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TO: Senior Vice Presidents
Executive Directors
Chief Financial Officers
Human Resources Directors

FROM: Ramanathan Raju, MD, FACS, MBA

DATE: April 30, 2010

SUBJECT: Amendments to Family Medical Leave Act (FMLA) in accordance with the Department of Labor's 2008 Final Rule and the National Defense Authorization Act (NDAA) for Fiscal Year 2010

Enclosed for your information and compliance is the amended HHC policy on the Family and Medical Leave Act (FMLA) of 1993. The Act has been amended in accordance with the Department of Labor's Final Rule dated November 17, 2008 and in accordance with the National Defense Authorization Act (NDAA) for Fiscal Year 2010. Implementation of these amendments is in coordination with leave provisions contained in the Citywide Agreement and the Leave Regulations for Employees Who Are Under the Career and Salary Plan, Appendix A of the Comptroller's Consent Determinations, pursuant to Section 220 of the NYS Labor Law; and for Group 11 employees, Operating Procedure No. 20-26 "Time and Leave Regulations Governing Group 11 Employees".

Changes to the FMLA resulting from the DOL's final rule and the passage of Section 585 (a) of the National Defense Authorization Act (NDAA) for Fiscal Year 2010 include the addition of two new *Military Family Leave* statutory amendments, Qualifying Exigency Leave and Covered Service Member Military Caregiver Leave. *Qualifying Exigency Leave* entitles employees with close family members in any branch of the Armed Forces including the National Guard and Reserves to use up to twelve (12) workweeks of FMLA job-protected unpaid leave in a 12-month period to manage the service members' affairs while the member is on active duty in a foreign country. The DOL has defined eight qualifying exigencies (emergency situations), for which employees can use FMLA exigency leave. *Covered Service Member Military Caregiver Leave* entitles family members of wounded military personnel and veterans who were members of the Armed Forces within the preceding five years to take up to 26 workweeks of FMLA job-protected unpaid leave in a 12-month period to care for a covered service member/veteran with a serious illness or injury incurred in the line of duty.

Other notable changes include clarifying the definitions of a "serious health condition" and a "chronic serious health condition", as well as regulatory changes to the Medical Certification process and expanding the Notice Requirements for employees and employers.

To carry out these changes, six new FMLA forms have been created or amended for immediate use by HHC facilities. Please review the amended policy and attached forms including:

- Notice of Eligibility Rights & Responsibilities (FMLA) HHC 2676 (Apr 10)
- Certification of Health Care Provider for Employee's Serious Health Condition (FMLA) HHC 2677 (Apr 10)
- Family and Medical Leave Act (FMLA) Certification of Employee's Essential Job Functions For Employee's Serious Health Condition HHC 2677a (Apr 10)
- Certification of Health Care Provider for Family Member's Serious Health Condition (FMLA) HHC 2678 (Apr 10)
- Certification for Serious Injury or Illness of Covered Service Member/Veteran for Military Family Leave (FMLA) HHC 2679 (Apr 10)
- Certification of Qualifying Exigency for Military Family Leave (FMLA) HHC 2680 (Apr 10)
- Designation Notice Leave (FMLA) HHC 2681 (Apr 10)

Attachment

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT OF 1993 IN ACCORDANCE WITH THE DEPARTMENT OF LABOR'S 2008 FINAL RULE AND THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010 *

PURPOSE

To update the Corporation's policies and procedures on the Family and Medical Leave Act (FMLA) of 1993, in accordance with the Department of Labor's (DOL's) final rule amendments, dated November 17, 2008 and in accordance with the National Defense Authorization Act (NDAA) for Fiscal Year 2010. Implementation of these amendments is in coordination with leave provisions contained in the Citywide Agreement and the Leave Regulations for Employees Who Are Under the Career and Salary Plan, Appendix A of the Comptroller's Consent Determinations, pursuant to Section 220 of the NYS Labor Law; and for Group 11 employees, Operating Procedure No. 20-26 "Time and Leave Regulations Governing Group 11 Employees".

BACKGROUND

The federal Family and Medical Leave Act (FMLA) of 1993 became effective for employees in Group 11 and for employees in Group 12 titles not certified to collective bargaining units, on August 5, 1993. It became effective for employees covered under collective bargaining agreements with the City of New York and the Health and Hospitals Corporation on February 5, 1994.

SUMMARY: LEAVE ENTITLEMENTS AND EMPLOYEE ELIGIBILITY

The FMLA entitles eligible employees to 12 weeks of leave in a 12-month period for childcare upon the birth, adoption or foster care placement of a child; and for a serious condition of the employee or covered family member. On November 17, 2008, Section 585 (a) of the National Defense Authorization Act (NDAA) amended FMLA to include two new statutory amendments regarding Military Family Leave, "Covered Service Member Military Caregiver Leave" and "Qualifying Exigency Leave".

To further expand the leave entitlements provided to military families, on October 28, 2009, in accordance with the National Defense Authorization Act, Congress amended the recently enacted caregiver and exigency leave entitlements to provide broader coverage.

