<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
<th>Introduced In</th>
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<tr>
<td>ADA</td>
<td>Americans with Disabilities Act prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities</td>
<td>Module 3</td>
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<tr>
<td>Chronic condition</td>
<td>A condition that requires visits at least twice a year for treatment and continues over an extended period of time</td>
<td>Module 2</td>
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<tr>
<td>Continuing treatment</td>
<td>A period of incapacity of at least 3 days followed by medical treatment by a medical provider</td>
<td>Module 2</td>
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<td>Extingency leave</td>
<td>A qualifying leave when the employee’s spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call of order of active duty in support of a contingency operation</td>
<td>Module 1</td>
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<tr>
<td>Fixed year</td>
<td>A period of time that is reflected either in a calendar year, a fiscal year, or any other period of 12 months that begins and ends on specified dates</td>
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<tr>
<td>FMLA</td>
<td>Family Medical Leave Act; an act that provides job security to employees who require time off from work because of illness or to care for family members</td>
<td>Module 1</td>
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<tr>
<td>Intermittent leave</td>
<td>Leave taken in separate blocks of time due to a single qualifying reason</td>
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<td>Next of kin</td>
<td>The nearest blood relative other than a spouse, parent, or child with priority given a to blood relative who has been given legal custody followed by brothers, sisters, and grandparents, aunts, uncles, and first cousins; only applies to military family leave</td>
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<td>Notice of Eligibility and Rights</td>
<td>A letter sent to the employee that preliminarily designates the time off as FMLA</td>
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<td>Rolling year</td>
<td>A method used to determine FMLA leave when the employer looks back over the past 12 months from the date of the request, adds all the used FMLA time, and grants the employee up to the remainder; also known as the look back method</td>
<td>Module 2</td>
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<td>Serious health condition</td>
<td>A health condition that makes the employee unable to perform the essential functions of their job</td>
<td>Module 2</td>
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The Family Medical Leave Act affects employees on a more personal level than just about any regulation or rule that I can think of. But almost 20 years after it’s been enacted, it continues to confuse attorneys, managers, and human resources professionals alike. More and more employees are using FMLA. So it’s important for companies to make sure that they’re complaint with their FMLA administration practices in order to avoid serious legal and financial implications. The Family Medical Leave Act was enacted in 1993 to provide job security to employees who required time off from work because of their own illness or to care for infirm family members or to care for newborn infants. It was Congress’s goal to balance the needs of employees and their families against the legitimate interests of the employers. Now Congress chose to do this by mandating that employers provide employees with unpaid leave coupled with guaranteed reinstatement in limited, closely defined circumstances. Well, like so many laws that affect the way that we live and conduct our business, the greatest challenge is not necessarily implementing what the law requires. Rather, in many cases, the greatest challenge is in figuring out what the law requires. Now businesses in all states are required to follow the provisions of the FMLA. But if you do business in any of these states, you’re governed by state family leave acts as well. And those states are California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon,
Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia. So first, what businesses are covered by the FMLA? Well the FMLA applies to any employer in the private sector who has 50 or more employees each working day during at least 20 calendar weeks or more in the current or preceding calendar year. It also applies to all public agencies, federal, state and local governments, and local primary and secondary schools. But the public sector employees do not need to meet the 50 employee requirement. So what employees are covered? To be eligible for FMLA benefits, an employee must meet all of the following. First, they need to work for a covered employer. They need to have worked for that employer for a total of 12 months. Now those 12 months don’t have to be consecutive months of service. However, in most circumstances the 12 months of service must be within the seven years preceding the start of the leave. Next, the employee must have worked at least 1250 hours over the previous 12 months. Now since nonexempt employees are paid only for the hours that they actually work, only the hours actually worked count for FMLA eligibility. The hours that an employee was on vacation or on leave, even if the vacation or the leave was paid, don’t count as time worked and therefore are not included in determining if an employee satisfies the 1250 hour threshold. Now the employer has the burden of showing that the employee has not worked the required hours unless the employee must work at a location in the United States or in any territory or possession of the United States where
at least 50 employees employed by that employer are within 75 miles of the employee’s job. And those are surface miles – not straight line linear miles. So the basic leave requirement for the FMLA – the FMLA requires covered employees to provide up to 12 weeks of unpaid job-protected leave to eligible employees for the following reasons: incapacity due to pregnancy, prenatal medical care or child birth; to care for the employee’s child after birth or placement for adoption or foster care; to care for the employee’s spouse, son, daughter, or parent who has a serious health condition; and note that spouses employed by the same employer are jointly entitled to a total of 12 work weeks of family leave for the birth and care of that newborn child or for the placement of the child for adoption or foster care, and to care for a child who has a serious health condition. Leave for birth and care or placement for adoption or foster care must end within 12 months of the birth or placement. The next condition is for a serious health condition that makes the employee unable to perform the employee’s job. And we’ll talk about how to define what is a serious health condition in the next module. Next is military caregivers’ leave. A covered employer must grant an eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered service member with a serious injury or illness up to a total of 26 work weeks of unpaid leave during a single 12 month period to care for that service member. Now a covered service member is a current member of the armed forces including the National Guard or Reserves who is undergoing medical
