

GUIDANCE ON THE INTERACTION BETWEEN THE NEW FEDERAL FMLA REGULATIONS AND THE CONNECTICUT FMLA REGULATIONS

The U.S. Department of Labor released revised federal Family and Medical Leave Act (FMLA) regulations on November 17, 2008 (see 29 C.F.R. Part 825). These regulations take effect on January 16, 2009, and cover employers with fifty (50) or more employees. Connecticut has its own state Family and Medical Leave Act (CFMLA) that covers employers with 75 or more employees. Employers who are covered by both laws have raised questions as to how the CFMLA and its regulations will interact with the revised federal regulations. The following document is intended to serve as guidance for employers and employees in answering these questions.

Background

Connecticut's FMLA became effective in 1990. The federal FMLA was enacted in 1993. While Connecticut employers with 75 or more employees were covered by both laws, the state law included some worker protections that were not afforded by the federal law. On the other hand, the U.S. Department of Labor adopted extensive regulations implementing the federal FMLA, which provided detailed procedural direction to employers and employees regarding the administration of FMLA leaves.

In order to respond to the concerns of employers trying to understand and comply with both laws, the General Assembly enacted Public Act 96-140, An Act to Coordinate the state Family and Medical Leave Laws with the federal Family and Medical Leave Laws, now codified at Section 31-51kk *et seq.*, of the Connecticut General Statutes. Section 31-51qq required the Labor Commissioner to adopt regulations to establish procedures and guidelines necessary to implement the CFMLA. The law specified that "[i]n adopting such regulations, the commissioner shall make reasonable efforts to ensure compatibility of state regulatory provisions with similar provisions of the federal Family and Medical Leave Act of 1993 and the regulations promulgated pursuant to said act." With that mandate, the Connecticut Department of Labor (CTDOL) promulgated its own CFMLA regulations. While the Labor Commissioner incorporated the majority of the federal FMLA regulations into the CFMLA regulations, the state regulations also retained a substantial number of worker protections that exist in state law, but not federal law.

New Federal Regulations/Interaction with CFMLA

Consistent with this approach, CTDOL has examined the newly revised federal regulations and will be proposing many corresponding revisions to the CFMLA regulations. Some of these revisions will merely codify existing enforcement practices, and CTDOL will be essentially conforming to the new federal regulation, even in advance of formally amending the corresponding state regulation. Other revisions will make a clear change in enforcement policy and can only be implemented through the formal rulemaking process.

There are also a number of federal changes that CTDOL does not plan to incorporate into the CFMLA regulations. Generally, these fall into two categories – either (1) there is a lack of statutory authority for the new federal rule under the CFMLA, or (2) the federal change would undermine a substantive employee protection under the CFMLA.

This document reviews the major federal FMLA regulation changes in the following format:

- Summary of federal change
- Federal regulation language
- Corresponding state regulation language
- Comment discussing whether CTDOL will or will not be immediately conforming to the federal change and the reason(s) why.

CTDOL is taking the unusual step of providing this guidance in advance of the formal rule-making process in order to assist human resources professionals in Connecticut in their efforts to comply with both the state and federal FMLA laws. It is important to note that once CTDOL proposes changes to the CFMLA regulations, there will be opportunity for public comment (including a public hearing) before the proposed changes are reviewed by the Attorney General and the Legislative Review Regulations Committee.

Additional Note regarding Military FMLA

On January 28, 2008, President Bush signed into law the National Defense Authorization Act (NDAA), P.L. 110-181. The NDAA amended the FMLA to provide eligible employees working for covered employers two new leave rights related to military service. This is a federal law without any corresponding Connecticut statute and, therefore, CTDOL is without authority to enforce any of the leave provisions relating to military service. Accordingly, any reference to an FMLA leave due to military service will neither be addressed nor incorporated in Connecticut's regulations.

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ELIGIBLE EMPLOYEES

The federal regulation provides that an employer need not look back more than 7 years to determine if an employee has worked the requisite 12 months.

Federal § 825.800 Definitions

Eligible employee means: (1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee....

State § 31-51qq-1 Definitions

(f) “Eligible employee” means an employee who:

(1) has been employed for a total of at least 12 months by the employer on the date on which any family or medical leave is to commence...