Covered Service Member Military Caregiver Leave - Under the original entitlement, an eligible employee who was the spouse, son, daughter, parent or next of kin (deemed to be the nearest blood relative) of a "covered service member" was eligible to take up to 26-workweeks of unpaid leave during a 12-month period to provide care to a service member who had sustained a serious injury or illness while serving in active military duty. Under this provision, eligibility for military-caregiver leave had been confined to the family of active duty members. Under the new

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* These changes issued April 30, 2010, supersede the amended FMLA policy guidelines dated May 19, 2008 and the amended FMLA policy guidelines dated December 14, 2000.

law, this entitlement has been extended and expanded to include veterans who were members of the Armed Forces (including the National Guard or Reserves) who undergo medical treatment, recuperation, or therapy for a qualifying injury or illness, so long as the veteran was a member of the armed forces in the preceding five years. Consequently, the family members of veterans now enjoy the same leave rights as those afforded relatives on active duty status. Additionally, military caregiver leave was expanded to include care for a service member who aggravates a prior injury or illness incurred while in the line of duty during the course of his military service. Thus, employees may take military caregiver leave for a family member whose pre-existing injury or illness was aggravated while on active duty.

Qualifying Exigency Leave – Under the original entitlement provision, an eligible employee was entitled to take up to 12 workweeks of unpaid leave to assist with non-medical family-related qualifying exigencies (situations requiring immediate attention) resulting from a spouse, son, daughter, or parent's active duty in the National Guard or Reserves, or resulting from a qualified family member's notification of an impending call or order to active duty in support of a contingency operation in a foreign country. Under this provision, qualifying exigency leave was confined to employees with family members in the National Guard or Reserves. The new law extends qualifying exigency leave to employees with family members in any branch of the Armed Forces. Additionally, instead of being limited to service in a contingency operation, the armed forces member simply needs to be deployed or deploying overseas on active duty.

Lastly, under DOL's final rule, the 1993 FMLA regulations were updated to include definitions that are more expansive with specific timelines, making the law operate more smoothly and providing greater clarity to employees, employers and health care providers about their responsibilities and rights under FMLA leave. Furthermore, the final rule added new Department of Labor Certification Forms to be used by employees and employers to facilitate the certification requirements for use of Family and Medical Leave and Military Family Leave.

MILITARY FAMILY LEAVE AMENDMENTS

On January 28, 2008, the National Defense Authorization Act amended the Family and Medical Leave Act of 1993 to include two new Military Family Leave categories. These categories provide protective leave to employees who have family members in any branch of the military, who are presently deployed in foreign countries, or who have been notified of an impending call to active duty in a foreign country, or to veterans who were members of the Armed Forces (including the National Guard or Reserves) at any point in time within five years preceding the date on which the veteran underwent medical treatment, recuperation, or therapy. The two types of leave available to employees with family members in the military include ***Covered Service Member Military Caregiver Leave*** and ***Qualifying Exigency Leave***.

Covered Service Member Military Caregiver Leave This type of military family leave enables an eligible employee who is the spouse, son, daughter, parent or next of kin (deemed to be the nearest blood relative) of a "covered service member" **to take up to 26-workweeks of leave during a 12-month period to provide care to a service member in any branch of the military who has sustained a serious injury or illness while serving in active military duty or to veterans who were members of any branch of the Armed Forces (including the National Guard or Reserves) at any point in time within five years of serving in the military**

who are receiving medical treatment, recuperation, or therapy that triggers the need for military caregiver leave. In addition, military caregiver leave is available to employees who are closely related to a service member who aggravates a prior injury or illness incurred while in the line of duty during the course of his military service. Thus, employees may take military caregiver leave for a family member whose pre-existing injury or illness was aggravated while on active duty.

Covered service members include those who are undergoing medical treatment, recuperation or therapy, in outpatient status or on the temporary disability retired list for a serious injury or illness. As stipulated in the statute, a "covered service member" includes a member of the regular Armed Forces, as well as members of the Nation Guard and Reserves.

The Department of Labor has mandated that the twelve months designated for this type of leave begin on the first day the leave is taken and end twelve months later, regardless of what other method the facility may be using for designating a leave year for other FMLA leave. Furthermore, the limitation of taking 26-workweeks in a 12-month period does not prohibit the employee from caring for the service member after the 12-month military caregiver leave period has ended by applying for the traditional twelve-workweeks of FMLA Leave for a Family Member with a Serious Health Condition. When leave qualifies as both military caregiver leave and traditional FMLA Leave to Care for a Family Member with a Serious Health Condition, the Department of Labor mandates that the facility first designate the leave to be military caregiver leave.

If the entire 26-workweeks of Caregiver Leave are **not** taken during the 12-month period, the remaining amount of workweeks is forfeited. In addition, under the Caregiver Leave statute, if HHC employs spouses, the aggregate number of workweeks both can take are limited to a combined total that each is eligible to take, but the leave taken may be as much as 26 workweeks.