treatment, recuperation or therapy in an outpatient status, or who is on the temporary disability retired list for a serious injury or illness. The definition of covered service member also includes veterans who are undergoing medical treatment for a serious injury or illness sustained in the line of duty and who were members of the armed forces within five years prior to the need for that medical treatment. The caregiver would be able to take up to 26 weeks of leave to care for the veteran up to five years after the service member leaves military service. For military caregivers, a serious injury or illness is one that was incurred by a service member in the line of duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank, or rating. The single 12 month period for leave to care for covered service members begins on the first day the employee takes for this reason and ends 12 months later, regardless of what 12 month period the employer has established for other types of FMLA leave. An eligible employee is limited to a combined total of 26 work weeks of leave for any FMLA qualifying reason during any single 12 month period. Now there’s qualifying exigency leave. A covered employee must grant eligible employees up to a total of 12 work weeks of unpaid leave during a normal 12 month period established by the employer for FMLA leave for qualifying exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call of order of active duty in support of a contingency operation. Well, qualified exigencies include
issues arising from covered military members short notice deployment; military events and related activities such as official ceremonies or programs; certain child care and related activities arising from the active duty or call to active duty status of the covered military member, such as arranging for alternative child care or providing child care on a non-routine, urgent, immediate-need basis; making or updating financial and legal arrangements to address a covered military member’s absence; you can take up to five days of FMLA to spend time with a covered military member who’s on short term temporary rest and recuperation leave during deployment; or you can take FMLA to certain post deployment activities, including attending arrival ceremonies or other official ceremonies or programs sponsored by the military up to 90 days following the end of a covered military member’s active duty status; and you can take FMLA to address issues arising from the death of a covered military member.

[End of recording.]
Female: Module Two – Ten Things You Need to Know About FMLA. Covered employees can take up to 12 weeks of FMLA leave in any 12 month period. But each employer determines how to define that 12 month period. The act itself doesn’t define what constitutes a 12 month period. Each employer can decide that on their own. So how do employers define an FMLA year? Well, employers can choose either a fixed year or a rolling year. Now a fixed year is either a calendar year, a fiscal year, or any other period of 12 months that begins and ends on specified dates. For example, some companies have used employee’s start date to be the beginning of their FMLA year. But the trouble with using a fixed year is that employees can stack their FMLA requests so that they can get more than 12 weeks in a row. For example, if a company uses the calendar year as their FMLA year, an employee can request FMLA in October, and then the clock would restart in January so that the employee would be entitled to an additional 12 weeks without ever returning to work. Now another option is to use the 12 month period measured forward from the date the employee’s FMLA leave begins. But most companies use a rolling year. The rolling method is also commonly known as the look-back method by HR professionals. Using this method, the employer will look back over the last 12 months from the date of the leave request, add up all the FMLA time the employee has used during the previous 12 months, and subtract that total from the employer’s 12 week leave allotment to find
out how much leave they have entitled. So what are FMLA covered conditions? Well, covered conditions include the birth of a child and to take care of a newborn child within one year of the child’s birth; the placement with the employee of a child for adoption or foster care, and to care for the newly placed child within one year of placement; to care for the employee’s spouse, child or parent who has a serious health condition; a serious health condition that makes the employee unable to perform the essential functions of their job; and any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter or parent is a covered military member on covered active duty. So what is a serious health condition? A serious health condition entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves either in-patient care or continuing treatment by a healthcare provider. OK, now let’s define in-patient care. Well, that one is pretty simple. In-patient care means an overnight stay in a hospital, a hospice, or a residential medical care faculty. So let’s define continuing treatment. Well, continuing treatment involves first, incapacity for at least three consecutive full calendar days followed by medical treatment by a medical provider. Now subsequent care can mean treatment two or more times within 30 days of the first day of incapacity, treatment by a healthcare provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the healthcare provider. Now in-person treatment of the regimen of continuing treatment may take
