



# New Mexico State Personnel Board State Personnel Office

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## Interpretative Memorandum 2011 - 006

Date: August 23, 2011  
To: Cabinet Secretaries, Agency Directors and Human Resources Managers  
From: Eugene J. Moser, State Personnel Director  
Subject: Family Medical Leave Act of 1993 Guidelines

### I. Purpose:

- A. This Interpretative Memorandum shall provide guidelines to agencies on implementation of the Federal Family Medical Leave Act of 1993 (FMLA) and the regulations there under.
- B. This memorandum replaces any correspondence from this office regarding any policy/questions previously issued. Please ensure that this revision is incorporated into your agency policy in this regard, made available to your staff, to all employees in your agency and maintain a record that every employee has received a copy. This memorandum applies to all state employees, regardless of collective bargaining agreement or pay plan.
- C. This Interpretative Memorandum is a result of final regulations issued by the United States Department of Labor in November of 2008 which became effective on January 16, 2009 and to amendments in the National Defense Authorization Act for Fiscal Year 2010 signed into law in October 2009.
  1. Specific changes as a result of the final regulations issued in November 2008 include:

- **New military caregiver leave.** Employees are allowed to take up to 26 weeks of unpaid FMLA leave in each 12-month period to care for family members (i.e. “spouse, son, daughter, parent, or next of kin”) who suffered a serious injury or illness while on active military duty.
  - **New leave for families of National Guard and Reserve members.** Families of National Guard and Reserve personnel on active duty are allowed to take up to 12 weeks of job-protected FMLA leave per year to manage their affairs.
  - **Revised definition of a “serious condition.”** The new regulations modify the definition of an FMLA-qualifying “serious health condition.” The new rules clarify that treatment two or more times must occur within 30 days of the first day of incapacity.
  - **Direct contact with doctor allowed.** The new regulations allow employers through a health care provider, a human resource professional, a leave administrator, or management official to directly contact an employee’s health care provider to seek clarification about information on an employee’s FMLA certification form.
2. Specific changes as a result of amendments signed into the National Defense Authorization Act for fiscal Year 2010 include:
- **Extended eligibility for qualifying exigency leave** to families of all service members, on active duty or called to active duty status. The FMLA sets forth seven general categories of qualifying exigencies: (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, and (7) post-deployment activities. (See Section III, paragraph K below).
  - **Expand the military caregiver leave** to include veterans of the Armed Forces who were service members at any time during the five years proceeding the date on which the veteran undergoes medical treatment, recuperation or therapy.
  - **Clarifying the definition of active duty** which is now called “covered active duty” and includes members of the regular component of the Armed Forces.
  - **Adding the term “covered military member”** to the list of definitions as this term is used when describing qualifying exigency leave situations.
  - **Clarifying the term “covered service member” to include veterans** and used when describing military caregiver leave situations.
  - **Clarifying the term “serious injury or illness of a covered service member”** that means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in the line of duty in the Armed Forces) and that may render the member medically unfit to perform the duties of the member’s office grade, rank or rating.

## II. **Policy**

- A. Every year, as measured forward from the date of the employee’s first FMLA leave begins, the State of New Mexico will provide up to 12 weeks of job-protected leave to “eligible” employees for certain family and medical reasons consistent with the FMLA and relevant State law.

- B. In addition, an eligible employee is entitled to 26 workweeks of leave to care for a covered service member with a serious injury or illness during a “single 12-month period.”

### III. **Definitions**

Listed below are the definitions of specific words and phrases as used in the FMLA. These definitions are intended to be used solely in relation to the provisions of the Family Medical Leave Act, and should not be expanded to any other situation. Following each heading is a citation number from the regulations published in 2009 or Public Law 111-84.

A. **“COVERED ACTIVE DUTY”** (Public Law 111-84) is defined as:

1. in the case of a member of the regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and
2. in the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty and includes:
  - (a) Retired members of the Regular Armed Forces and members of retired Reserve who retired after completing 20 years of active service;
  - (b) All reserve unit component members in case of war or national emergency;
  - (c) Unassigned members of the Ready Reserve; and
  - (d) The National Guard and state military during war or cases of national emergency as declared by the President or Congress.