COMMENT: An eligible employee must work for the employer for 12 months before an FMLA leave commences. The 12 months do not need to be consecutive. The new federal regulations put a limitation on how many years an employer is required to look back. An employer now must look back only 7 years to determine if the employee has ever been employed by that employer. The employer may recognize prior employment greater than 7 years as long as that is done uniformly. Because a 7 year look back period is fair to both the employer and the employee and is a reasonable limitation on the existing CFMLA regulations, CTDOL will conform its enforcement practice to reflect this provision.

ELIGIBLE EMPLOYEES (continued)

The federal regulation provides that, although an employer may grant some type of leave to an employee who has not worked for the employer for at least 12 months, any leave taken prior to the 12 month anniversary shall not be designated as FMLA. This has consistently been CTDOL’s position.

Federal § 825.110

(d) The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on “non-FMLA leave” at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA qualifying reason after the employee meets the eligibility requirement would be “FMLA leave.”

COMMENT: Although there is no similar language in the CFMLA, CTDOL has consistently taken the position that an employee may come into an FMLA entitlement while on a non-FMLA leave. If an employee has been granted a leave prior to the 12-month anniversary of his or her employment with the employer, upon the anniversary date, the employee is entitled to the full FMLA entitlement. Inasmuch as this is CTDOL's position, the federal provision does not change our enforcement policy.

JOINT EMPLOYMENT AND PROFESSIONAL EMPLOYER ORGANIZATIONS

The federal regulation provides that a Professional Employer Organization does not enter into a joint employment relationship with its client companies when it performs just administrative duties, such as payroll, benefits and updating employment policies.

Federal § 825.106 Joint employer coverage.

(2) A type of company that is often called a “Professional Employer Organization” (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances....

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. See § 825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer. In those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

State § 31-51qq-4 How is “joint employment” treated under FMLA?

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, and providing FMLA leave. Factors considered in determining which is the “primary” employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

COMMENT: The federal regulation exempts a PEO from joint employment liability if it merely performs administrative functions for its client companies. The specific language of the CFMLA does not exclude a PEO from joint liability with its client companies even if it only performs administrative functions, such as payroll and benefits. Therefore, CTDOL is unable to conform to the federal provision without formally amending the current regulation.

JOINT EMPLOYMENT AND PROFESSIONAL EMPLOYER ORGANIZATIONS – ONE YEAR RULE

The federal regulation provides that the joint employment relationship may end after a one year period.

§ 825.111 Determining whether 50 employees are employed within 75 miles.

(a)(3) For purposes of determining that employee’s eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee’s worksite is the primary employer’s office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee’s worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer’s full-time or permanent employees.

COMMENT: There is no corresponding CFMLA regulation. Therefore, in Connecticut, the PEO remains a potential joint employer past that one-year period. Accordingly, CTDOL is unable to conform to the federal provision without formally amending the current regulation.

SERIOUS HEALTH CONDITION AND CONTINUING TREATMENT

The federal regulation provides that the more than 3 consecutive calendar days of incapacity in the definition of serious health condition must be more than 3 full consecutive calendar days.

Federal § 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves. . .

State § 31-51qq-1. Definitions – Continuing treatment

(u)(1)(B) Continuing treatment by a health care provider, including outpatient treatment. A serious health condition involving continuing treatment by a health care provider includes:

(i) A period of incapacity (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves. . .

COMMENT: CTDOL has consistently interpreted the more than three consecutive calendar days to mean more than three full days. Therefore, the federal provision does not affect our enforcement policy.

SERIOUS HEALTH CONDITION AND CONTINUING TREATMENT (continued)

The federal regulation provides that continuing treatment must include a doctor's visit within 7 days of the beginning of the incapacity and, if there is a second doctor's visit, the second visit must occur within 30 days, absent extenuating circumstances.

Federal § 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct

supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term “extenuating circumstances” in paragraph (a)(1) of this section means circumstances beyond the employee’s control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

State § 31-51qq-1. Definitions – Continuing treatment

(u)(1)(B) Continuing treatment by a health care provider, including outpatient treatment. A serious health condition involving continuing treatment by a health care provider includes:

(i) A period of incapacity (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(aa) Treatment two or more times, including outpatient treatment, by a health care provider or by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(bb) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider, including outpatient treatment.