New Definition of Son or Daughter under Military Family Leave

The traditional FMLA definition of "son and daughter" **cannot** be applied to FMLA's military family leave provisions, because it requires that a son or daughter either be under 18 years of age; or 18 years of age or older and incapable of self care because of a mental or physical disability. Accordingly, the Department of Labor provided a new definition for a **"son or daughter on active duty or call to active duty status."** The new definition covers "the employee's **biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in *loco parentis***, who is on active duty or call to active duty status, **and who is any age**."

Qualifying Exigency Leave - This type of military family leave enables an eligible employee **to take up to 12 workweeks of unpaid leave to assist with non-medical family-related qualifying exigencies (situations requiring immediate attention) resulting from a spouse, son, daughter, or parent's, deployment or call to active duty in a foreign country as a member of any branch of the military, including the National Guard or Reserves.**

As determined by the Secretary of Labor, **there are eight types of qualifying exigencies.**

The 8 Qualifying Exigencies are as follows:

1. Short-notice deployment (seven or less calendar days prior to the date of deployment);
2. Military events and related activities (in advance of and during deployment, including family support or assistance programs and information briefings);
3. Childcare and school activities (*e.g.*, to arrange for alternative childcare, provide childcare on an urgent, immediate-need basis or to attend meetings at a school or daycare facility);
4. Financial and legal arrangements (*e.g.*, to prepare and execute powers of attorney, enroll for military health care or to prepare a will or living trust);
5. Counseling (non-medical, for oneself, the service member, or a child of any age);
6. Rest and recuperation (up to five days for each);
7. Post-deployment activities (to attend ceremonies and briefings for a period of 90 days or to address issues arising from the service member's death); and
8. Additional activities agreed to by the facility and employee.

Certifying and Verifying Exigency Leave

To obtain qualifying exigency leave, the employee will be required to complete a **Qualifying Exigency Military Family Leave form HHC 2680 (R Apr 10)**. This form requires the employee to provide a copy of the related service member's orders or other military documentation, verifying the service member's call to active duty and expected dates of active duty service. In addition, under the military family leave statute, the facility may contact the appropriate Department of Defense unit to verify the service member's orders. Each time an employee's service member relative is ordered to active military duty, proof of deployment documentation is required. While a facility may only request proof of the relative's deployment once for each deployment, the facility may request additional certifications regarding the reason for each qualifying exigency leave request during the period of the relative's service.

The certification serves as a statement or description of need, describing the facts of the qualifying exigency and includes the approximate dates, purpose of the absence, and an estimate of the frequency and duration of the qualifying exigency. Additionally, the certification form requires that if the qualifying exigency leave involves a meeting with a third party, for example to arrange for childcare with a childcare provider, the employee must provide contact information about the third party individual or entity with whom they are meeting. Third party contacts may only be contacted to verify that a meeting is scheduled to address the stated exigency and that the employee's absence from work is required.

Certifying and Verifying Military Caregiver Leave

The procedure followed to certify an employee for Military Family Caregiver Leave is similar to the certification process an employee must follow when seeking traditional FMLA Leave to care for a family member with a serious health condition. In order to obtain Military Family Caregiver Leave an employee is required to obtain a certification from the service member or veteran's authorized health care provider (i.e., Department of Defense (DOD), Department of Veterans Affairs (VA) or a DOD TRICARE network or non-network authorized private health care provider).

HHC Form 2679 (R Apr 10)-, the Certification for Serious Injury or Illness of a Covered Service Member must be completed to certify the need for military caregiver leave and enables the facility to obtain information that demonstrates that the employee is eligible for military family leave. Covered service members include those who were on active military duty in a foreign country or veterans who incurred service-related injuries or illnesses while in the line of duty within five years of serving in the military. The form provides information on the relationship of the employee to the service member for whom care is sought; it indicates the service member's military status, and where the service member is receiving medical care, or if he/she is on a temporary disability retired list, as well as a description of the expected care and the time that will be needed.

In addition, the certification form requires health care providers to provide the facility with certain military-related determinations. The facility may request that the health care provider provide contact information, information about the type of medical practice, and specialty, and whether the healthcare provider is an "authorized" health care provider as required by the D.O.L. statute. The form requests that the medical provider classify the covered service member or veteran's medical condition and verify that the condition for which the service member/veteran is being treated was incurred in the line of duty while in active military service, as well as the expected duration and frequency of the need for the family member's caregiver role. Through the review of the health care provider information, the facility will be able to determine sufficiently whether the service member/veteran's injury or illness qualifies for military family caregiver leave. The existing 12-week limit on other types of Family Medical Leave remains in affect, and the combined total for all types of FMLA leaves, including Servicemember Family Leave, cannot exceed 26 weeks in a single 12-month period.

GENERAL FMLA PROVISIONS

The following FMLA provisions are integrated with existing time and leave benefits contained in the Citywide Agreement, the Leave Regulations for Employees Who Are Under the Career and Salary Plan, Appendix A of the Comptroller's Consent Determinations, pursuant to Section 220 of the NYS Labor Law; and managerial leave regulations as contained in Operating Procedure 20-26. FMLA provisions apply to Group 11 and eligible full-time and part-time employees in all jurisdictional classifications (competitive, non-competitive, labor, and exempt) and include provisional, temporary, and seasonal employees. Each facility must designate a FMLA Coordinator to assist in effecting these provisions.