place after the period of incapacity has ended and the employee has already returned to work. So therefore, that leave may not have qualified as FMLA leave at the time it was taken. But it was later shown to meet the requirements of FMLA leave, so it needs to be retroactively designated as FMLA. Serious health condition is also pregnancy or prenatal care. Any period of incapacity due to pregnancy for prenatal care constitutes continuing treatment entitling that employee to FMLA leave. Also, chronic conditions. Now chronic conditions include conditions that require visits at least twice a year for treatment continued over an extended period of time. But it may cause episodic rather than continuing periods of incapacity – something like asthma or diabetes. Also serious health condition includes permanent or long term conditions. For example, Alzheimer’s, a severe stroke, or terminal stages of a disease would qualify as permanent or long term conditions, entitling that employee to FMLA leave. And last, conditions requiring multiple treatments. This could be like chemotherapy for cancer or physical therapy for an injury or arthritis, or dialysis for kidney disease. Now substance abuse may be a serious health condition, and FMLA leave may be taken, but only for treatment of substance abuse. Absences because of the employee’s use of the substances rather than for treatment do not qualify for the FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. Now here’s what serious health conditions are not. The FMLA regulations don’t list ailments that are
categorically excluded from the definition of a serious health condition, but they do state that the following conditions will ordinarily not qualify as a serious health condition. That would include the common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. However, if complications arise in any and any of these conditions meet the requirements, then they will be considered to be a serious health condition. Conditions for which cosmetic treatments are administered, like plastic surgery or treatments for acne, are not serious health conditions unless in-patient hospital care is required, or if complications develop. 

Now a healthcare provider is not limited to licensed physicians or doctors of medicine or osteopathy. It also can include podiatrists, dentists, clinical psychologists, optometrists, a chiropractor if the chiropractor’s treatment is consisting of manual manipulation of the spine. It can include nurse practitioners, nurse midwives, and clinical social workers, and can also include Christian Science practitioners if they’re listed with the First Church of Christ Scientists in Boston, Massachusetts. Any healthcare provider that’s recognized by the employer or the employer’s group health plan also can be considered to be a healthcare provider. So what if there’s a reduction in force or a layoff while the employee is on FMLA leave? Well, FMLA leave does not exempt an employee from the effects of a reduction in force or a layoff. Now although employees do have job and benefits protection during FMLA leave, they’re not totally exempt from
termination or layoff. According to the FMLA regulations, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. So if an employer can show that an employee would have been laid off at the time of the reinstatement, they can deny restoration of employment to the employee. Now FMLA talks about key employees. Certain key employees may not be guaranteed reinstatement to their positions following their FMLA leave. Now under these limited circumstances where restoration to the employment would cause substantial and grievous economic injury to the company’s operations, an employer may refuse to reinstate certain highly paid salaried key employees. Now in order to do that, the employer must notify the employee in writing of his or her status as a key employee as defined by the FMLA and the reasons for denying job restoration, and provide that employee with a reasonable opportunity to return to work after the notification. So now let’s define who’s a family member. According to the FMLA, family members are spouse, parent, child, and for the covered military members, next of kin. But this includes not only a biological or adopted child, but also a foster child, step child, legal ward, or a child of a person standing in loco parentis. Now Congress intended that the definition of son or daughter should reflect the reality that many children in the United States today do not live in traditional nuclear families with a biological father and a biological mother. So those who find themselves in
need of workplace accommodation of their childcare responsibilities are often not the biological parent of the children they care for, but they’re adopted, they’re step or foster parents, they’re gardens, or sometimes they’re simply the grandparents or other relatives or other adults that are charged with the care of the child. Now partners of same sex parents who are defined as loco parentis of their partner’s children. Next of kin applies only to military family leave, and it means the nearest blood relative other than a spouse, parent, or child with priority given to blood relative who has been given legal custody followed by brothers, sisters, and grandparents, aunts, uncles, and first cousins. Or the service member could designate the next of kin in advance. Now FMLA and employee leave time – remember that FMLA is unpaid leave. But if the employee has accrued sick time, personal leave, or vacation, either the employee or the employer can choose to use that time to cover some or all of the FMLA leave. So let’s say an employee has 12 weeks of accrued sick leave and requests FMLA. The company can require the employee to use the sick leave for FMLA simultaneously. An employee can’t use up 12 weeks of paid sick leave, and then come back and request additional unpaid leave for the same reason. Now what about a work related injury or illness? Sometimes FMLA leave and workers’ compensation leave can run together, provided that the reason for the absence is due to a qualifying serious illness or injury, and the employer has properly notified the employee in writing that the workers’ compensation leave will be counted
as FMLA leave. Employers are required to inform their employees about their rights under the FMLA. Every employee covered by the FMLA is required to post a notice of FMLA rights. Those employers must post a notice permanently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. If an FMLA covered employer has any eligible employees, it must also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees, or by distributing a copy of the general notice to each new employee on hiring. If you don’t inform your employees of their rights under the FMLA, you’re putting your company at risk for liability.

