**4.16 Family and Medical Leave Act – Interference Claims –**

**(NEW) – 29 U.S.C. §§ 2601-2654**

In this case, [name of plaintiff] claims that [he/she] was entitled to a leave of absence from work under a federal law called the Family and Medical Leave Act, also known as the FMLA, and that [name of defendant] interfered with, restrained, or denied [his/her] entitlement to a leave of absence.

Under the FMLA, an eligible employee may take up to 12 weeks of leave during any 12-month period for [the employee’s own serious health condition/the birth, placement or adoption of a child/the care of a spouse, child, or parent who has a serious health condition/active-duty orders/the care of a covered service member]. This leave is called FMLA leave.

The FMLA also gives the employee, after [his/her] leave, the right to be restored by the employer to the position held when the leave began, or to be given an equivalent position. It is unlawful for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise any of these rights.

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was eligible for FMLA leave;

Second: [Name of plaintiff] was entitled to FMLA leave;

Third: [Name of plaintiff] gave [name of defendant] proper notice of [his/her] need for leave; and

Fourth: [Name of defendant] [describe interference, e.g., refused to allow leave, refused [name of plaintiff] reinstatement, discharged [name of plaintiff], failed to maintain benefits].

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

For the first element, [name of plaintiff] was “eligible” for FMLA leave if:

 [name of plaintiff] worked for [name of defendant] for at least 12 months before the date any FMLA leave was to begin, and

 [name of plaintiff] worked for [name of defendant] for at least 1,250 hours during the 12-month period before the date any FMLA leave was to begin.

For the second element, [name of plaintiff] was “entitled” to FMLA leave if [he/she] had an FMLA-qualifying reason. [A serious health condition that prevented [name of plaintiff] from performing the functions of [his/her] job/The birth, placement or adoption of a child/The care of a spouse, child, or parent who has a serious health condition/Following active-duty orders/The care of a covered service member] is an “FMLA-qualifying reason.”

[A “serious health condition” is an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical facility, or continuing treatment by a healthcare provider. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, and other similar conditions do not meet the definition of a “serious health condition” and do not qualify for FMLA leave.]

For the third element, [name of plaintiff] “gave proper notice” to [name of defendant] of [his/her] need for FMLA leave if [he/she] notified [name of defendant] of the need to take FMLA leave in a timely manner and in a way that alerted [name of defendant] that [his/her] absence might qualify as FMLA leave – even if [name of plaintiff] did not expressly mention the FMLA.

If [name of plaintiff] knew of the need for leave more than 30 days before the leave was to begin, [he/she] was required to give [name of defendant] notice at least 30 days before the leave was to begin. If [name of plaintiff] knew of the need for leave less than 30 days before the leave was to begin, [he/she] was required to give [name of defendant] notice as soon as was reasonably possible.

For the fourth element, you must determine whether [name of defendant] [describe interference].

[**Including Affirmative Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

It is lawful for an employer to [describe interference] for reasons unrelated to an employee’s [FMLA leave/attempt to take FMLA leave]. To establish its affirmative defense, [name of defendant] must prove by a preponderance of the evidence that [he/she/it] [describe interference] for reasons that were unrelated to [name of plaintiff]’s [FMLA leave/attempt to take FMLA leave]. Put another way, [name of defendant] must prove that [he/she/it] would have [describe interference] even without the [FMLA leave/attempt to take FMLA leave].

If you find that [name of defendant] established [his/her/its] affirmative defense, you will not decide the issue of [name of plaintiff]’s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[**Without Affirmative Defense:** If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide the issue of [name of plaintiff]’s damages.]

The measure of damages for [name of plaintiff] is either lost wages and benefits or other expenses incurred because of [name of defendant]’s FMLA violation. [Name of plaintiff] can recover lost wages and benefits, or [he/she] can recover other expenses incurred because of [name of defendant]’s actions – but not both.]

If [name of plaintiff] proved that [he/she] lost wages or benefits because of [name of defendant]’s FMLA violation, then [name of plaintiff] may recover net lost wages and benefits from the date of [describe interference] to the date of your verdict.

If you find that [name of plaintiff] did not directly lose pay or benefits because of [name of defendant]’s FMLA violation, then you may award [name of plaintiff] the actual monetary loss that directly resulted from [name of defendant]’s FMLA violation. This amount of damages cannot exceed [12/26] weeks of [name of plaintiff]’s wages or salary.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to “mitigate” those damages. For purposes of [name of plaintiff’s] claim for lost pay, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: work comparable to the position [name of plaintiff] held with [name of defendant] was available, and [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]’s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

**Special Interrogatories To The Jury**

**Do you find from a preponderance of the evidence:**

 That [name of plaintiff] was eligible for FMLA leave?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

 That [name of plaintiff] was entitled to FMLA leave?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

 That [name of plaintiff] gave [name of defendant] proper notice of [his] [her] need for leave?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

 That [name of defendant] [describe interference]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[ That [name of defendant] [describe interference] for reasons that were unrelated to [name of plaintiff]’s [FMLA leave/attempt to take FMLA leave]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

 That [name of plaintiff] should be awarded damages?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

So Say We All.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Foreperson’s Signature

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_