Employee Exclusions under FMLA

1. Certain individuals are excluded from the definition of "employee" under the FMLA. A person who:

   a. is not subject to the civil service laws of the political subdivision which employs the employee, and

   b. holds a public elective office; or

   c. is selected by the holder of such public elective office to be a member of his/her personal staff; or

   d. is appointed by such public elective officeholder to serve on a policymaking level; or

   e. is an immediate adviser to such public elective officeholder with respect to the constitutional or legal powers of the office of such officeholder; or

   f. is an employee in the legislative branch or legislative body of...[the] political subdivision

   is not eligible for FMLA leaves.

2. An eligible employee is one who has worked for the Corporation for a total of at least 12 months preceding the start of the leave. The 12 months need not be consecutive. If an employee is maintained on the payroll for any part of a week, the week counts as a week of employment. To be eligible, the employee must also have actually worked 1,250 hours over the 12-month period immediately preceding the start of the leave. (Time on paid or unpaid leave does not count toward the 1,250 hours).

Eligibility & Leave Entitlement

3. An eligible employee is entitled to a total of 12 workweeks of leave in a 12-month period for one or more of the following:
   - Upon the birth of a son or daughter of the employee and in order to care for such son or daughter.
   - For the care of a newly adopted child or newly placed foster child.
   - In order to care for a spouse, child under age 18, child age 18 or older but incapable of self-care because of a physical or mental disability, or parent of the employee, if such spouse, child, or parent has a serious health condition.
   - When the employee has a serious health condition that makes the employee unable to perform the functions of the position.
   - In order to address a qualifying exigency (emergency situation) arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty in a foreign country (or has been notified of an impending call or order to active duty in a foreign country) in any branch of the military including the National Guard or Reserves.
   - In order to care for a domestic partner in accordance with Section 1-112(121) of the Administrative Code of the City of New York.

4. Under Covered Service Member Military Caregiver Leave, a provision of FMLA's Military Family Leave, an eligible employee is entitled to up to 26 weeks of leave in a single 12-month period in order to care for a service member or veteran who served in military during the preceding five-years who has sustained a serious injury or illness while serving in active military duty. Covered services members include the spouse, son, daughter, parent, or next of kin of the employee.

5. The 12-month period in which the 12 or 26 weeks of leave entitlement occurs is a "rolling" 12-month period measured backward from the date any FMLA leave is to be used. Under this method of leave calculation, each time an employee is to take FMLA leave, the leave entitlement would be the balance of the 12/26 weeks, which had not been used during the immediately preceding 12 months.

6. **Serious Health Condition Defined**

Serious health condition, as further explained below, means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. A health condition, which involves inpatient care (i.e., overnight stay) in a hospital, hospice, or residential medical care facility, also includes any period of incapacity, and any subsequent treatment, related to such inpatient care.

Incapacity means inability to work, attend school, or perform other regular daily activities due to the serious health condition, or consequent treatment, or recovery from the serious health condition. When leave is taken for the employee's own serious health condition, incapacity means the inability to work at all or to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act of 1990 and its implementing regulations.

* FMLA Military Family Leave does not address domestic partners.

A **Serious Health Condition,** involves continuing treatment by a health care provider, and **includes one or more of the following six definitions:**

- A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves treatment two or more times by a health care provider, a nurse or physician's assistant under the direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders, or on referral by a health care provider. **The two visits to the health care provider must take place within 30 days of the beginning of the period of incapacity, and the first visit to the health care provider must take place within seven days of the first day of incapacity;** or

- A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves 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 visit to the health care provider must take place within seven days of the first day of incapacity**; or

- Any period of incapacity due to pregnancy or for prenatal care; or

- Any period of incapacity due to a chronic serious health condition, which requires **at least two periodic visits for treatment per year**, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.); or

- A period of incapacity, which is long term or a permanent incapacity due to a condition for which treatment may not be effective. Active treatment by a health care provider may not be necessary but continuing supervision by a health care provider is required; or

- Any period of absence to receive multiple treatments (including any period of recovery resulting from treatment) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for restorative surgery after an injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical treatment, such as cancer (chemotherapy, radiation, etc.), kidney disease (dialysis), etc.

7. **Definition of Health Care Providers**

Doctors of medicine or osteopathy authorized to practice medicine or surgery; podiatrists, dentists, clinical psychologists, optometrists, chiropractors in certain instances, nurse practitioners, nurse-midwives, and clinical social workers, authorized to practice in the state; and Christian Science practitioners listed with the First Church of Christ Scientist in Boston, Massachusetts; or any other health care provider determined by the U.S. Department of Labor to be capable of providing health care services.