[End of recording.]
Module Three – Common Compliance Problems. In this module, we’ll talk about some common compliance problems and what you can do to deal with those situations. Now most employers assume that if they give an employee 12 weeks of leave to comply with the FMLA, their obligation to this employee is finished. But if this employee is disabled, the employer's duty under the Americans with Disabilities Act may just be beginning. Most HR professionals will agree that the coordinating the FMLA with the Americans with Disabilities Act, or ADA, is one of their top challenges. The confusion created by this overlap of FMLA and ADA is another example of good intentions gone awry. Congress passed both of these laws without considering how they would interact. And the regulatory agencies contributed further to the uncertainty by providing only their minimum of guidance. So as a result, most employers must make their own rules for applying the sometimes conflicting laws to an employee’s leave of absence. As a practice matter, these laws will overlap when an employee takes a leave of absence for FMLA serious health condition that also qualifies as a disability under the ADA. For example, if an employee who’s been on FMLA for 12 weeks cannot return to work because of a continuing serious health condition, the condition may also be a disability. Therefore, the employer will have to accommodate the employee by granting additional leave beyond the 12 weeks of FMLA. If an employee requests a six-weeks leave of absence as an accommodation to seek a
treatment for a disability, that time off covered could be counted as FMLA leave for a serious health condition. Now employees can trigger FMLA without ever saying the term “FMLA.” So your company should have a specific policy and process for employees to request leave. There’s no magic words that an employee has to say to invoke FMLA. Now typically, employees don’t label their requests for your convenience. They don’t come in and say, “I need an ADA accommodation,” or, “I’d like to request FMLA leave.” Instead, they tell you, “I need some time off to get an operation,” or, “I have to leave early on Fridays to go to therapy.” The managers who additionally deal with the employees and those who make the eventual decision must be well trained to ask the right questions and not to ask the wrong questions in order to decipher whether the employee is asking for ADA accommodation, FMLA leave, or both. So if an employee comes in and just says, “I need to take a leave of absence,” what kind of leave should that be? Well first, if the employee is not eligible for FMLA or the reason for the leave is outside of FMLA, then view that leave request through an ADA filter and decide if it has any bearing on ADA. But if the request qualifies for FMLA, go ahead and start the FMLA procedures because you’re better off if you can start those procedures as early as possible. Now if you don’t know for sure whether an employee’s absence is caused by an FMLA qualifying event, go ahead and send a letter to the employee that preliminarily designates the time off as FMLA. And this is called a notice of eligibility and rights. This letter should also
request that the employee return a completed certification of healthcare provider within 15 days. After you review the completed form, then you should issue another letter indicating that the preliminary designation is becoming final, or that the leave was not considered to be FMLA qualifying. So eligibility notice and notice of rights and responsibilities – the employer is required to provide the employee a notice of eligibility for FMLA leave within five days of learning that the employee’s leave may be an FMLA qualifying reason. So when the employer finds out that an employee’s leave may be for an FMLA qualifying reason, the employer must provide that employee with notice of the employee’s eligibility for leave. It must provide this notice within five days of receiving notice. Employers must also provide a written notice detailing the specific expectations and obligations of the employee in explaining any consequences of a failure to meet these obligations. And this notice must be provided to the employees each time the eligibility notice is provided. So if the FMLA leave has already begun, the notice must be mailed to the employee’s address of record. And the document, whether it’s mailed or whether it’s given to the employee, must include notice that the leave may be designated and counted against the annual FMLA leave entitlement; that any requirement for the employee to provide and the consequences to the employee for failing to provide those requirements; the employee’s right to substitute paid leave and whether the employer will require this substitution of paid leave; it should also list any requirements for the