B. **“COVERED MILITARY MEMBER”** (CFR 825.126 and Public Law 111-84) This term is used when describing employee leave for a qualifying exigency and includes, the employee’s spouse, son, daughter, or parent who is on covered active duty or called to covered active duty.

C. **“COVERED SERVICEMEMBER”** (Public Law 111-84) This term is used when describing employee leave to care for a service member or veteran with a serious injury or illness and includes:

1. a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness; or
2. a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

D. **“EMPLOYEE IS NEEDED TO CARE FOR A FAMILY MEMBER OR A COVERED SERVICEMEMBER”** (CFR 825.124) This encompasses both physical and psychological care which include situations where:

1. Because of a serious health condition, the family member or covered service member is unable to care for his or her own basic medical, hygienic, nutritional needs or safety; or is unable to transport himself or herself to the doctor.
2. The employee is needed to provide psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.
3. The employee may be needed to fill in for others who are caring for the family members or covered service members, or to make arrangements for changes in care, such as transfer to a nursing home.

**E. "HEALTH CARE PROVIDER" (CFR 825.125)**

1. A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices.
2. Others capable of providing health care services including only:
  - Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist) authorized to practice in the State.
  - Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law.
  - Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.
  - Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits, including a foreign physician.

**F. "INCAPABLE OF SELF-CARE" (CFR 825.122)** Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs).

**G. "IN LOCO PARENTIS" (CFR 825.122)** Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

**H. "NEXT OF KIN" (CFR 825.127)** The next of kin of a covered service member is the nearest blood relative, other than the covered service member's spouse, parent, son or daughter, in the following order of priority:

1. Blood relatives who have been granted legal custody of the service member by court decree or statutory provisions;
2. Brothers and sisters;
3. Grandparents;
4. Aunts and uncles;
5. First cousins;

unless the covered service member has specifically designated in writing another blood relative for the purposes of military caregiver leave under the FMLA.

- I. **"PARENT"** (CFR 825.122) a biological, adoptive, step or foster parent or an individual who stands or stood in loco parentis to an employee when the employee was a child. This term does not include parents "in law".
- J. **"PHYSICAL OR MENTAL DISABILITY"** (CFR 825.122) A physical or mental impairment that substantially limits one or more of the major life activities of an individual.
- K. **"QUALIFYING EXIGENCY"** (CFR 825.126 and Public Law 111-84) Eligible employees may take FMLA leave while the employee's spouse, son, daughter or parent (the "covered military member") is on covered active duty or called to covered active duty for one or more of the following qualifying exigencies:
  1. **Short notice deployment** – leave to address issues that arise from the fact that a covered military member is notified of an impending call or order to covered active duty seven days or less prior to the date of deployment. Leave under this event can be used for a period of seven calendar days beginning on the date the covered military member is notified of the impending call or order to covered active duty.
  2. **Military events and related activities** – leave to attend any official ceremony, program or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the covered military member or to attend family support or assistance programs and information briefings sponsored or promoted by the military, military service organizations or the American Red Cross that relate to the covered active duty or call to covered active duty.
  3. **Childcare and school activities** – events include:
    - (a) Leave to arrange for alternative childcare if the call to covered active duty necessitates a change in existing childcare arrangements.
    - (b) Leave to provide childcare on an urgent immediate basis provided such care arises from the call to covered active duty.
    - (c) Leave to enroll in or transfer to a new school or day care facility when necessitated by the covered active duty or call to covered active duty status.
    - (d) Leave to attend meetings with staff at a school or daycare facility, such as meeting with school officials regarding disciplinary measures, parent-teacher conferences, or meeting with school counselors when such meetings are necessary due to circumstances arising from the call to covered active duty or call to covered active duty.
  4. **Financial and legal arrangements** – events include:
    - (a) Leave to make or update financial or legal arrangements to address the covered military member's absence while on covered active duty or call to covered active duty such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, obtaining military identification cards or updating a will or living trust.

(b) Leave to act as covered military member's representative before a federal, state or local agency for purposes of obtaining, arranging or appealing military services benefits while the covered military member is on covered active duty and for a period of 90 days following the termination of the covered military member's covered active duty status.

