct the deficiencies. The employer may seek clarification of any ambiguities on the form with the employee's consent. If these measures still do not alleviate the employer's concerns regarding the validity of the medical certification, the employer may seek a second (and in some cases a

23 Information in this section was adapted from the U.S. Equal Employment Opportunity Commission's, The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, available at <http://www.eeoc.gov/policy/docs/fmlaada.html>.

24 As discussed above, the FMLA also grants leave to care for any immediate family member and service members, but because this Information Bulletin focuses solely on parental leave, only the right to take leave to care for a child with a serious health condition is discussed.

third) opinion at its expense. All communication(s) regarding the medical certification form must be between a health care provider or HR/benefits professional chosen by the health center and the employee's health care provider.

Title VII: A health center's policy regarding medical examinations and inquiries must be applied consistently across male and female employees, regardless of their specific medical condition.

Reinstatement Rights

FMLA: Typically, employees have the right to return to the same position or to an equivalent one at the end of FMLA leave. However, an employee who has exhausted his or her FMLA leave and is unable to return to work no longer has the FMLA protection of job reinstatement. Also, if the employee is a "key" employee who was notified of this status in writing, the health center is not obligated to reinstate that employee if the health center can show that doing so would cause significant economic injury to its operations.

Title VII: Health centers must allow an employee on parental leave to return to his or her job on the same basis as other employees returning to work from comparable types of leave.

Health centers must be aware of an employee's parental leave rights under both the FMLA and Title VII, and consider their obligations under each.

Continuance of Health Insurance Benefits

FMLA: FMLA requires an employer to continue the employee's existing level of health insurance coverage during the leave period, provided the employee pays his or her share of the premiums. A health center must provide such an employee with the same benefits on the same terms normally provided to an employee in the same leave status.

Title VII: An employer must continue an employee's health insurance benefits during his or her leave period only if it does so for other employees in a similar leave status. When addressing employee requests for parental leave, Human Resource professionals should first analyze carefully an eligible employee's request under the FMLA. Almost always, as long as adequate notice is given, the employee's request must be granted. Keep in mind that an employer must provide the employee with written notice that the leave he or she is about to take will be considered FMLA leave. Next, to assure compliance with Title VII, health centers should make sure that any actions they take or plan to take in response to parental leave requests are not discriminatory in application or effect, and would be the same as those taken in response to an employee's request for any other type of leave.²⁵ It is important to remember that some states have their own family and medical leave laws, and an employer must comply with the applicable law that is most protective of the employee's rights.

²⁵ As previously noted, health centers also must comply with the requirements of the ADA.

Steps for Determining Rights and Responsibilities Regarding Parental Leave Requests²⁶

1. **Consider which laws apply to employees as a group.** The FMLA covers health centers with 50 or more employees, while Title VII applies to health centers with 15 or more employees. Thus, only those health centers with 50 or more employees are covered concurrently by the FMLA and Title VII.
2. **Identify which laws are applicable to a particular employee's situation.** If the employee has met the eligibility requirements and requests leave because of inability to work due to a serious health condition (e.g., pregnancy complications), the birth and subsequent care of a child, for adoption or foster care, or to care for a child with a serious health condition— then the FMLA will apply. If a serious health condition is involved, then the health center should request a medical certification or consultation regarding the employee or child's health status.²⁷
3. **Verify the employee's benefits and/or entitlements under the relevant laws.**
4. **Remember –** when more than one law applies (e.g., state and local versions of the Federal FMLA), **employers must provide leave that is most protective of the employee's rights.**
5. **Establish a plan for reinstatement, unless the employee would fall under an exception. If an exception applies, determine how the health center will handle it,** according to formal written policies, consistently applied.

DISABILITY INSURANCE

Health centers have the option of partially replacing employees' lost income (e.g., for medical conditions associated with pregnancy) by providing disability insurance coverage for employees as part of a fringe benefits package. A balanced and fair benefits package is important for recruitment and retention purposes. Disability insurance policies vary by length of disability, and tend to fall into either short- or long-term coverage.²⁸ Moreover, in the parental leave context, disability insurance may only cover leave that is specifically related to pregnancy or its complications, including delivery-related complications.²⁹

Short-Term Disability Policies

Short-term disability insurance provides employees who become disabled and unable to work with some income security (i.e., partial payment of salary) for a short period of time. Although disability in the broader insurance coverage context can be from an illness or an off-the-job accident, in the context of parental leave, temporary disability will most likely be the result of pregnancy complications or recovering from giving birth.