employee to make premium payments to maintain health benefits, and what arrangements need to be made to make those payments; it needs to say whether or not that employee is a key employee, and the potential consequences if they are a key employee; and the employee’s rights to maintenance of benefits during FMLA leave and restoration to the same or equivalent job on return for FMLA leave. So what happens if an employee just doesn’t show up to work? Well, if that employee’s covered by the FMLA, then it would be a good idea to delay any no-call, no-show disciplinary actions until you send the employee an FMLA notice of eligibility and rights and get the answer back. So when in doubt, send out the notice of eligibility and rights. So how do you calculate FMLA leave? Regular full time employees who work 40 hours a week are entitled to 12 weeks times 40 hours a week, or 480 hours of FMLA leave for each FMLA leave year. Now part time employees’ entitlement is calculated by averaging the number of hours worked over the last 12 months times the 12 weeks of eligibility. The amount of FMLA leave available to the employee must be based on the number of hours worked in a normal work week, even if it exceeds 40 hours. So if an employee routinely works overtime, then the employee is still entitled to that average number of hours worked weekly over the last 12 months times the 12 weeks of eligibility. So what if the HR or the supervisor thinks the medical certification is bogus? Well, they have two options. They can request a second opinion from another health provider at the employer’s expense; or
they can contact the healthcare provider that wrote the certification. You need to be careful with contact with the healthcare provider. Employers can directly contact the employee’s healthcare provider to authenticate the information. Now remember, it’s HR that can do this contacting. A direct supervisor needs to stay out of this because it’s pretty tricky. The employer has the right under the FMLA to provide the healthcare provider with a copy of the certification, and they can request verification that the information contained on that certificate was completed and/or authorized by the provider who signed the document. Now that contact does not require the employee’s consent and does not violate the HIPAA privacy regulations if it’s done correctly. Now let’s get to intermittent leave. Intermittent leave is leave taken in separate blocks of time due to a single qualifying reason. It can be occasional blocks of time, or it can be a reduced work schedule. Intermittent leave under the FMLA is usually the top contributor to HR’s headaches. This is due to the fact that when employees are on intermittent or reduced schedule leave, only the amount of leave that’s actually taken can be counted towards the 12 weeks of leave. So it’s important that you have good tracking systems in place to properly account for the intermittent leave. Intermittent FMLA leave must be accounted for in the increments no greater than one hour, or the smallest increment allowed by the employer’s payroll system. So for example, if your payroll system accounts for increments of quarter-hours, then you have to calculate intermittent FMLA leave in quarter-hours, too.
Now some payroll systems calculate down to increments of six minutes, or tenths of an hour. If that’s the case in your office, you need to be able to track intermittent FMLA down to increments of a tenth of an hour. So what are the employer’s rights under intermittent leave that they don’t have under regular full time FMLA leave? Well, under intermittent leave, the employers may transfer or reassign the employee to an alternative position with equivalent pay and benefits. And they may also require the employee to make reasonable effort to schedule the planned medical treatment so as not to disrupt operations. Here’s what you can do to prevent intermission FMLA abuse. You should always insist that employees provide the required notice once they learn of the need for leave. And always insure eligibility. Make sure that employees requesting FMLA leave are eligible to take it. Don’t give out FMLA leave prematurely. Make sure that the employee is eligible. And deny any requests for intermittent parental leave. Even though intermittent leave is FMLA leave, you can deny it for parental care. No intermittent leave is available for childbirth or adoption purposes. And you can require medical certification. All leave must be medically necessary. So return to previous position – now the FMLA does not require the employer to reinstate the employee to another less-demanding job. However, the ADA or the employer’s short term disability policy may demand a different result. So this is really tricky, and you need to be cautious because under the ADA, a qualified individual with a disability may work part time in his or her current position,
or take some occasional time off as a reasonable accommodation if it does not impose an undue hardship on the employer. So if or when reduced hours create an undue hardship in the current position, the employer must see if there’s a vacant or equivalent position for which the employee’s qualified and in which the employee can be reassigned without undue hardship while working a reduced schedule. An ADA accommodation of this nature is not restricted to 12 work weeks. But there’s not statutorily guaranteed right of reinstatement as exists under the FMLA. This is a complex area of statuary interaction, and you should consult competent counsel. Now this is just a heads up regarding accommodating nursing mothers. The Fair Labor Standards Act was amended to require employers to provide unpaid breaks for nursing mothers to express milk for up to one year after the birth of a child. While the United States Department of Labor has not issued a decision as to whether those breaks should be charged against the employee’s FMLA entitlement, the Department of Labor is currently requesting comments on this issue before they make a decision. So what if you need to terminate an employee after the FMLA is exhausted? When is it OK to fire a worker when they don’t return from FMLA leave? Well, you need to be extremely careful when considering a decision to terminate an employee who has exhausted their FMLA leave. You need to be prepared with adequate documentation to support your decision. If your company ever decides it must deny an employee an additional leave, you must be able to