5. **Counseling** – leave to attend counseling provided by someone other than a health care provider for oneself, for the covered military member or for a child, provided that the need for counseling arises out of the covered active duty or call for covered active duty.
6. **Rest and recuperation** – leave to spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during a period of deployment. Eligible employees may take up to five days for each instance of rest and recuperation.
7. **Post deployment activities** – events include:
  - (a) Leave to attend ceremonies, reintegration briefing and events or any other official programming or ceremony sponsored by the military for a period of 90 days following the termination of the covered military member's covered active duty status.
  - (b) Leave to address issues that arise from the death of a covered military member while on covered active duty status such as meeting and recovering of the body and making funeral arrangements.
8. **Additional activities** – Leave to address other events that arise out of the covered military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave qualifies as an exigency and both agree to the timing and extent of the leave.

L. **"SERIOUS HEALTH CONDITION"** (CFR 825.114 and CFR 825.115) for purposes of the FMLA, serious health condition means an illness, injury, impairment, or physical or mental condition that involves:

1. **Inpatient care**, i.e., an overnight stay, in a hospital, hospice, or residential care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care; or
2. **Continuing treatment** by a health care provider that involves:
  - (a) **A period of incapacity** (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery there from) **of more than three consecutive full calendar days; and**
  - (b) 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, 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 order 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. The first (or only) treatment visit to a health care provider must be within seven (7) days of the first day of incapacity.

3. **Pregnancy** is defined as any period of incapacity due to pregnancy, or for prenatal care. This absence qualifies for FMLA leave even though the employee does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days; or
4. **Chronic serious health condition** is defined as any period of incapacity or treatment for such incapacity due to a chronic serious health care condition. **Chronic serious health condition** is defined as one which:
  - (a) Requires periodic visits (defined as at least twice per year) for treatment by a healthcare provider, or by a nurse or physician's assistant under direct supervision of a health care provider; and
  - (b) Continues over an extended period of time; and
  - (c) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.); or
5. **Permanent or long term condition** means a period of incapacity which is permanent or long term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider, (e.g., Alzheimer's, a severe stroke, or the terminal stages of a disease); or
6. **Multiple treatments.** Any period of absence to receive multiple treatments (including any period of recovery there from) by a health care provider or a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention such as cancer (radiation, chemotherapy, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).
7. **Specific Exclusions.** Routine physical, eye, or dental examinations, and cosmetic treatments, cold, flu, and earaches without complications are ordinarily excluded.
8. **Specific Inclusions.** The following conditions are included in the definition of serious health condition if all the conditions of the FMLA are met:
  - (a) Mental illness
  - (b) Allergies; and
  - (c) Substance abuse. Leave may only be taken for treatment of substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. Absence due to an employee's use of the substance does not qualify for FMLA leave. (CFR 825.119)

M. **"SERIOUS INJURY OR ILLNESS OF A COVERED SERVICEMEMBER"** ( Public Law 111-84) The term "serious injury or illness"

1. in the case of a member of the Armed Forces (including a member of the National Guard or Reserves), means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty in the Armed Forces) and that may render the member medically unfit to perform the duties of the member's office grade, rank or rating; and
  2. in the case of a veteran who was a considered to be a covered service member (as previously defined), means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the members active duty and was aggravated by service in the line of duty on active during in the Armed Forces) and that manifested itself before or after the member became a veteran.
- N. **"SON" OR "DAUGHTER"** (CFR 825.122) means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care" because of a mental or physical disability at the time that FMLA leave is to commence.
- O. **"SPOUSE"** (CFR 825.122) a spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized.
- P. **"UNABLE TO PERFORM THE FUNCTIONS OF THE POSITION OF THE EMPLOYEE"** (CFR 825.123) Where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act. A person who must be absent to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions during the absence for the treatment.

#### IV. **Procedures and Responsibilities**

##### A. **Eligibility**

##### 1. **Employee Eligibility**

- (a) The employee must have worked for the State of New Mexico for at least 12 months. The 12 months need not be consecutive, provided the employee's prior service occurred within the last seven years or, if the break in service was longer than seven years, was due to the employee's duty to fulfill his or her National Guard or Reserve military service obligation.
- (b) In addition, the employee must have worked at least 1,250 hours during the 12 months immediately preceding the request. The Fair Labor Standards Act requires employers to count hours of work only, not paid hours such as vacation, holidays, sick pay, unpaid leave of any kind, or periods of layoff. An employee returning from fulfilling his or her National Guard or military obligation shall be credited with the hours of service that would have been performed but for the period of military service.