8. **Intermittent or Reduced Schedule Leave**

Leave taken for the employee's own serious health condition, to care for a covered relative's serious health condition, or as provided in accordance with military family leave (Military Caregiver Leave or Qualifying Exigency Leave) may be taken on an intermittent or reduced leave schedule in cases of medical necessity. Certification from a health care provider stating the medical necessity for leave on an intermittent or reduced leave basis and the duration and schedule of the leave satisfies the medical necessity requirement. However, the employee must attempt to schedule leave so as not to disrupt the facility's operations. If an employee requests intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, including a period of recovery from a serious health condition, the facility may require the employee to

transfer temporarily to an available alternative position for which the employee is qualified and which has equivalent pay and benefits, which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position shall require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law.

9. **Childcare Leave**

Entitlement to FMLA childcare leave expires 12 months after the birth or placement of the child with the adoptive or foster parent. Childcare leave may not be taken on an intermittent or reduced leave schedule. Paid annual leave and non-FLSA compensatory time must be used concurrently with FMLA child care leave, but if FMLA leave is to be extended by HHC provided child care leave (for birth or adoption), only that portion of the FMLA leave which is not coincident with paid leave is to be counted against the HHC child care leave entitlement. If an employee commences childcare leave and has no annual leave or compensatory time, FMLA childcare leave is to be counted in its entirety against the HHC childcare leave entitlement. If FMLA childcare leave has not been taken and the 12-month eligibility period has elapsed, HHC childcare leave may be taken at any time until the child's fourth birthday. (See O.P. 20-21)

10. **Employee Notice of Need for FMLA Leave**

When the need for FMLA leave is foreseeable, an employee must give the facility FMLA Coordinator at least 30 calendar days advance notice before the leave begins. If the employee does not, the facility can delay the start of the FMLA leave. If leave is to be delayed by the facility because of the employee's failure to comply with the 30-day requirement, it must be clear that the employee had notice of this requirement. It is therefore imperative that the notice entitled "Employee Rights and Responsibilities under the Family and Medical Leave Act" be posted conspicuously at the worksite and, either in an employee handbook or upon hire. If the employee's foreseeable leave is to be delayed because there was no reasonable cause for the untimely notification, an administrative review must be conducted by designated facility personnel. An employee needing FMLA leave, absent of any unusual circumstances, must follow the facility's usual and customary call-in procedures for reporting a FMLA leave of absence. If the need for leave is unforeseeable, the employee is ordinarily required to give notice within one or two business days of when the need for leave becomes known to the employee. In the case of Military Family Leave, either Exigency Leave or Military Caregiver Leave, the employee should provide such notice to the facility as is reasonable and practicable.

In those cases where paid leave is used concurrently with FMLA leave, if the facility's notice requirements are more stringent than the notice requirements of the FMLA, only the less stringent requirements may be imposed.

11. **Facility's Responsibility to Advise Employee of FMLA Qualifying Leave**

When an employee requests leave for a FMLA qualifying purpose, but does not request to use FMLA leave, it is the facility's responsibility to designate such leave as FMLA leave and so notify the employee. Such designation may be made before or after the leave commences, as long as it is made within five business days, absent of any extenuating circumstances, of the facility acquiring knowledge that the leave is for a FMLA qualifying purpose. If the facility learns, subsequent to the commencement of leave, that the leave or some portion thereof, is or was for a FMLA qualifying purpose, the facility must designate such leave as FMLA leave retroactively to, and/or prospectively from, the FMLA qualifying event.

The facility may designate leave as FMLA leave after the employee returns to work only if the facility was not aware of the reason for the leave prior to such time or the facility preliminarily designated leave as FMLA leave while awaiting medical certification. In the former instance, leave must be designated as FMLA leave within five business days of the employee's return to work, with appropriate notice to the employee. In the latter case, the preliminary designation of FMLA leave becomes final upon receipt of medical certification confirming the leave was for an FMLA qualifying purpose. If the employee requests leave to be counted as FMLA leave, the employee must notify the facility, absent of any unusual circumstances, by following the facility's usual and customary call-in procedures for reporting a FMLA leave of absence.

If the facility's initial notice to the employee designating FMLA leave is oral, the facility must confirm the designation in writing, no later than the following payday or, if there is less than one week between the oral notice and the next payday, written notice must be no later than the subsequent payday.

12. **Facility's FMLA Notification Obligations**

When an employee requests leave for a FMLA qualifying purpose, the facility must provide the employee with the following information:

- ☐ A **Notice of Eligibility – Rights & Responsibilities (FMLA) HHC Form No. 2676 (R Apr 10)** which includes the date FMLA leave commenced and the anticipated date of return from FMLA. The form contains five (5) FMLA leave options as follows: **1.** The birth of a child, or placement of a child with employee for adoption or foster care. **2.** The employee's own serious health condition. **3.** The employee is needed to care for his/her spouse, child, or parent with a serious health condition. **4.** The employee must handle a qualifying exigency arising out of the fact that employee's spouse, son, daughter, or parent is in the Armed Forces on active duty or call to active duty status in a foreign country. **5.** The employee is needed to care for his/her spouse, son, daughter parent, or next of kin who is a covered service member/veteran with a serious injury or illness. The Notice of Eligibility informs the employee that he/she **may** be eligible for FMLA leave having met the initial eligibility criteria; or the Notice informs the employee that he/she is **not** eligible for FMLA leave because
  - Employee has not met the FMLA's 12-month length of service requirement.
  - Employee has not met the FMLA's 1,250-hours worked requirement