document exactly how that additional leave would adversely affect your business. So enforcing attendance and conduct policies – you need to be sure that your attendance policies are carefully drafted, and you also need to ensure that equal application of all policies for all employees. Between HR tracking FMLA use and managers tracking employee absences, it's really easy for the facts to get lost in the shuffle, and managers may end up disciplining an employee for being absent too often when some of that time was protected under the FMLA. Before any absence-related action is taken against an employee who has used FMLA, companies should conduct an audit to determine if any of those unexcused absences that the manager has tracked should have been excused. And managers need to work together on leave issues with HR. And remember that employers are prohibited from retaliating against employees or their friends and family for FMLA related issues.

[End of recording.]
Module Four – FMLA Dos and Don’ts. Do always provide notice of approval or disapproval to the employee. The employer is required to respond to the employee within five days of receiving a request for FMLA leave. The employer’s response must establish whether the employee is eligible for FMLA leave and notify the employee of his or her rights and responsibilities under the FMLA. The easiest way to comply with this requirement is to use the FMLA model form Notice of Eligibility and Rights and Responsibilities, form WH-381. Do establish detailed policies and consistent practices. Detailed policies could be your best friend when you’re administering FMLA leave. In the next module, we’ll go through a recommendation for what should be included in your company’s FMLA policy. Do visit the Department of Labor’s website at http://www.dol.gov.whd.fmla. The Department of Labor website has general guidance, fact sheets, ordering information for FMLA posters, and you can download all of the applicable FMLA forms. The site also has Department of Labor administrator determinations on a variety of topics. Do keep up with changes in the law. Again, a good source for changes to FMLA is the Department of Labor website. Do post the required FMLA notice in the workplace. The FMLA notice is poster WHD, publication 1420. Remember that all covered employers are required to display and keep on display a poster explaining the provisions of the FMLA and telling employees how to file a complaint with the Wage and Hour Divisions of
the violations of the act. The poster must be displayed permanently where the employees and applicants for employment can see it. And where the employer’s workforce is comprised of significant portions of workers who are not literate in English, the employer is required to provide the notice in a language which the employees are literate. Do train the managers on FMLA and conduct FMLA refresher training. One of the top contributing factors to noncompliance with FMLA is the failure of front line managers to respond to FMLA requests properly. This is usually due to lack of understanding of the requirements of the law, and/or company policy and why the role as a front line manager is important. Now HR is usually the expert of FMLA. But the employees go to their front line supervisors to request leave. So with rising EEOC claims as well as increased violations for FMLA noncompliance, it’s critical for organizations to invest in adequate resources and proper training of front line managers to respond to the FMLA requests. Do advise employees of FMLA certification requirements and consequences. Now the Department of Labor has published four different model certification forms. When requiring a medical certification, you’re going to want to select the appropriate form to include with the form WH-381, Rights and Responsibilities form. Employees must be allowed up to 15 days to complete and return their certification form. There’s a form for Certification of Healthcare Provider for Employees with Serious Health Condition, Certification of Healthcare Provider for Family Members Serious Healthcare Condition, Certification
