THE EXPANDING FMLA AND COLORADO'S FAMILY CARE ACT:
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COLORADO BAR ASSOCIATION – LABOR AND EMPLOYMENT SECTION

BY

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<td>i. “Qualifying Exigency” arising from active duty or call up expanded to include leave to care for a parent incapable of self-care.</td>
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<td>ii. “Covered Service Member” expanded to include veterans discharged within 5 years of when the employee needs to take leave to care for the service member.</td>
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<td>iii. “Serious Illness or Injury” Definition for current service member expanded to include pre-existing injuries that were aggravated by service in the line of duty on active duty.</td>
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<td>v. Certification for service member expanded to encompass additional</td>
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vi. “Rest and Recuperation” leave expanded from 5 to 15 days.
b. Airline Flight Crews Eligibility and Leave: hours of service criteria specific to industry

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<th>2. Administrator Interpretation 2013-1</th>
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<td>a. Expansion of the term “son or daughter” for purposes of the FMLA (non-military leave provision). First, it applies to anyone acting “in loco parentis” and does not require a biological relationship. Second, with respect to children over the age of 18 with a disability that are incapable of self-care, the age at which the child becomes disabled is irrelevant. Whether a child has a disability is determined via the ADA. Employees seeking this type of leave must show: (1) the adult child is their son or daughter; (2) the person has a disability; (3) is incapable of self-care; (4) has a serious health condition; (5) is in need of care due to the serious health condition.</td>
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<td>b. Resources: <a href="http://www.dol.gov/whd/opinion/adminIntrprtnFMLA.htm">http://www.dol.gov/whd/opinion/adminIntrprtnFMLA.htm</a></td>
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| 3. Post-DOMA Guidance: The Department of Labor issued statements |
and revised fact sheets regarding coverage for spouses in *same sex marriages*. The statute defines “spouse” as “a husband or wife, as the case may be.” 29 U.S.C. §2611 (13). The regulations, however, define spouse as “a husband or wife as defined or recognized under State law for purposes of *marriage* in the State where the employee resides.” 29 C.F.R. §825.122(a)(emphasis added). Previously, pursuant to DOMA, the DOL had ruled in an opinion letter that spouses in same sex marriages were not covered by the FMLA. In August 2013, following the Supreme Court’s *Windsor* decision invalidating portions of DOMA, the DOL withdrew that opinion letter and revised Fact Sheet #28F to reinforce the regulatory requirement that spouses of same sex *marriages* are covered by FMLA. This probably does not impact Colorado employees, however, as civil unions are expressly *not* marriages. C.R.S. §14-15-118.

4. Significant 10th Circuit Decisions
   b. Employees engage in protected activity under the FMLA by requesting leave even before they become eligible. *Smith v. Wynne*, 2012 WL 3553722, n.4 (10th Cir. 2012)(unpublished). In addition, employees engage in protected activity by notifying an employer of their intent to take FMLA leave, if they qualify for that leave.

Khalik v. United Air Lines, 671 F.3d 1188 (10th Cir. 2012): Court affirmed employer’s motion to dismiss. The plaintiff alleged FMLA retaliation, but failed to include facts on when FMLA was requested, why, who considered and denied the request, when she complained about not receiving leave, and when she was terminated. **Note to plaintiff’s counsel:** Twombly pleading standards must be satisfied. Conclusory statements of elements of claims will not hold up.

Smith v. Wynne, 494 Fed. Appx. 867 (10th Cir. 2012): Court affirmed summary judgment in favor of employer on
c. Employees are not protected from a reduction in force while on FMLA leave, and may be terminated for misconduct occurring during a FMLA leave. Sabourin v. Univ. of Utah, 676 F.3d 950 (10th Cir. 2012). Similarly, work errors discovered while an employee is on leave may permit termination and do not create FMLA interference or retaliation claims. Mercer v. The ARC of Prince Georges County, Inc., 2013 WL 3470489 (4th Cir. July 11, 2013)(unpublished).
d. Even close timing between a request for FMLA leave and termination may not be sufficient to establish interference or retaliation claims. Brown v. Scriptpro. LLC, 700 F.3d 1222 (10th Cir. 2012). For example, temporal proximity alone is not enough to establish pretext for an interference claim if the employer had a good faith belief the employee had engaged in misconduct. Borwick v. T-Mobile West Corp., 2013 WL 4007740 (10th Cir. Aug. 7, 2013)(unpublished).
e. Failure to provide a return to work release after expiration of FMLA leave may justify termination and denial of FMLA reinstatement. Robert v. Board of Cty. Comm’rs, 691 F.3d 1211 (10th Cir. 2012). Employee’s FMLA interference and retaliation claims. Employee’s medical paperwork stated she was cleared to return to work without restriction on the day she requested leave. The Court found she did not have a qualifying serious medical condition. Note to plaintiff’s counsel from fn. 4: retaliation claim could be viable even if employee does not ultimately have a qualifying serious medical condition if adverse action is taken immediately upon request for leave. (unlike an interference claim, eligibility is not an element of an FMLA retaliation claim).