COMMENT: There are no specific time frames in the CFMLA regarding when the visits to the health care provider must occur. The federal regulations provide that the first (or only) visit must occur within 7 days of the first day of incapacity and the second visit must occur within 30 days of the first day of incapacity, absent extenuating circumstances. CTDOL believes that the time frames in the new federal regulations are reasonable and will conform its enforcement practice to reflect this provision.

SERIOUS HEALTH CONDITION AND CHRONIC CONDITION

The federal regulation provides that a chronic condition requires at least two visits per year to a health care provider.

Federal § 825.115 Continuing treatment.

(c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider....

State § 31-51qq-1 Definitions - Chronic condition

(u)(1)(B)(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which: (aa) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider; (bb) Continues over an extended period of time (including recurring episodes of a single underlying condition); and (cc) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

COMMENT: CFMLA provides for “periodic” visits to a health care provider. The federal regulation that requires two visits per year to a health care provider is a reasonable interpretation of “periodic” and CTDOL will conform its enforcement practice to reflect this provision.

PREGNANCY

The federal regulations have added a separate section regarding leave for pregnancy or birth.

Federal § 825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

(1) Both the mother and father are entitled to FMLA leave for the birth of their child.

(2) Both the mother and father are entitled to FMLA leave to be with the healthy newborn child (*i.e.*, bonding time) during the 12-month period beginning on the date of birth.

(5) The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition. See § 825.124.

(6) Both the mother and father are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(c) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

State § 31-51qq-7 Under what kinds of circumstances are employers required to grant family or medical leave?

(a) Employers covered by the FMLA are required to grant leave to eligible employees for one or more of the following:

(1) Upon the birth of a son or daughter of the employee;

(b) The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or care of a child.

COMMENT: The federal rules provide that “both the mother and father” are entitled to leave for the birth of a child and bonding time. However, CFMLA regulations allow any “eligible employee” to take leave for the birth of a child. This rule applies to parents generally and does not limit leave to one mother and one father. This takes into account the possibility of two mothers or two fathers (in a same-sex relationship), which the federal regulations exclude.

In addition, the federal regulation provides for leave for the “husband” to care for his pregnant spouse or following the birth of the child if the spouse has a serious health condition. In Connecticut, the term “spouse” is not exclusive to marriage between a man and a woman, but also includes same-sex civil union partnerships and same-sex marriage. See Conn. Gen. Stat. § 46b-38aa, et seq.; Kerrigan v. Commissioner of Public Health, 289 Conn. 135 (2008). CTDOL will not substitute the term “husband” for the term “spouse” in the regulations, as same-sex spouses are eligible to take leave to care for their spouse with a serious health condition that is related to either pregnancy or birth. Therefore, CTDOL cannot adopt these changes.

HEALTH CARE PROVIDERS

The federal regulations specifically add “physician assistants” to the definition of “health care provider.”

Federal § 825.125 Definition of health care provider.

(a) The Act defines “health care provider” as:

(b) Others “capable of providing health care services” include only:

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law.

State § 31-51qq-1. Definitions

(1) “Health care provider” means:

(1) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices;

(2) a podiatrist, dentist, psychologist, optometrist or chiropractor authorized to practice by the state in which such person practices and performing within the scope of the authorized practice;

(3) an advanced practice registered nurse, nurse practitioner, nurse midwife or clinical social worker authorized to practice by the state in which such person practices and performing within the scope of the authorized practice;

(4) a Christian Science practitioner listed with the First Church of Christ, Scientist in Boston, Massachusetts;

(5) any health care provider from whom an employer or a group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits;

(6) a health care provider as defined in subdivisions (1) to (5), inclusive, of this subsection who practices in a country other than the United States and who is licensed to practice in accordance with the laws and regulations of that country; or

(7) such other health care provider as the Commissioner determines, performing within the scope of the authorized practice. The Commissioner may utilize any determinations made pursuant to Chapter 568 of the General Statutes.

COMMENT: The federal regulations provide that the definition of “health care provider” now includes “physician assistants.” The CFMLA regulations do not specifically list “physician assistants” under the definition of “health care provider;” however, CTDOLE believes that it can conform its enforcement practice to reflect this change immediately as the regulation allows for any health care provider accepted by an employer or health plan.