- Employee has previously taken FMLA leave and has exhausted the twelve (12)-weeks of FMLA entitlement for the twelve (12) month rolling period.
- Employee is not eligible for FMLA leave since he/she did not meet the qualifying eligibility criteria. Notice requests that employee submit documentation to determine the type of leave for which the employee may be eligible. In addition, based on the reason for the FMLA leave, the employee may be asked to complete **one of four Certification forms.**

❑ The Certification forms are as follows: (a) **Certification of Health Care Provider for Employee's Serious Health Condition** (FMLA) - **Form No. HHC 2677 (R Apr 10) and FMLA Certification of Employee's Essential Job Functions for Employee's Serious Health Condition Form No. HHC 2677a (Apr 10)**; (b) **Certification of Health Care Provider for Family Member's Serious Health Condition** (FMLA) – **Form No. HHC 2678 (R Apr 10)** (c) **Certification of Serious Injury or Illness of Covered Service Member for Military Family Leave** (FMLA) – **Form No. HHC 2679 (R Apr 10)**; or (d) **Certification of Qualifying Exigency for Military Family Leave** (FMLA) – **Form No. HHC 2680 (R Apr 10)**. Facilities must provide their employees with at least fifteen (15)-calendar days to return their certification forms. The employee must, in turn, submit the completed certification form as soon as practicable. Please note that the facility may not deny or delay the leave because the employee has not submitted written notice as long as the employee has provided timely oral notice of the need to take leave for a FMLA qualifying reason.

❑ Following a review of the FMLA Certification and supporting documentation, the facility FMLA Coordinator or designee must complete A **Designation Notice** (FMLA) - **Form No. HHC 2681 (R Apr 10)** indicating the disposition (determination) of the leave request. The FMLA leave will either be Approved or Denied; or the Certification may be found incomplete and insufficient to determine whether the FMLA applies to the employee's leave request. If the Certification is incomplete, the employee will be given additional time to provide the needed information. If the requested information is not received in a timely manner, the employee's FMLA leave may be denied. The FMLA Coordinator must return the Notice of Designation to the employee within **5 working days of receipt of the Certification and documentation.** The FMLA Coordinator will provide the employee with a Payroll accounting "work-up" of the employee's available leave balances that will be counted against the employee's FMLA Leave entitlement provided there is no deviation from the employee's anticipated FMLA date of return.

Please note that the Notice of Eligibility Rights & Responsibilities form contains notice to the employee of specific obligation of the employee and the consequences of the failure to meet these obligations, as well as certain obligations of the facility. Among the items discussed are the requirements for documents to support the leave and the return to work, the employee's status as a "key" employee, the right to be restored to the same or equivalent position, and the requirement to substitute paid leave.

13. **Substitution of Paid Leave**

Appropriate paid leave balances (including vested leave balances as applicable) must be used concurrently with FMLA leave. For instance, all paid sick leave must be used and counted against the 12-week FMLA leave entitlement if absence is due to the employee's own serious health condition. If all sick leave balances have been exhausted and annual leave is used due to the employee's own serious health condition, the annual leave used shall be counted against the FMLA entitlement. Compensatory time balances, except for compensatory time subject to the Fair Labor Standards Act, must also be used and counted against the FMLA entitlement. Similarly, all paid annual leave and non-FSLA compensatory time must be used and counted as FMLA leave if absence is for any other FMLA qualifying purpose. After all leave balances have been exhausted, any leave that is advanced or granted for either the employee's own serious health condition or other FMLA qualifying reasons will be counted against the employee's FMLA entitlement. If an employee chooses to use FLSA compensatory time for an FMLA qualifying purpose, such time used may not be counted against the employee's FMLA leave entitlement. In the case of Service Member Military Caregiver Leave, employee leave to care for a service member/veteran (spouse, son, daughter, parent or next of kin) who has suffered a serious injury or illness as a result of active military duty, an eligible employee may elect, or an facility may require the employee, to substitute any accrued paid annual leave and compensatory time leave balances for any part of the 26-week period of such leave.

14. **Certification of Need for FMLA Leave**

An employee will be required to present medical documentation (a Health Care Provider's Certification) to support a request for FMLA leave when leave is needed to address the employee's own serious health condition or that of a qualifying family member. For the employee's own serious health condition, such documentation should include the date the serious health condition commenced, the probable duration of the condition, the regimen of treatment prescribed (at least two visits per year), the medical facts (may include symptoms/diagnosis) a statement that the employee is unable to perform all or any one of the essential functions of the employee's position, or in the case of leave to care for a covered relative's serious health condition, a statement that the relative requires assistance for basic medical needs, hygiene, nutritional needs, safety, transportation, or psychological comfort. The Health Care Providers Certification should be requested at the time the employee requests leave or in the case of unforeseen leave, soon after the leave commences. Documentation must be provided within 15 calendar days from the facility's request where practicable. An employee is **not** required to give the facility his or her medical records. The facility, however, does have a statutory right to request that an employee provide **medical certification** containing sufficient medical facts to establish that a serious health condition exists. If a facility requests it, an employee is required to provide a complete and sufficient medical certification in order to take FMLA-protected leave due to a serious health condition. Under the regulations, a facility should request medical certification, in most cases, at the time the employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the facility should request medical certification within five days after the leave begins.