Wehrley v. American Family Mut. Ins. Co., 513 Fed. Appx. 733 (10th Cir. 2013): Notice of intent to take FMLA leave, where employee is qualified for leave, is protected activity. Employee told employer he would take FMLA leave once his surgery was scheduled. Five weeks later, employee was terminated. Court held that the temporal connection in this case was alone enough to show a causal connection between protected activity and the adverse action. Take away for plaintiff’s counsel: notifying an employer of the future intention to take FMLA leave is protected activity.

Sabourin v. Univ. of Utah, 676 F.3d 950 (10th Cir. 2012): Employee was fired while he was on FMLA leave. Employee was insubordinate and properly terminated for cause because he interfered with his employer’s ability to continue with the work the plaintiff was assigned, during the plaintiff’s approved FMLA leave. Prior to taking leave, employee emptied his office of all paper and electronic files necessary to do
Similarly, termination for job abandonment for failure to return a doctor’s certification for STD leave does not create pretext when the employer’s policy stated that would occur. **Murphy v. Samson Resources Co.**, 2013 WL 1896822 (10th Cir. May 8, 2013).

f. There is no separate FMLA claim for “failure to restore” someone to their pre-FMLA leave position; instead, this is analyzed as a FMLA interference claim. **Peterson v. Exide Technologies**, 2012 WL 1184001 (10th Cir. 2012)(unpublished).

g. An employee’s refusal to return to work because she did not want to work with her former supervisor any longer did not create FMLA claims. **Harrison v. M-D Building Products, Inc.**, 2012 WL 6621466 (10th Cir. 2012)(unpublished).

h. An employee who is terminated after they do not return to work following the expiration of their FMLA leave cannot assert an FMLA interference claim. **Glover v. DCP Midstream Corp.**, 2013 WL 2631520 (10th Cir. 2013)(unpublished).

i. Forcing an employee to take involuntary FMLA because she could not perform the functions of her job did not create a Title VII gender/pregnancy claim. **Freppon v. City of Chandler**, 2013 WL 3285628 (10th Cir. July 1, 2013).

j. Firing an employee for failure to comply with attendance and his job and kept the laptop on which the only files were maintained. **Reminder to plaintiff’s counsel:** FMLA leave does not insulate an employee from legitimate discipline even during the period of such leave.

Brown v. Scriptpro, LLC, 700 F.3d 1222 (10th Cir. 2012): Employee either on his own or with permission from former supervisor, worked at home in addition to regular hours to “bank” extra time to be used later at PTO. Court held, to show pretext, temporal proximity alone is not enough; plaintiff must also show circumstantial evidence of retaliatory motive.

See also **Borwick v. T-Mobile West Corp.**, 2013 WL 4007740 (10th Cir. August 7, 2013) (unpublished): Employee notified employer of pregnancy and intent to take FMLA at nearly the same time the employer became aware that employee might be engaged in misconduct in job performance. The Court held that temporal proximity alone was not enough to establish pretext in this case.

But see **Wehrley, supra**. **Note to plaintiff’s counsel:** the Court in Brown recognized that temporal proximity may be enough to prove causation (the third element) of an interference claim, but is not alone sufficient to prove pretext.

Robert v. Board of Cty. Comm’rs, 691 F.3d 1211 (10th Cir. 2012): Employee was not able to return to work by end of her FMLA leave and thus, her FMLA retaliation claim
notice-of-absence policies does not create FMLA interference or retaliation claims, even if the absences were protected by the FMLA. **Barnes v. Spirit Aerosystems, Inc.,** 2013 WL 5495883 (10th Cir. Oct. 4, 2013)(unpublished).

k. Failing to promote an employee after taking FMLA leave to donate a kidney was not FMLA retaliation, where the employer relied on the recommendation of two panels that suggested hiring another person. **Wright v. City of Topeka,** 2013 WL 5860724 (10th Cir. Nov. 1, 2013)(unpublished).

could not survive summary judgment. Further, under the ADA, an indefinite exemption from the essential functions of in-person attendance was not a reasonable accommodation. **Reminder to plaintiff’s counsel:** an employer has no obligation to provide leave beyond the 12-weeks permitted by the FMLA.