INCREMENTS OF INTERMITTENT LEAVE

The federal regulation provides that an employer may charge intermittent FMLA leave in increments of one hour or less, depending on the employer’s leave policy.

Federal § 825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) *Minimum increment.*

(1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave

provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. If an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period in which the FMLA leave is taken. If an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave.

State § 31-51qq-14 Does FMLA leave have to be taken all at once, or can it be taken in parts?

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.

COMMENT: The revised federal regulations permit an employer to grant FMLA using an increment no greater than the shortest period of time an employer uses for other forms of leave. However, in no circumstance may an employer use a period of time that is greater than one hour. The CFMLA permits such an interpretation and CTDOL will conform its enforcement practice to reflect this provision.

INTERMITTENT LEAVE

The federal regulation provides that physical impossibility to return to a work shift may require a longer period of FMLA leave than is actually needed by the employee.

Federal § 825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a)(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.

COMMENT: There is no similar provision in the CFMLA. However, this provision is consistent with CTDOL's position in that when an employee is unable to return to his or her shift due to a physical impossibility, the entire period shall be designated as FMLA.

INTERMITTENT LEAVE (continued)

The federal regulation provides that to determine the number of hours worked for an individual whose hours vary, the employer should take an average of the employee's hours for the past 12 months.

Federal § 825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(b)(2) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

State § 31-51qq-16 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

(c) If an employer has made a permanent or long-term change in the employee's schedule (for other than FMLA, and prior to the notice of need for FMLA leave); the hours worked under the new schedule are to be used for making this calculation.

(d) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 16 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

COMMENT: CFMLA regulations specify that an employer must use the 16 weeks prior to the beginning of the leave period to calculate the hours of an employee who has a varied schedule. Due to the specificity of CFMLA's regulatory provision, CTDOL is unable to conform to the federal provision, which permits a look back period of 12 months, without formally amending the current regulation.

SUBSTITUTION OF PAID LEAVE

The federal regulation provides that an employer and employee may agree to have paid leave supplement an employee's workers' compensation payment and, if the injury or illness qualifies for FMLA, such time will count towards the FMLA entitlement.

Federal § 825.207 Substitution of paid leave.

(e) The Act provides that a serious health condition may result from injury to the employee "on or off" the job. If the employer designates the leave as FMLA leave in accordance with § 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary.

State § 31-51qq-18 Is FMLA leave paid or unpaid?

(e) A serious health condition may result from injury to the employee "on or off" the job. Either the employer or the employee may choose to have the employee's FMLA 16 week leave entitlement run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable.

COMMENT: CFMLA's regulation is silent on an agreement to supplement workers' compensation with paid leave, but, inasmuch as it permits an employee to receive full payment during a period of Workers' Compensation eligibility, CTDOL will conform its enforcement practice to reflect this provision.

EQUIVALENT POSITION AND PAY

The federal regulations now allow an employer to deny employees certain bonuses based on their absence from work due to FMLA.

Federal § 825.215 Equivalent position.

(c) *Equivalent pay.*

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a

specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

State § 31-51qq-23 What is an equivalent position?

(c) Equivalent pay.

(2) Many employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. See sections 31-51qq-24(b) and (c) of the Regulations of Connecticut State Agencies. A monthly production bonus, on the other hand does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate).

COMMENT: The revised federal rule now allows employers to deny employees bonuses that are based on achievement of a specified goal, such as attendance, if they have not met the goal due to an FMLA absence. This is a departure from the previous federal regulation and the CFMLA regulation, which specifically provide that an employee who would have met the requirements for these bonuses but for an FMLA leave, may not be disqualified for the bonus because of that FMLA leave. As the CFMLA regulation speaks to this issue directly and is contrary to the revised federal provision, CTDOL cannot conform to this provision without formally amending the current regulations.

PROTECTION FOR EMPLOYEES

The federal regulation permits a settlement or release of an FMLA claim without the approval of the U.S. Department of Labor or a court.

Federal § 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining

representatives) cannot “trade off” the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court.

State §31-51qq-25 How are employees protected who request leave or otherwise assert FMLA rights?

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA.

COMMENT: CTDOL has consistently taken the position that permission from DOL or a court was unnecessary to effectuate a settlement and will conform its enforcement practice to reflect this provision.