of Qualifying Exigencies of Military Family Leave, and Certification for Serious Injury or Illness of Covered Service Member for Military Family. Do make sure that you count all qualifying absences toward the employee’s FMLA entitlement. Now this is one way to make sure that your company’s FMLA policies are applied the same way to all employees. When something is this complicated and there are so many people involved, it’s easy to open the door for a claim of disparate treatment. Do manage intermittent FMLA properly. You should put your intermittent leave policy in writing and require certification for every employee that asks for sick leave. Again, minimize the risk of a disparate treatment claim. Do grant FMLA leave to same-sex parents. Now the definition of son or daughter under the FMLA includes a child of a person standing in loco parentis. The Department of Labor provides the following examples. Where an employee provides day to day care for his or her unmarried partner’s child with whom there’s no legal or biological relationship, even if he does not financially support the child; or two, where the employee will share equally in raising of a child with the child’s biological parent; and three, where the employee will share equally in raising of an adopted child with a same-sex partner, even if no legal relationship with that child exists. Now notably, this interpretation does not extend to FMLA leave rights to care for a same-sex partner’s illness. It’s limited and applies only to leave to care for children. Do discipline for non FMLA-related misconduct that you learn about as a result of FMLA
absence. Now obviously, you can’t reprimand or fire somebody for taking FMLA leave, and you wouldn’t want to be can that’s illegal retaliation. But what happens if you have to discipline someone for misconduct or poor performance, and they just happen to have taken FMLA recently. Discipline an employee for non FMLA related misconduct that you learn about as a result of an FMLA absence – let’s say for example an employee takes a week of FMLA leave, and during the absence, a supervisor logs on to the employee’s computer to access urgent files and finds out that that employee had been moonlighting on company time. Well, you can apply whatever discipline is applicable under your policy. Do discipline an employee who is taking intermittent FMLA leave and who fails to meet an agreed-upon level of performance. You can discipline someone who is taking intermittent FMLA leave and who fails to meet and agreed-upon adjusted level of performance. For example, an employee takes leave two afternoons a week for a medical treatment, and you and the employee should be able to agree that – let’s say that the employee should complete two production reports a week instead of the usual three. Well, the employee repeatedly fails to submit those two reports, you can discipline her for underperforming because this is independent of the leave. But just make sure that you document your adjusted performance agreement. Do make sure that the same rules are in place for everyone. This is worth saying again. To minimize the risk of claims of disparate treatment, make sure that there are rules in place and that managers are
trained as to how to apply those rules. Do use a company-wide FMLA complaint formula for tracking leave days and hours. Now the FMLA has significant requirements for record keeping. So using the same formulas for every company employee will just help you make it easier to get through that FMLA maze. Now let’s get to the don’ts. Don’t assume you know it all. If anyone knew everything there is to know about FMLA, there wouldn’t be so many court cases, and so many of those court cases with conflicting decisions. You should learn as much as you can, and know where to find more information. And most of all, you should know when you’re out of your depth and you need to consult an attorney. Now don’t mistakenly assume that it’s the employee who requests the FMLA leave. And don’t mistakenly assume that the employee does not specify FMLA leave the absence not FMLA leave. FMLA entitlement is determined by the circumstances, and managers need to be trained to ask the right questions in order to determine whether a request is FMLA. The employee does not have to specifically request an FMLA entitlement. And don’t require an independent medical examination for FMLA unless the circumstances give rise to reasonable suspicion. Now the FMLA rules say that an employer can ask for a second medical certification if it has reason to doubt the validity of a medical certification. Now what the rule does not specify is what type of reason will suffice. It may be that you simply don’t trust the employee, that the doctor has a reputation for writing dubious medical certifications, or any other reason just so long as you have a
reason. And don’t terminate or demote an employee during or after FMLA leave without clear prior cause. Now terminating or demoting an employee during or just after FMLA leave will give the appearance of retaliation. If you have a good cause to terminate, make sure that you have all of the documentation to get past the double hurdle of termination and a claim of retaliation. And don’t ask for a doctor’s note for every FMLA intermittent absence. A federal court has ruled that an employer was not entitled to request a doctor’s note for every FMLA absence where that employee had already provided FMLA certification in support of the intermittent absences. The court found that that policy violated regulations prohibiting employers from asking for additional information beyond that what was required in the certification, and it discouraged people from taking lawful leave. Recognizing the interests of employers in confirming FMLA absence, the courts have approved other less invasive confirmation practices, such as calling employees at home or requiring an employee to verify orally or in writing that an absence was in fact FMLA related.

[End of recording.]