**Murphy v. Samson Resources Co.,** 525 Fed. Appx. 703 (10th Cir. 2013) (unpublished): Employee failed to return to work at end of short term disability and failed to provide promised documentation of continued need for medical leave in violation of employer’s policy. **Reminder to plaintiff’s counsel:** an employer has no obligation to provide leave beyond the 12-weeks permitted by the FMLA.

**Peterson v. Exide Technologies,** 477 Fed. Appx. 474 (10th Cir. 2012): Employee terminated while on FMLA leave to recover from workplace injury caused by employee running forklift he was driving into a pole in the warehouse. Employee had formal warnings about safety issues and his termination notice cited flagrant disregard of safety rules and policies. The Court held that the employee failed to provide any evidence that his termination was based on taking FMLA leave rather than violation of safety policies. **Note to plaintiff’s counsel:** Plaintiff’s assertion of pretext based on employer’s alleged failure to follow its progressive discipline policy was rejected by the Court because the policy is discretionary, not mandatory. **Additional note to plaintiff’s counsel:** the only two causes of action under the FMLA are
entitlement/interference and retaliation/discrimination.

Harrison v. M-D Building Products, Inc., 489 Fed. Appx. 219 (10th Cir. 2012): Employee was verbally harassed by supervisor and took FMLA after passing out in a meeting. Employee refused to return to work for same supervisor after FMLA leave expired. Court dismissed employee’s FMLA interference and retaliation claims because employee was permitted to take full FMLA leave and her job was held open for her return. **Reminder to plaintiff’s counsel:** the FMLA does not protect an employee’s at-work conditions.

Glover v. DCP Midstream Corp., 2013 WL 2631520 (10th Cir. June 13, 2013) (unpublished): Employee was unable to return to work following full use of FMLA leave for the year. **Reminder to plaintiff’s counsel:** an employer has no obligation to provide leave beyond the 12-weeks permitted by the FMLA.

Freppon v. City of Chandler, 2013 WL 3285628 (10th Cir. July 1, 2013) (unpublished): Employee alleged that being forced to take FMLA leave instead of being granted light-duty was gender discrimination and retaliation. The Tenth Circuit affirmed the district court’s grant of summary judgment in favor of the employer, holding the employee did not establish evidence of pretext. **Silver lining for plaintiffs:** forcing an employee to take FMLA leave can qualify as an adverse employment action.
Barnes v. Spirit Aerosystems, Inc., 2013 WL 5495883 (10th Cir. Oct. 4, 2013) (unpublished): Firing an employee for failure to comply with attendance and notice-of-absence policies does not create FMLA interference or retaliation claims, even if the absences were protected by the FMLA. **Take-away for plaintiff’s counsel:** use of FMLA does not exempt an employee from complying with employer policies.

Wright v. City of Topeka, 2013 WL 5860724 (10th Cir. Nov. 1, 2013) (unpublished): Failing to promote an employee after taking FMLA leave to donate a kidney was not FMLA retaliation, where the employer relied on the recommendation of two panels that suggested hiring another person. **For plaintiff’s counsel to note:** in comparing candidates for an open position, the court held that it was the employer’s subjective belief as to who was more qualified rather than an objective comparison of qualifications and relevant experience.

5. Recent District of Colorado decisions
   a. Employee entitled to discovery regarding whether employer had 50 employees to determine whether she was an “eligible employee” under the FMLA, denying motion to dismiss and for summary judgment. Waters v. AXL Charter Sch., 2013 U.S. Dist. LEXIS 31643 (D. Colo. Mar. 7, 2013).
   b. Employee did not sufficiently allege interference claim, but retaliation claim was sufficiently Waters v. AXL Charter Sch., 2013 U.S. Dist. LEXIS 31643 (D. Colo. Mar. 7, 2013): Dismissing early-filed motion to dismiss and for summary judgment on FMLA claims because employee was entitled to discovery regarding whether employer had 50 employees to determine eligibility under the FMLA. **Note to plaintiff’s counsel:** eligibility under FMLA is a question of subject-matter jurisdiction. **Side note:** other circuits have recognized equitable estoppel in the context of FMLA claims and the Court may have considered such claim had employee asserted that employer made
pled based on allegations that lifting requirement was not uniformly applied, and employee did not have to plead facts regarding pretext to defeat motion to dismiss. Pina-Belmarez v. Board of Cty. Comm’rs, 2012 WL 2974701 (D. Colo. July 19, 2012).