PROTECTION FOR EMPLOYEES WORKING “LIGHT DUTY”

The federal regulation provides that an employee on light duty has a right to job restoration until the end of the applicable 12-month leave year.

Federal § 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. . . . Nor does it prevent an employee’s voluntary and uncoerced acceptance (not as a condition of employment) of a “light duty” assignment while recovering from a serious health condition (*see* § 825.702(d)). An employee’s acceptance of such “light duty” assignment does not constitute a waiver of the employee’s prospective rights, including the right to be restored to the same position the employee held at the time the employee’s FMLA leave commenced or to an equivalent position. The employee’s right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

State §31-51qq-25 How are employees protected who request leave or otherwise assert FMLA rights?

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot “trade off” the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee’s voluntary and uncoerced acceptance (not as a condition of employment) of a “light duty” assignment while recovering from a serious health condition (see section 31-51qq-41(b) of the Regulations of Connecticut State Agencies). In such a circumstance the employee’s right to restoration to the same or an equivalent position is available until 16 weeks have passed within the 2 year period, including all FMLA leave taken and the period of “light duty.”

COMMENT: The revised federal rule now protects an employee’s right to be restored to his/her position for a maximum period of 12 months if that employee accepts a “light duty” assignment. That is, the employer cannot count the time the employee works “light duty” against the employee’s FMLA leave entitlement. The CFMLA also agrees that a “light duty” assignment cannot be counted against an employee’s FMLA leave entitlement; however, it is limited to 16 weeks within the 2 year period, including all FMLA leave taken and the period of “light duty.” Therefore, CTDOL cannot conform to this provision without formally amending the current regulation.

EMPLOYER NOTICE REQUIREMENTS

The federal regulations now require employers to provide separate notices to employees regarding FMLA: general notice, eligibility notice, rights and responsibilities notice, and designation notice.

Federal § 825.300 Employer notice requirements.

The federal regulations create new notice requirements and forms. Employers are now required to issue:

(a) *General notice.* (1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act’s provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division . . .

(b) *Eligibility notice.* (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee’s leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee’s eligibility to take FMLA leave within five business days, absent extenuating circumstances.

(c) *Rights and responsibilities notice.* (1) Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.

(d) *Designation notice.* (1) The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (*e.g.*, after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances.

State § 31-51qq-26 What notices to employees are required of employers under the FMLA?

(a) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA shall be included in the handbook or other document.

(b) If such an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA.

(c) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice shall be provided to the employee in a language in which the employee is literate. Such specific notice shall include, as appropriate:

(1) that the leave shall be counted against the employee's FMLA leave entitlement (see section 31-51qq-19 of the Regulations of Connecticut State Agencies);

(2) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see section 31-51qq-30 of the Regulations of Connecticut State Agencies);

(3) the employee's right to substitute paid leave and whether the employer shall require the substitution of paid leave, and the conditions relating to substitution.

(4) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see section 31-51qq-35 of the Regulations of Connecticut State Agencies).

(5) the employee's right to restoration to the same or an equivalent job upon return from leave (see section 31-51qq-21 of the Regulations of Connecticut State Agencies).

(g) Except as required in subsection (h) of this section, if the employer is requiring medical certification or a fitness-for-duty report, written notice of the requirements shall be given with respect to each employee notice of a need for leave.

COMMENT: Although these new notices are different from the CFMLA notices, they contain most of the same information that is required by the CFMLA regulations. CTDOL will permit employers to use the federal notices listed above, except that employers should be aware of the following differences and adjust the notice forms accordingly:

(1) General notice (Appendix C – WH Publication 1420).

CFMLA regulations do not have a posting requirement, but do provide that employers must provide written notice to employees of their FMLA policies upon hire.

(2) Eligibility and Rights and Responsibilities notice (Appendix D – Form WH-381).

The CMFLA provides that employees are eligible for state FMLA if they have worked 1,000 hours as opposed to the federal requirement of 1,250 hours and provides for 16 weeks of leave in a 24-month period. The CFMLA does not have a "key employee" exception. The CFMLA requires an employer to return an

employee to his/her original job, unless that job is “not available,” in which case the employer can return the employee to an equivalent position. This is stricter than the federal law, which allows the employer to return the employee to an equivalent position regardless of whether the original position still exists. The CFMLA requires the notice to be provided to the employee within 2 days, as opposed to the new 5 days allowed by the federal rule. The above differences would require statutory and/or regulatory changes and CTDOL cannot conform to this provision.