## 2. **Reasons for Taking a Qualifying Leave**

- (a) For the birth of the employee's child, and to care for such child.
- (b) For the placement with an employee of a child for adoption or foster care.
- (c) To care for the employee's spouse, son or daughter, or parent with a serious health condition.
- (d) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of an employee's job.
- (e) Because of any qualifying exigency arising out of the fact that the employee's spouse, daughter, or parent is a covered military member on covered active duty (or has been notified of an impending call or order to covered active duty).
- (f) To care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the service member.
  - (1) Under this provision, eligible employees are entitled to 26 weeks of leave during a single 12-month period.
  - (2) The single 12-month period begins on the first day the eligible employee takes FMLA to care for the covered service member and ends 12 months after that date.
  - (3) If the employee does not take the full 26 weeks during the single 12-month period, any remaining part of the 26 weeks is forfeited.
  - (4) Leave entitlement is to be applied on a per covered service member, per injury basis, thus entitling an employee to more than one period of 26 weeks of leave if the leave is to care for the same service member with a subsequent injury or illness or if it is to care for a different covered service member, except that no more than 26 workweeks of leave may be taken in a single 12-month period.
  - (6) An eligible employee is entitled to combine a total to 26 weeks of leave for any FMLA qualifying reason during the single 12-month period provided that the employee is entitled to no more than 12 weeks of leave for one or more of the following:
    - i. Birth of son or daughter
    - ii. Placement of son or daughter with the employee for adoption or foster care
    - iii. To care for a spouse, son, daughter or parent who has a serious health condition
    - iv. Because of the employee's own serious health condition.
    - v. Because of a qualifying exigency.

## 3. **Employer's Response to the Employee's Request for FMLA Leave**

When an employee requests FMLA qualifying 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. In addition, each time an

eligibility notice is given, the employer must provide the employee with the following (Form WH-381- While use of this form by employers is optional, it provides employees with the information required by 29 C.F.R. 825.300. This form may be located at <http://www.dol.gov/whd/forms/WH-381.pdf> :

- (a) Notice describing the employee's obligations and explaining the consequences of a failure to meet the obligations.
- (b) The leave will be counted against the employee's 12 weeks of FMLA leave.
- (c) Any certification requirements (of a serious health condition, serious injury or illness or qualifying exigency) and the consequences of failing to furnish such certification.
- (d) Employee's right to use paid leave, whether the employer requires the substitution of paid leaves, and the employee's right to take unpaid leave if the employee does not meet the requirements for paid leave.
- (e) Requirements concerning payment of health insurance premiums.
- (f) The employee's potential liability for payment of health insurance premiums paid by the employer during FMLA leave if the employee fails to return to work after taking the leave.
- (g) The employee's rights to maintenance of benefits and restoration to the same or an equivalent job upon return from FMLA leave.
- (h) The employee's status as a "key employee" and its potential consequences.

## **B. Certification Requirements**

1. In most cases, the Agency Medical Coordinator will request that an eligible employee furnish certification where the requested leave is to care for a covered family member with a serious health condition or due to the employee's own serious health condition.
2. The Agency Director or designee may require that an employee's leave because of a qualifying exigency or to care for a covered service member with a serious injury or illness be supported by a certification;
3. In most cases, the Agency Director or designee will request the certification at the time the request for leave is made, or in the case of an unforeseen leave, within five (5) business days after the leave commences. However, the appointing authority may request a certification at some later date if it has reason to question whether the leave is appropriate or its duration.
4. If the Agency Director or designee finds that any certification is incomplete or insufficient, the Director or designee will advise the employee, and will state what additional information is needed.
5. If the required certification is not provided, the taking of the leave may be denied. In all cases it is the employee's responsibility to provide a complete and sufficient certification.

6. The Agency Director or designee may request a fitness for duty certificate upon the employee's return to work only if the requirement is delineated as part of the approval process.