c. Employee did not sufficiently allege she was entitled to FMLA leave merely by making the conclusory assertion that she was a “qualifying employee” and therefore claim would be dismissed, but without prejudice. Weise v. EISAI, Inc., 2012 WL 84701 (D. Colo. Jan. 11, 2012). FMLA claim would not be dismissed, however, where employee did sufficiently allege she had worked sufficient hours to be entitled to FMLA as of a certain date. Bourne v. Exempla, Inc., 2013 WL 1232139 (D. Colo. Mar. 27, 2013).

d. Whether an employee is an eligible employee for FMLA leave, for purposes of determining the number of workers at the worksite, is determined as of the time the employee sought the FMLA; therefore, if the employee sought leave for a time during which the employer had less than 50 employees, he was not eligible for FMLA leave. Teufel v. Sharpshooter Spectrum Venture LLC, 2012 WL 161820 (D. Colo. Jan. 19, 2012).

e. Employer’s good faith belief that positive representations (or misrepresentations) to her regarding eligibility under the FMLA.

Pina-Belmarez v. Board of Cty. Comm’rs, 2012 WL 2974701 (D. Colo. July 19, 2012): Employee did not sufficiently allege interference claim, but retaliation claim was sufficiently pled based on allegations that lifting requirement was not uniformly applied, and employee did not have to plead facts regarding pretext to defeat motion to dismiss. Take-away for plaintiff’s counsel: the McDonnell Douglas framework has no relevance to a plaintiff’s pleading burden, even under the heightened Twombly standard.

Weise v. EISAI, Inc., 2012 WL 84701 (D. Colo. Jan. 11, 2012): Employee did not sufficiently allege she was entitled to FMLA leave merely by making the conclusory assertion that she was a "qualifying employee" and therefore claim would be dismissed, but without prejudice. Note to plaintiff’s counsel: plead each fact regarding eligibility for FMLA leave separately. On a motion to dismiss, courts need not take legal conclusions, as opposed to factual allegations, as true.

Bourne v. Exempla, Inc., 2013 WL 1232139 (D. Colo. Mar. 27, 2013): FMLA claim would not be dismissed where employee sufficiently alleged she worked required number of hours to be entitled to FMLA as of a certain date. Plaintiff’s counsel should note: the court recognized an FMLA interference claim based on the employer’s failure to notify employee she was not an
employee was not entitled to FMLA leave for absence that led to her termination defeated FMLA retaliation claim, but FMLA interference claim survived summary judgment based on evidence that employee might have had a serious health condition that would have entitled her to FMLA leave. Crowell v. Denver Health and Hosp. Authority, 2013 WL 788087 (D. Colo. Mar. 1, 2013).

f. An employee was not even eligible for FMLA could not argue that the fact intermittent leave is available under the FMLA means providing it would be reasonable in an ADA reasonable accommodation context. Felkins v. City of Lakewood, 2013 WL 5200901, *4 (D. Colo. Sept. 13, 2013).

g. An employee who was able to take FMLA leave nevertheless stated an interference claim with evidence that the employer created a powerful disincentive for taking leave with actions such as immediate work warnings after announcing plans for taking FMLA leave, and attempting to remove a large commission producing customer account. Martin v. Canon Business Solutions, Inc., 2013 WL 4838913, *3-5 (D. Colo. Sept. 10, 2013). Allegations about warnings, loss of accounts, and related facts also supported FMLA eligible employee within 5 days of her request, as required by FMLA regulations.

Teufel v. Sharpshooter Spectrum Venture LLC, 2012 WL 161820 (D. Colo. Jan. 19, 2012): Whether an employee is an eligible employee for FMLA leave, for purposes of determining the number of workers at the worksite, is determined as of the time the employee sought the FMLA; therefore, if the employee sought leave for a time during which the employer had less than 50 employees, he was not eligible for FMLA leave. Notable distinction: when an employee suffers from multiple serious medical conditions and may take leave for different conditions on different occasions, eligibility for a particular instance of leave is determined on the date of the notice for leave only related to that specific medical condition. An employee must request leave separately for each FMLA qualifying reason (even if leaves and notices are concurrent or overlapping).