(3) Designation notice (Appendix E – Form WH-382).

The federal regulations provide that an employer can require the employee to submit a fitness-for-duty certification that addresses whether the employee can perform the essential functions of his/her job. The CFMLA regulations do not allow employers to require an employee’s fitness-for-duty certification to be more than a “simple statement of an employee's ability to return to work.” In addition, the CFMLA requires the notice to be provided to the employee within 2 days, as opposed to the new 5 days allowed by the federal rule. Therefore, CTDOL cannot conform to these provisions without formally amending the current regulation.

EMPLOYEE NOTICE REQUIREMENTS FOR FORESEEABLE LEAVE

The federal regulations impose stricter obligations on employees regarding notice procedures for foreseeable leave.

Federal § 825.302 Employee notice requirements for foreseeable FMLA leave.

(c) *Content of notice.* An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. . . . When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. . . .

(d) *Complying with employer policy.* An employer may require an employee to comply with the employer’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. . . . Where an employee does not comply with the employer’s usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. . . .

State § 31-51qq-27 What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may state only that leave is needed for an expected birth or adoption for example. The employer shall inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave.

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. . . . However, failure to follow such internal employer procedures shall not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(g) An employer may waive employee's FMLA notice obligations or the employer's own internal rules on leave notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement or applicable leave plan allow less advance notice to the employer.

COMMENT: The federal regulations now specifically require employees with previously qualified intermittent FMLA leave to notify their employer when an absence is due to that FMLA qualifying reason. CTDOL believes that it is reasonable for employers to expect their employees to identify such absences as FMLA when they have previously been qualified as such and that view is consistent with current CFMLA enforcement practice.

The federal regulations impose stricter requirements on employees to comply with employer notification policies, including a provision that failure to do so can result in the employer delaying or denying FMLA leave. The CFMLA regulations, however, do not allow an employer to delay or deny leave if an employee fails to comply with internal notice policies as long as the employee gives "timely verbal or other notice," and CTDOL cannot conform to the federal provision without formally amending the current regulation.

EMPLOYEE NOTICE REQUIREMENTS FOR UNFORESEEABLE LEAVE

The federal regulations impose stricter obligations on employees regarding notice procedures for unforeseeable leave.

Federal § 825.303 Employee notice requirements for unforeseeable FMLA leave.

(c) *Complying with employer policy.* When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

State § 31-51qq-28 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee shall give such notice to the employer of the need for FMLA leave as is practicable under the facts and circumstances of the particular case. It is expected that an employee shall give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances of the particular case where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

COMMENT: The federal regulations impose stricter requirements on employees to comply with employer notification policies, including that failure to do so can result in the employer delaying or denying FMLA leave. The CFMLA regulations, however, do not allow an employer to delay or deny leave if an employee fails to comply with internal notice policies. CTDOL cannot conform to this provision without formally amending the current regulation.

MEDICAL CERTIFICATION

The federal regulations provide new Medical Certifications, WH-380E for the employee's own serious health condition and WH-380F for a family member's serious health condition. The employer should request the medical certification within 5 business days from its notice of the employee's need for leave.

Federal § 825.305 Certification, general rule.

(a) *General.* An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in §§ 825.309 and 825.310, respectively. An employer must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by § 825.300(c). An employer's oral request to an employee to furnish any subsequent certification is sufficient.

(b) *Timing.* In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences.

State § 31-51qq-30 When shall an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, or daughter, as defined in section 31-51qq-1 of the Regulations of Connecticut State Agencies, or parent, or due to the employee's own serious health condition, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer shall give notice of a requirement for medical certification each time a certification is required; such notice shall be written notice whenever required by section 31-51qq-26 of the Regulations of Connecticut State Agencies. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient....

(c) In most cases, the employer shall request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences.

COMMENT: An employer may utilize the new federal FMLA medical certification forms (WH-380E and WH-380F) when requesting medical certification for a leave under CFMLA. However, the new federal forms request a diagnosis from the health care provider. The CFMLA does not include the request for diagnosis in its medical certification and CTDOL cannot conform to this provision without formally amending the current regulation.