Female: Module Five – Determining When to Approve FMLA Leave. Your rights and responsibilities under FMLA – you know, human resources is not the only department that’s responsible for FMLA. Managers need to know their responsibilities, and they need to know that the FMLA allows individual supervisor liability. So if you’re a manager and you think that FMLA is HR’s job, you’re mistaken. Managers and HR specialists need to work together to make sure that FMLA is administered correctly with the least risk to the company. Managers can be held legally liable personally for their decisions in regard to FMLA leave. So supervisors should adhere to the following tips to avoid violating the FMLA. Don’t make any comments that discourage an employee from taking or requesting leave. Don’t make any changes in compensation, duties or other conditions of employment for any reason that’s related to leave. Don’t reference leave in a performance review. If you need to discipline an employee for reasons unrelated to leave, make sure that those reasons are well documented. Don’t ask invasive or overly personal questions about an employee’s medical condition. Don’t harass the employee about coming back to work as soon as possible. Don’t tell other employees about the employee’s medical condition. Rely on the employee’s doctor to determine what duties an employee is capable of performing. And last, tell the employee if the time taken off will be counted toward the employee’s FMLA leave. The act, the whole act, and nothing but the act –
don’t give FMLA leave to employees who are not entitled to FMLA. And
don’t give FMLA leave for reasons that are not covered by the act. The
way that you make sure that you’re applying your company’s FMLA
policies equally throughout your organization is to follow these rules.
Document a company policy and then make sure that the company’s
actions match that policy. A clear, well-documented policy is the best way
to mitigate your FMLA risk. Let’s go through a sample FMLA policy and
look at what should be included in your company’s policy for FMLA. You
should have a section for definition. You should list clear definitions of
FMLA terminology. For example, you should list, “For purposes of this
policy, the following definitions apply.” And then list definitions for an
eligible employee, FMLA leave, both fixed and rolling leave year, serious
health condition, in-patient care, continuing treatment, covered service
member, covered military member, active duty or call to active duty,
serious injury or illness, and qualifying exigency. Next you should have a
section on qualifying reasons for FMLA leave. Now we’ve talked about
those at some length. But basically, you should say in your policy that you
can request and receive FMLA leave for the birth, adoption, or placement
in foster care of a child for up to a 12-month period following the birth or
placement; a serious health condition of a qualifying family member; and
then go ahead and list, even though you defined it, what is a qualifying
family member; and then a serious health condition of the employee that
makes the employee unable to perform any one or more of the essential
functions of the job; and any qualifying exigency – there’s this word again – arising out of the fact that the employee’s spouse, parent, son or daughter is on active duty or has been called to active duty in the armed forces to support contingency operation. You should also have a section on how to coordinate paid leave benefit coordination with your FMLA and your worker’s compensation and ADA. In this section, you should state if the company will require the employees to take paid leave concurrently with their FMLA leave. And you should include requirements for the workers’ compensation and the ADA coordination. Then you should have a section on intermittent or reduced schedule leave. In this section, you need to document if the employees might be required to transfer to an alternative position to accommodate periods of intermittent leave, and you also need to document whether or not that you require the employee to make a reasonable effort to schedule medical treatment so as not to unduly interrupt operations. Now every employee is obligated to make a reasonable effort to schedule the medical treatment to not unduly interrupt the operations. But you need to document that in your policy so that the employee is aware of it. Next, you should have a section for employee notice requirement. This is where you document the process that employees must use for notifying the company of FMLA leave. You need to tell the employees that they need to provide the company with sufficient information to make it aware that the employee needs FMLA leave, and the anticipated timing and duration of the leave. Now you also need to
say if the need for leave is foreseeable, the employee is required to provide such notice to the HR or the benefits administrator at least 30 days before the commencement of the leave if it’s foreseeable and unless it’s unpractical to do so. I have found that it usually is impractical to do so, and you rarely get the whole 30 days of notice. You should also have a section on application and medical certification. This is where you detail the documentation is needed to support the FMLA leave request. Then you need a section on continuation of group health benefits. This is where you need to document the method that the employee needs to use to pay the employee’s portion of the premiums for their group health insurance, and the consequences of failure to pay for those group health benefits because failure to make timely premiums may result in termination of their health benefit coverage. You should also include a section for return-to-work and fitness-for-duty certification. This is where you would document the steps to be taken before the employee can return to work from their FMLA leave. Now sometimes you can if you need – you need to call a certain person, or they need to furnish recertification or a fitness-for-duty certification. If your company wants to require that, this would be the place to put that. You need to have that in your policy. Then finally, at the end you should have a section for questions. This is just where you would document the point of contact for clarification and for any additional information that the employees need. This will probably be somebody in
the HR department who would serve as the benefits coordinator for the FMLA.

[End of recording.]