Crowell v. Denver Health and Hosp. Authority, 2013 WL 788087 (D. Colo. Mar. 1, 2013): Employer’s good faith belief that employee was not entitled to FMLA leave for absence that led to her termination defeated FMLA retaliation claim, but FMLA interference claim survived summary judgment based on evidence that employee might have had a serious health condition that would have entitled her to FMLA leave. Important caveat for plaintiff’s counsel: an employee’s physician’s revised opinion regarding the seriousness of a medical condition can be used to invalidate a previously approved

Felkins v. City of Lakewood, 2013 WL 5200901 (D. Colo. Sept. 13, 2013): Although no FMLA claim was asserted in this case, the employee attempted to use the fact that other employees who were eligible for FMLA and received it, to prove that allowing leave in general was a reasonable accommodation (not an undue burden) for her disability - bone disease. The Court granted summary judgment for the employer on the ground that the employee failed to prove she requested a reasonable accommodation for her disability because she requested leave for a broken leg suffered from tripping over a dog, and not because of her bone disease. **Side note regarding the ADA:** if leave (whether FMLA or other leave if not eligible for FMLA) is requested as a reasonable accommodation under the ADA, it must be because of the disability protected by the ADA.

Martin v. Canon Business Solutions, Inc., 2013 WL 4838913 (D. Colo. Sept. 10, 2013): An employee who was able to take FMLA leave nevertheless stated an interference claim with evidence that the employer created a powerful disincentive for taking leave with actions such as immediate work warnings after announcing plans for taking FMLA leave, and attempting to remove a large commission producing customer account. Allegations about warnings, loss of accounts, and related facts also supported FMLA retaliation claims. **Important take-away for plaintiff's counsel:** a plaintiff can state
a claim for FMLA interference if an employer discourages an employee from using such leave, i.e., provides a strong disincentive.

**Borgeault v. Pueblo County**, 2013 WL 2468314 (D. Colo. June 7, 2013): Discovery of work performance problems when employee took FMLA leave justified transfer upon return; retaliation claim dismissed. **Note to plaintiff’s counsel:** a plaintiff cannot save their job by taking FMLA leave when poor performance issues are already well-documented and used as the employer’s legitimate non-discriminatory reason.

| 6. New Colorado State Law: “Family Care Act,” C.R.S. § 8-13.3-201 et seq. (effective Aug. 7, 2013). For employees eligible to take FMLA leave, this statute expands the group of people considered “family” (parent, spouse, son or daughter) for whom the employee can take leave to care for if the person has a serious health condition. This statute provides a right to leave to care for the employee’s partner in a civil union, or the employee’s domestic partner (if the domestic partnership is registered with the city or state or is recognized by the employer). Employers can require reasonable documentation of the relationship and require the employee to submit the same certifications required by the FMLA. Denial of leave under this statute, or interference, creates a right of action in state court with the remedies available under the FMLA. The statute also provides for repeal if the FMLA is amended to provide leave for the reasons set forth in the FCA. Note that the statute |
provides that leave under this statute runs concurrently with leave taken under the FMLA and does not increase the total amount of leave an employee is entitled to, but it does not preclude an employer from granting an employee more leave than required under the FMLA. The FMLA does not prohibit other laws that provide greater family leave rights, 29 U.S.C. §2652(a), but despite this “no additional leave” language in the FCA, the FMLA regulations specifically provide that state laws may result in employees obtaining more leave than they would under the FMLA. 29 C.F.R. § 825.701. Accordingly, regardless of the language in the FCA that FCA leave runs concurrently with FMLA leave, and that the FCA does not increase the total amount of leave, there may be situations where an employee obtains separate leaves under both statutes that exceed the 12 weeks that would be available under the FMLA. For example, at the beginning of a FMLA 12 month period, an employee needs 12 weeks of leave to care for a domestic partner (covered by the FCA but not the FMLA, and so it does not count against the 12 weeks under the FMLA), and then, a week after returning to work, the employee has a baby and chooses to take 12 weeks of leave under the FMLA. Under the reverse scenario, however, where the employee first takes 12 weeks of FMLA leave, there would not be additional leave available under the FCA.