### **C. Designating Leave and Required Notices**

When the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason (e.g. after receiving a completed certification), the employer must notify the employee of its determination within five (5) business days absent extenuating circumstances. If the employer is designating the leave as FMLA-qualifying, this notification should include the following:

1. The amount of the leave counted against the employee's leave entitlement, including, if known, the number of days, hours or weeks that will be counted. If it is not possible to provide the amount because the need for the leave is unscheduled, the employee has the right to request this information but not more often than once in a 30-day period and only if leave was taken during that period.
2. Whether the employer will require paid leave to be substituted for unpaid leave, and that paid leave taken will be counted as FMLA leave.
3. Whether the employer will require the employee to provide a fitness-for-duty certification, and whether the fitness-for-duty certification must address the employee's ability to perform the essential functions of the job.

If the employer determines that the leave will not be designated as FMLA-qualifying (e.g. the leave is not for a reason covered by the FMLA or the FMLA leave has been exhausted), the employer must notify the employee of that determination.

**Retroactive Designation:** The employer may retroactively designate leave as FMLA with appropriate notice to the employee, provided that its failure to timely designate the leave does not cause harm or injury to the employee. In all cases, the employee and employer may mutually agree that leave be retroactively designated as FMLA leave. (Form WH-382- While use of this form by employers is optional provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c). This form may be found at <http://www.dol.gov/whd/forms/WH-382.pdf>)

## **VI. Job Benefits and Protection**

- A. During an FMLA qualifying leave, the employee and dependent health and dental insurance is maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the entire leave period.
- B. An eligible employee returning from a FMLA qualifying leave is entitled to be returned to the same position and shift that the employee held when the FMLA qualifying leave began, or to an equivalent position and shift with equivalent benefits, pay, and other terms and conditions of employment.

- C. Provided the employee returns to work immediately following his/her FMLA qualifying leave (i.e., does not follow the FMLA qualifying leave with additional unpaid leave), benefits must be resumed upon the employee's return to work at the same level as were provided when leave began. Any new or additional coverage or changes in health benefits must be made available to an employee while on FMLA qualifying leave.

## **VII. General Provisions**

### **A. Recordkeeping**

1. FMLA provides that the Appointing Authority shall make, keep, and preserve records pertaining to the obligations under the Act.
2. The records must disclose the following:
  - (a) Basic payroll data - name; address; occupation; rate of pay; hours worked per pay period; additions and deductions from wages; total compensation paid.
  - (b) Dates FMLA qualifying leave is taken.
  - (c) If FMLA qualifying leave is taken in increments of less than one full day, the number of hours taken.
  - (d) Copies of employee notices of leave provided to the employer; copies of all general and specific notices given to employees by the employer.
  - (e) Any documents describing employee benefits or employer policies or practices regarding taking of paid or unpaid leave.
  - (f) Premium payments of employee benefits.
  - (g) Records of any disputes between the employer and employee regarding designation of FMLA qualifying leave.
  - (h) Records and documents relating to medical certifications or medical histories of employees or employees' family members, which shall be maintained in separate confidential files.

### **B. Posting Requirements**

1. Appointing Authorities must post a notice describing the Act's provisions. The notice must be posted in all areas where employees and applicants for employment would normally expect to find official notices, and may also be posted electronically, provided that it is in a conspicuous place on the Appointing Authority's website and is accessible to both applicants and current employees.
2. If an Appointing Authority publishes and distributes an employee handbook, information on employee entitlements and obligations under the FMLA must be included.
3. If the Appointing Authority does not publish or distribute a handbook, it must provide written guidance to employees when they request a FMLA qualifying leave and to each new employee upon hire.

### **C. Appeal Process**

If an employee believes that their rights under the FMLA have been violated, he/she may:

1. Internal

Contact their Human Resources Office.

2. External

(a) File or have another person file on his/her behalf, a complaint with the Secretary of the United States Department of Labor.

- (1) The complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, United States Department of Labor. The complaint may be filed at any local office of the Wage and Hour Division; the address may be found in telephone directories or on the Department of Labor's website.
- (2) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his/her FMLA rights have been violated, but in no event more than two (2) years from the date the alleged violation occurred, or three (3) years for a willful violation.
- (3) No particular form is required to make a complaint, however the complaint must be reduced to writing and include a statement detailing the facts of the alleged violation or;

(b) File a private lawsuit pursuant to section 107 of the FMLA.

- (1) If the employee files a private lawsuit, it must be filed within two (2) years of the alleged violation of the Act, or three (3) years if the violation was willful.