26 The information in this section was adapted from the DOL Office of Disability Employment Policy's Employment Laws: Medical and Disability-Related Leave, available at: <http://www.dol.gov/odep/pubs/fact/employ.htm>.

27 As previously noted, FMLA grants leave in other situations as well and is broader than just parental situations.

28 Long-term disability policies begin where short-term policies leave off and cover employees who become disabled and are unable to work for longer periods of time, usually six months or longer. In the context of parental leave, long-term disability policies would typically only pertain to situations where a woman is suffering from severe pregnancy-related complications – either before or after the birth of the baby – and is unable to work for an extended period of time.

29 This is because caring for a child does not render the employee "disabled," even temporarily.

Best Practices for Health Center Parental Leave Policies and Procedures

- **The health center should ensure its parental leave policies are easy to understand and that those in charge of implementation appreciate the importance of uniform application.** When formulating leave policies, health centers should address issues regarding reinstatement, duration of leave, notice requirements, use of vacation and/or sick leave as substitutes for unpaid leave, and disability benefits.
- **The health center should address non-medical parental leave requests when drafting policies.** Recall that parental leave requests can be for reasons such as caring for a newborn, or bonding with a newly adopted or foster care child. Procedures for addressing these types of leave requests are clearly addressed in federal legislation and health centers must comply with them. Thus, health centers must incorporate such procedures (or more generous procedures) into their own policies.
- **The health center should notify employees that written medical certification will be required for certain leave requests.** Health centers should confirm that the medical certification requirements, including time requirements and the consequences of failing to submit certification forms, are clearly spelled out in health center policies. A health center should consider including on any leave of absence form a consent provision granting the employer's health care provider permission to contact the employee's health care provider for purposes of clarifying or authenticating information on medical certification forms.
- **The health center should require Human Resource professionals to thoroughly document any disciplinary actions or communications regarding parental leave.** In the event that a claim does arise under FMLA or Title VII, having clear and detailed documentation will be critical to an adequate defense.

Generally, short-term disability policies require the employee to satisfy an initial "qualifying period," which can mean the employee must remain temporarily disabled for a defined waiting period. This initial qualifying period is commonly up to a week or two. During this time, the employee will likely be exhausting sick days and paid leave. Short-term disability benefits begin after the qualifying period and continue for the duration of the benefit, which is typically a period of weeks (usually under 26 weeks). Most short-term disability insurance policies pay the employee a percentage of his or her salary, generally about half to two-thirds.

A few states have mandated short-term disability programs. Each of these programs has unique provisions and guidelines regarding employer

compliance. The health center's Human Resources director should check to see if the state has a mandated short-term disability program.

Factors to Consider when Choosing a Disability Policy

When choosing a disability policy, a health center should take notice of how "disability" is defined, as this will affect the cost of the policy and when benefits will be triggered. Some policies use an "own occupation" definition of disability, which means an inability to work at one's specific job, while others use an "any occupation" definition of disability, which denotes an inability to work in any job. Generally, policies using the "any occupation" definition are cheaper, as this standard is more difficult to satisfy.

A health center has some flexibility when choosing the terms of a disability policy – factors such as the benefit percentage (often 50%, 60%, or 66% of salary), maximum duration, qualifying period requirements, and which definition of disability is used are generally negotiable and can affect greatly the cost to the employer. A health center also has several options regarding how these policies will be funded – policies can be 100% employer paid, 100% employee paid, or the employer can purchase a base policy and give the employee the option to purchase increased coverage.

CONCLUSION

This Information Bulletin discusses laws that are intended to protect both health centers and their employees in the context of pregnancy and parenting leave, and provides a brief summary of disability insurance to supplement unpaid leave in certain circumstances. While compliance with the applicable laws may appear to be daunting, this need not be the case.

It is imperative that health centers remain conscious of the diverse contexts in which parental leave should be granted and make efforts to identify accurately and address all appropriate requests. To ensure compliance with the laws governing parental leave:

1. Health center management must use common sense and ensure that all Human Resource personnel are properly educated about state and federal parental leave laws; and
2. Health centers should carefully draft and clarify their own policies regarding parental leave.

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