15. **Medical Certification Process**

The FMLA regulations clarify that contact between the facility and the employee's health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. Under the regulations, facilities may contact an employee's health care provider for authentication or clarification of the medical certification through a health care provider, a human resource professional, a leave administrator, or a management official. In order to address employee privacy concerns, the rule makes clear that in no case may the employee's direct supervisor contact the employee's health care provider. In order for an employee's HIPAA-covered health care provider to provide a facility with individually-identifiable health information, the employee will need to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the facility. Facilities may **not** ask the health care provider for additional information beyond that contained on the medical certification form. Whenever a facility requests a medical certification, however, it is the employee's responsibility to provide the facility with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization, allowing the health care provider to provide a complete and sufficient certification to the facility, the employee's request for FMLA leave may be denied. A facility must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to correct the deficiency. The facility must state in writing what additional information is necessary to make the certification complete and sufficient. The regulations also require that the facility allow the employee **at least seven calendar days to correct the deficiency**, unless seven days is not practicable under the particular circumstances despite the employee's diligent good faith efforts.

16. **Child Care Leave Certification**

An employee will be required to present documentation to support a request for FMLA leave to care for a newborn child or a child who has been adopted or received into foster care. Documentation should be requested at the time the employee requests leave, or in the case of unforeseen leave, soon after the leave commences. Documentation must be provided within 15 calendar days from the facility's request where practicable. (See attached Notice of Eligibility Rights & Responsibilities – Form No. HHC 2676 (Mar. 09); "Child Care Leave Certification under the Family and Medical Leave Act.")

17. **Fitness-for- Duty Certification**

An employee on FMLA leave for his/her own serious health condition may be required to provide medical documentation certifying fitness to return to work before restoration. Facilities may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the facility has appropriately notified the employee that this information will be required and has provided a list of essential functions. Additionally a facility may require a fitness-for–duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the condition for which leave was taken. If an employee fails to submit a properly requested fitness-for-duty certification, the facility may delay job restoration

until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.

18. **Medical Recertification/New Medical Certification**

The regulations allow recertification no more often than every 30 days in connection with an absence by the employee unless the condition will last for more than 30 days. For conditions that are certified as having a minimum duration of more than 30 days, the facility must wait to request a recertification until the specified period has passed, except that in all cases **the facility may request recertification every six months in connection with an absence by the employee.** The regulations also allow a facility to request recertification in less than 30 days if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly, or if the facility receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. Additionally, facilities may request a new medical certification each leave year for medical conditions that last longer than one year. Such new medical certifications are subject to second and third opinions.

19. **Job Restoration**

An employee who returns from FMLA leave must be restored to his or her previous position or to an equivalent position. An equivalent position is a position in the same title, which has the same pay, benefits, and working conditions (including the same worksite or a geographically proximate worksite). A geographically proximate worksite is one that does not involve a significant increase in commuting distance or time. If the employee is denied restoration or other benefits, the facility must be able to show that the employee would not have continued to be employed, or to have received the benefits, if the employee had been continuously employed during the leave period.

20. **FMLA Leave & Employee Benefits**

FMLA leave is not considered a break in service for the purpose of pay and benefits; however, the time spent on unpaid leave is not counted as service in determining benefits, including pensions. Under FMLA, a facility may deny a bonus that is based upon achieving a goal, such as hours worked, or perfect attendance, to an employee who takes FMLA leave (and thus does not achieve the goal) as long as it treats employees taking FMLA leave the same as employees taking non-FMLA leave. For example, if a facility does not deny a perfect attendance bonus to employees using vacation leave, the facility may not deny the bonus to an employee who used vacation leave for a FMLA-qualifying reason.

21. **Restoration of Key Employees**

Where the restoration of a "key" employee would cause substantial and grievous economic injury to its operations, a facility may refuse to restore such employee provided certain procedures have been followed. A "key" employee is a salaried employee who is among the highest paid ten percent of HHC employees. A "key" employee must be advised in writing of his/her status as such, and the implications of such status, at the time leave is requested. If it is determined, while the employee is on leave, that restoration will cause grievous economic injury, the facility must notify the employee by certified

mail that it intends to deny restoration on completion of leave and must state the basis for its determination. The "key" employee must be given a reasonable time in which to return to work. If he/she does not return to work at that time, the "key" employee may still request restoration at the end of the leave period. If the facility's determination remains the same, the employee must be notified by certified mail that restoration is denied. Please note that "key" employees who are also permanent employees covered under Rule 7.5 of the Personnel Rules and Regulations, must be restored to their positions unless the appropriate procedures required by the Personnel Rules and Regulations have been followed. In addition, "key" employees who are on HHC provided child care leave concurrent with FMLA child care leave are to be restored to their positions pursuant to HHC's leave provisions.