In addition, as explained with regard to the Eligibility and Rights and Responsibilities notice, the CFMLA requires the Medical Certification to be provided to the employee within 2 days, as opposed to the new 5 days allowed by the federal rule. CTDOL cannot conform to this provision without formally amending the current regulation.

CURING THE DEFICIENCIES IN MEDICAL CERTIFICATIONS

The federal regulation gives the employee a 7-day period to cure any deficiency in the medical certification upon notification by the employer of the deficiencies to be cured.

Federal § 825.305 Certification, general rule.

(c) Complete and sufficient certification.

The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency.

(d) At the time the employer requests certification, the employer shall also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

State § 31-51qq-30 When shall an employee provide medical certification to support FMLA leave?

(d) At the time the employer requests certification, the employer shall also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

COMMENT: CFMLA provides a “reasonable opportunity” to cure deficiencies in the medical certification. CTDOL believes that the 7-day period of time provided by the federal regulations is reasonable within the meaning of the CFMLA regulations, especially in light of the provision that the 7-day period may be extended if it is not practicable under the circumstances. The same time periods

are incorporated into the provision concerning the medical certification for a family member.

FYI - CTDOL has long accepted the terms “unknown” or “indeterminate” as appropriate on medical certifications where more definitive time frames were not available to the health care provider. The supplementary information to the federal regulation provides guidance that reinforces CTDOL’s position: “[w]hile terms such as ‘lifetime,’ ‘unknown,’ or ‘indeterminate’ will not be sufficient where more specific estimates are possible, there will be situations in which such terms are an appropriate response reflecting the health care provider’s best medical judgment and will therefore be sufficient.”

AUTHENTICATION AND CLARIFICATION OF A MEDICAL CERTIFICATION

The federal regulations permit the employer to call the health care provider directly for the purpose of the authentication and clarification of the medical certification.

Federal § 825.307 Authentication and clarification of medical certification for leave taken because of an employee’s own serious health condition or the serious health condition of a family member; second and third opinions.

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee’s direct supervisor contact the employee’s health care provider.

State § 31-51qq-32 What may an employer do if it questions the adequacy of a medical certificate?

(a) If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

COMMENT: The federal regulation provides for an employer’s direct contact with the employee’s health care provider. Such a provision contravenes the language of the CFMLA regulation, which specifically mandates that the contact to clarify a medical certification must be between health care providers. Accordingly, CTDOL

is unable to conform to this provision without formally amending the current regulation.

SECOND OPINION ON A MEDICAL CERTIFICATION

The federal regulations provide that when a second opinion is required by the employer, the employee or the employee's family member must release relevant medical information pertaining to the serious health condition to the health care provider who is performing the second opinion.

Federal § 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(b) *Second opinion.* (1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

COMMENT: There is no corresponding CFMLA provision. However, it is reasonable to expect that an employee or employee's family member would provide the relevant medical information to assist in the assessment of his or her serious health condition. Accordingly, CTDOL will conform its enforcement practice to reflect this provision.

COPIES OF THE SECOND AND THIRD OPINION

The federal regulation provides that an employer must provide a copy of the second and third opinion to the employee within 5 days of the employee's request.

Federal § 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(d) *Copies of opinions.* The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

State § 31-51qq-32 What may an employer do if it questions the adequacy of a medical certificate?

(d) The employer shall provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.

COMMENT: CFMLA provides that the employer must provide the second and third opinion reports to the employee within 2 days of the employee's request. CTDOL believes that the 2 day period is more beneficial to the employee and, therefore, CTDOL is unable to conform to the federal provision without formally amending the current regulation.

TRANSLATION OF MEDICAL CERTIFICATIONS FROM ABROAD

§ 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(f) *Medical certification abroad.* In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

COMMENT: CFMLA has no similar provision but believes that such a provision assists the employer in making a prompt determination for the employee. CTDOL will conform its enforcement practice to reflect this provision.

RECERTIFICATION

The federal regulations allow for recertification less than every 30 days in certain circumstances.

Federal § 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *30-day rule.* An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) *More than 30 days.* If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. . . . Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) *Less than 30 days.* An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). . . . ; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. . . .

(f) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

State § 31-51qq-33 Under what circumstances may an employer request subsequent recertifications of a medical condition?

(a) The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis, provided the standards for determining what constitutes a reasonable basis for recertification may be governed by a collective bargaining agreement between such employer and a labor organization which is the collective bargaining representative of the unit of which the worker is a part if such a collective bargaining agreement is in effect. Unless otherwise required by the employee's health care provider, the employer may not require recertification more than once during a thirty-day period and, in any case, may not unreasonably require recertification.

(b) The employer shall pay for any recertification that is not covered by the employee's health insurance. No second or third opinion on recertification may be required.

COMMENT: CFMLA regulations allow employers to seek recertification on a “reasonable basis,” but not more than every 30 days. The federal regulations also limit recertifications to 30 days and even extend that time frame for serious health conditions with a “minimum duration” of more than 30 days. This is in line with current CFMLA regulations.

However, the federal regulations proffer two exceptions to that rule. First, if the minimum duration of a serious health condition is more than 6 months, an employer can always request recertification every 6 months in connection with an absence. CTDOL believes this conforms to CFMLA’s limitation of recertifications on a “reasonable basis.” Second, the federal regulations provide for recertifications less than 30 days in cases of fraud, significantly changed circumstances of the leave or in response to requests for extension of the leave. Because the language in the CFMLA statute specifically prohibits recertifications of less than 30 days, CTDOL cannot conform to this provision without a statutory change.

Finally, the federal regulation provides that recertifications requested by the employer shall be at the employee’s expense. The CFMLA statute and regulations specifically provide that employers are to pay for recertifications that are not covered by the employee’s health insurance and, as such, CTDOL cannot conform to this provision without a statutory change.

FITNESS-FOR-DUTY CERTIFICATION

The federal regulations allow employers to seek more information in the fitness-for-duty certification related to an employee’s health condition when returning from leave.

Federal § 825.312 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee’s own serious health condition that made the employee unable to perform the employee’s job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee’s health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. See § 825.305(d).

(b) An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee’s need for FMLA leave. The certification from the employee’s health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee’s ability to perform the essential functions of the employee’s job. In order to require such a certification, an employer must provide an

employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

State § 31-51qq-35 Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a "fitness-for-duty" report)?

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) Any notice that employers are required to give to each employee giving notice of the need for FMLA leave regarding their FMLA rights and obligations shall advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook shall explain the employer's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification shall be required either at the time notice of the need for leave is given or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required.

(f) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notices required in subsection (e) of this section.

COMMENT: CFMLA regulations allow an employer to require an employee to provide a fitness-for-duty certification from a health care provider before returning to work from a continuous FMLA leave. The fitness-for-duty certification “need only be a simple statement of an employee’s ability to return to work.” The federal regulations have expanded this requirement and now allow employers to seek a more detailed fitness-for-duty certification that asks the employee’s health care provider to address whether the employee can perform the essential functions of the job. CTDOL cannot conform to this provision without formally amending the current regulation and will continue to prohibit requiring fitness-for-duty certifications that are more than a simple statement.

In addition, the federal regulations now allow personnel beyond the employer’s health care provider to contact the employee’s health care provider directly to seek authentication and clarification of the fitness-for-duty certification. CFMLA regulations only allow the employer’s health care provider to do this and, therefore, CTDOL cannot conform to this provision without formally amending the current regulation.

FITNESS-FOR-DUTY CERTIFICATION FOR INTERMITTENT LEAVE

The federal regulations allow employers to request fitness-for-duty recertifications for intermittent leave.

Federal § 825.312 Fitness-for-duty certification.

(f) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee’s ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety

concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

State § 31-51qq-35 Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a "fitness-for-duty" report)?

(g) An employer is not entitled to certification of fitness to return to duty when the employee takes intermittent leave. (See section 31-51qq-14 of the Regulations of Connecticut State Agencies.)

COMMENT: The federal regulations provide that an employer can require a fitness-for-duty certification every 30 days for intermittent or reduced schedule leave absences if reasonable safety concerns exist regarding the employee's ability to perform his or her duties. The CFMLA currently does not allow employers to request fitness-for-duty certifications for intermittent or reduced schedule leaves and CTDOL cannot conform to this provision without formally amending the current regulation.