22. **Maintenance of Health Insurance Benefits**

Group health insurance must be maintained for an employee on FMLA leave on the same terms as if the employee had continued to work. However, the facility may recover its share of health plan premiums for the period of time the employee was on unpaid leave if the employee does not return to work after the FMLA leave has expired, unless there is a continuation or onset of a serious health condition or another circumstance occurs which is beyond the employee's ability to control.

23. **Maintenance of FMLA Records**

FMLA records must be kept **for no less than three years** and must be made available for inspection, copying and transcription by representatives of the Department of Labor upon request. Records and documents relating to medical certifications, re-certifications, or medical histories of employees' or their family members must be maintained as confidential medical records and must be stored in separate files from the usual personnel files and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements.

24. **FMLA Enforcement**

Employees who exercise their rights under the FMLA are protected from discrimination and retaliation under the law, and they are similarly protected if they oppose any practice, which they reasonably believe to be a violation of the Act or regulations.

ATTACHMENTS:

- HHC Form 2676 (R Apr 10) - Notice of Eligibility Rights & Responsibilities (FMLA)
- HHC Form 2677 (R Apr 10) - Certification of Health Care Provider for Employee's Serious Health Condition (FMLA)
- HHC Form 2677a (Apr 10) FMLA Certification of Employee's Essential Job Functions For Employee's Serious Health Condition
- HHC Form 2678 HHC (R Apr 10)- Certification of Health Care Provider for Family Member's Serious Health Condition (FMLA)
- HHC Form 2679 HHC (R Apr 10)- - Certification for Serious Injury or Illness of Covered Service Member/Veteran for Military Family Leave (FMLA)
- HHC Form 2680 HHC (R Apr 10)- - Certification of Qualifying Exigency for Military Family Leave (FMLA)
- HHC Form 2681 HHC (R Apr 10)- - Designation Notice (FMLA)

DEFINITIONS:

ACTIVE DUTY - means duty under a call or order to active duty under a provision of law referred to in section 101(a) (13) (B) of title 10, United States Code.

CHILD - means a biological, adopted or foster child of the employee; a legal ward or stepchild of the employee; or a child for whom the employee stands in loco parentis. A child must either be under the age of 18 or incapable of self-care because of mental or physical disability.

CONTINGENCY OPERATION – means an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force.

COVERED SERVICEMEMBER - means a member of the Armed Forces, including a member of the National Guard or Reserves.

DOMESTIC PARTNER – means a domestic partner as defined in Section 1-112(121) of the Administrative Code of the City of New York.

ELIGIBLE EMPLOYEE- means an employee who has been employed
(i) for at least 12 months by the facility with respect to whom leave is requested under section 102; and
(ii) for at least 1,250 hours of service with such facility during the previous 12-month period.

EXCLUSIONS-The term "eligible employee" does not include
(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code (as added by title II of this Act); or
(ii) any employee of an facility who is employed at a worksite at which such facility employs less than 50 employees if the total number of employees employed by that facility within 75 miles of that worksite is less than 50.

FACILITY.- (i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;
(ii) includes-- (I) any person who acts, directly or indirectly, in the interest of an facility to any of the employees of such facility; and (II) any successor in interest of an facility; and
(iii) includes any "public facility", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x).

HEALTH CARE PROVIDER - means a doctor of medicine or osteopathy authorized to practice medicine or surgery; podiatrists, dentists, clinical psychologists, optometrists, chiropractors in certain instances, nurse practitioners, nurse-midwives, and clinical social workers, authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; and Christian Science practitioners listed with the First Church of Christ

Scientist in Boston, Massachusetts; or any other health care provider determined by the Secretary of Labor to be capable of providing health care services.

INCAPACITY – means inability to work at all or to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act of 1990 and its implementing regulations.

NEXT OF KIN - used with respect to an individual, means the nearest blood relative of that individual.

OUTPATIENT STATUS – "with respect to a covered service member", means the status of a member of the Armed Forces assigned to a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

PARENT - means the biological parent of an employee or an individual who stood in loco parentis for the employee when the employee was a child, as defined herein; it does not include "in-laws".

QUALIFYING EXIGENCY – means a non-medical situation requiring immediate attention.

REDUCED LEAVE SCHEDULE - means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

SECRETARY - means the Secretary of Labor.

SERIOUS HEALTH CONDITION - means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. A health condition, which involves inpatient care (i.e., overnight stay) in a hospital, hospice, or residential medical care facility, also includes any period of incapacity, and any subsequent treatment, related to such inpatient care.

SERIOUS INJURY OR ILLNESS IN THE CASE OF A MEMBER OF THE ARMED FORCES, INCLUDING A MEMBER OF THE NATIONAL GUARD OR RESERVES - means an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.

SON OR DAUGHTER ON ACTIVE DUTY OR CALL TO ACTIVE DUTY STATUS means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in *loco parentis*, who is on active duty or call to active duty status, and who is any age.

SPOUSE - means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides.