



HR, Compliance & People Development

Understanding FMLA Employee/Employer Rights and Responsibilities

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Introduction

The Family and Medical Leave Act of 1993 (FMLA) entitles eligible employees to take up to 12 or 26 weeks of unpaid leave of absence in a 12-month period for certain medical and family reasons.

Employers with 50 or more employees during 20 or more workweeks in the current or preceding calendar year are covered by the FMLA. All employees, even employees who are “jointly” employed (e.g., leased employees in many cases) or part time, must be included when determining if an employer employs 50 or more employees.

Employees Who Qualify For FMLA Leave

Employees are eligible for FMLA leave if they have been employed for at least 12 months (not necessarily consecutive) and have worked at least 1,250 hours during the 12 months prior to the need for leave (the time an individual spends working for an organization as a temporary employee through a temporary employment agency generally must be counted toward the 12-month/1,250 hour eligibility test). In considering whether an employee has worked for the employer for 12 months, the employer must consider any time worked for the employer in the past seven years (rehires).

An employee is not eligible for FMLA where there are less than 50 employees within 75 miles of the employee's worksite. This important exemption means that

employees working in small offices within a company may not be eligible for FMLA leave. For example, employees who regularly work in a small sales office more than 75 miles from the main company worksite are probably not eligible for FMLA leave.

Reasons That Prompt FMLA Leave

Employers covered by the FMLA must grant unpaid leave to an eligible employee for any of the following reasons:

- The birth of a son or daughter, and to care for the newborn child;
- The placement of a son or daughter with the employee for adoption or foster care;
- To care for the employee's spouse, son, daughter or parent with a serious health care condition;
- Because of a serious health condition that makes the employee unable to perform the essential functions of the employee's job.

In addition, eligible employees with a spouse, son, daughter, or parent who is a service member on covered active duty may use their 12-week entitlement to address certain qualifying exigencies.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered service member or veteran during a single 12-month period.

"Spouse" means a husband or wife.

"Child" means biological, adopted, or foster child, a stepchild, legal ward, or a child being raised by the employee. The child must be either under 18 years of age, or 18 and older and incapable of self-care because of a mental or physical disability for Basic Leave Entitlement. For Military Leave Entitlement, the child may be of any age.

"Parent" means biological parent, or a non-biological parent who has primary responsibility for raising the employee. This term does not include "parents-in-law."

What Constitutes a Serious Health Condition

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one or more of the following:

Hospital Care – This includes inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care. Incapacity, for purposes of FMLA, is defined to mean inability to work,

attend school or perform other regular daily activities due to the serious health condition, treatment for or recovery from that condition.

Absence Plus Treatment – A serious health condition may include a period of incapacity of more than three consecutive calendar days (including 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, by a nurse or physician's assistant under direct supervision of a health care provider or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
- Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider. A regimen of continuing treatment includes such examples as a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not by itself include the taking of over-the-counter medications, such as aspirin, antihistamines or salves; bed rest; drinking fluids; exercise; or other similar activities that can be initiated without a visit to a health care provider. The first visit to the health care provider must take place within seven days of the first day of incapacity. Treatment two or more times must occur within 30 days of the first visit to the health care provider.

Treatment includes examinations to determine if a serious health condition exists and evaluation of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

Pregnancy – This includes any period of incapacity due to pregnancy or for prenatal care.

Chronic Conditions Requiring Treatments – To qualify, this must be a chronic condition that:

- Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
- Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.), but does not necessarily require a visit to a physician at the time of occurrence. Examples include a patient with asthma who has been advised to stay home when the pollen count is high or a pregnant woman with morning sickness. "Periodic visits" is defined as at least two visits to a health care provider per year.

Permanent/Long-Term Conditions Requiring Supervision – This is a period of incapacity that is permanent or long term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment

by, a health care provider. Examples include Alzheimer's, a severe stroke or the terminal stages of a disease.

Multiple Treatments (Non-Chronic Conditions) – This includes any period of absence to receive multiple treatments (including any period of recovery from) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy) and kidney disease (dialysis).

Amount of FMLA Leave Available to Eligible Employees

An eligible employee is entitled to a maximum of 12 weeks of unpaid family and medical leave during any 12-month period. The 12-month period is determined in one of four ways:

- (a) calendar year;
- (b) a fixed 12-month "leave year," such as a fiscal year;
- (c) a 12-month period measured forward from the date an employee's first FMLA begins; or
- (d) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

Employers should expressly choose one of the above methods for its workforce and communicate it in their FMLA policies. Spouses employed by the same employer are limited to a combined total of 12 weeks of FMLA for the birth and care of a newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition. Employees are entitled to up to 26 weeks of leave in a single 12-month period measured forward for leave to care for a covered service member.

FMLA Leave Does Not Have to be Taken All at Once

An employee is entitled to take FMLA leave on an intermittent or reduced schedule basis when the leave is medically necessary (1) to care for a spouse, child or parent with a serious health condition; or (2) because the employee is unable to perform any one of the essential functions of the job due to a serious health condition. An employee may request, but the employer does not have to grant, intermittent or reduced leave schedule for the birth or placement of a child.

An *intermittent leave* is a leave taken in separate blocks of time due to a single illness or injury, rather than for one continuous period of time, and may include leave periods of one hour or less, or several hours or days at a time. Examples of intermittent leave would include leave for medical appointments related to a

serious health condition, or leave taken for a day or two at a time spread over several months.

A *reduced leave* schedule is a leave schedule that reduces an employee's usual number of working hours per workweek. In other words, a reduced leave schedule is the change of an employee's work schedule for a period of time, normally from full time to part time. For example, an employee may request reduced leave to work part time while recovering from a serious health condition or to care for a seriously ill family member.

If an employee takes intermittent or reduced leave, only the amount of leave actually taken can be counted toward the number of weeks of FMLA leave to which the employee is entitled. If an employee who normally works five days a week takes off one day, then the employee has used only one-fifth week of FMLA leave. Similarly, an employee who normally works eight-hour days and works four-hour days under a reduced leave schedule uses one-half week of leave each week.

Some employers calculate an employee's FMLA entitlement by hours. That is, if an employee is normally scheduled to work 40 hours per week, the employee is entitled to 480 FMLA hours during a leave year (12 weeks x 40 hours).

An employee who requests intermittent or reduced leave for **foreseeable medical treatment** may be temporarily transferred by the employer to another job with equivalent pay and benefits that better accommodates the need for leave. If, however, the leave is not foreseeable (unforeseen asthma attacks, migraine headaches, etc.), employers cannot mandate such a transfer. The employer may have an interactive discussion with an employee to see if he or she agrees. If the employee does agree to the temporary transfer, it is recommended that the agreement be in writing and signed by the employee and the supervisor.

Employees Needing FMLA Leave: What is Required

An employee must give at least 30 days notice before an FMLA leave is to begin if the reason for the leave is reasonably foreseeable. If the need for the leave is not reasonably foreseeable, the employee must give notice as soon as practicable. Employees do not have to specifically request or mention FMLA to meet their notification obligations. They do, however, have to provide their employer with enough information so that it can be inferred that the leave may be covered under the FMLA.

An employer may require an employee to provide written certification from a health care provider of the employee's serious medical condition or the serious medical condition of the employee's spouse, child or parent. FMLA leave may be delayed until proper notice or certification is provided by the employee under certain circumstances.

Employers should respond to FMLA situations in a timely manner. While the U.S. Supreme Court overruled the U.S. Department of Labor regulation that employers cannot make a retroactive designation of FMLA if the employee

gave sufficient notice of the need for FMLA leave, the employee may still have a valid claim if he can show that he was prejudiced by the lack of notice.

The Employer is Allowed to Request Recertification During the Leave

The employer can require recertification of the serious medical condition or the medical necessity for intermittent or reduced leave at reasonable intervals, but not more often than every 30 days, unless the original certification was for a longer period. The exceptions are:

- The employee requests an extension of the leave;
- Circumstances described in the original certification have changed significantly;
- The company receives information that casts doubt on the need for leave.

In all cases, the employer may request a recertification of a medical condition every six months in connection with an absence by the employee.

The FMLA States the Twelve Weeks of Leave are Unpaid, But the Employer Can Require Employees to Take Paid Leave in Conjunction with FMLA

The employer may require an employee to use paid vacation or paid personal leave during any FMLA leave. An employer can also require an employee to use sick days as part of any FMLA leave based on a serious medical condition of the employee, spouse, child or parent as long as the employer's sick pay plan allows pay for these purposes. The fact that an employee is required to take paid vacation and use paid sick days during an FMLA leave does not extend the entitlement to FMLA leave beyond 12 weeks, as long as this is made clear in the employer's policy.

Any paid leave that qualifies as FMLA, including short-term disability and workers' compensation leave, may be counted as FMLA. Employers should make it clear in their FMLA policy and subsequent notice to employees that such leaves run concurrently. Employers should also be aware of conflicting or overlapping provisions in the Americans with Disabilities Act.

Major Employer Requirements Under the FMLA

For the duration of FMLA leave, the employer must maintain the employee's health coverage under any group health plan under the same conditions that coverage would have been provided if the employee had continued working. Employees can be required to continue making the same copayments during the leave that they were making before the leave starts. If the employee does not return to work after FMLA leave ends, the employer may recoup (in some

cases) all payments made by the company to continue the employee's health coverage while the employee was on leave.

Upon return from an FMLA leave, an employee must be reinstated to the same position the employee held when the leave started, or to a position with equivalent pay, benefits, and other terms and conditions of employment. This is a strict standard essentially requiring reinstatement to the same job, pay and working conditions. If the employer offers, and an employee accepts, a light duty position, the time spent in the light duty position does not count against the employee's 12 weeks of reinstatement or leave rights.

The “**Employee Rights and Responsibilities Under the Family and Medical Leave Act**” poster (WHD Publication 1420) explaining the Family and Medical Leave Act must be posted in a conspicuous place where it can be seen by employees and applicants for employment. Information concerning an employee's rights and obligations, and the employer's FMLA leave policies must also appear in the employee handbook.

If the employer does not maintain an employee handbook, information about the FMLA and their rights (i.e., U.S. Wage and Hour's Fact Sheet #28 <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>) must be given to an employee at the time the employee requests FMLA leave. The employer must also give an employee a notification of eligibility, rights and responsibilities (i.e., Form WH-381) at the time an employee requests FMLA leave, though no particular form is required.

The Designation Notice (i.e., WH-382) may be used to designate whether or not the requested leave is FMLA qualifying. This may be given at the time FMLA is requested if the employer has sufficient information, or within five days of receipt of a certification. The best practice is to use the forms provided by the Department of Labor.

Employers are required to maintain records of all FMLA leaves for three years. The records that must be kept can be accessed at <http://www.dol.gov/compliance/laws/comp-fmla.htm#recordkeeping>.

Who Enforces the FMLA, and What Are the Penalties or Violations?

An employee may file a complaint with the U.S. Department of Labor's Wage and Hour Division alleging a violation of the FMLA, or the employee can go directly to court and file a private FMLA lawsuit. The statute of limitations is two years from the last act that the employee contends violated the Act, or three years if the violation was willful.

If the employer is found to have violated the FMLA, the following remedies are available to the employee:

- Wages, benefits or other compensation lost as a result of the violation;

- Any monetary loss suffered by the employee because of an unlawful denial of FMLA leave, such as the cost of providing care up to a sum equal to 12 weeks of wages for the employee;
- Liquidated damages equaling the total of the previous sums;
- Employment, reinstatement or promotion when appropriate;
- Reasonable attorney and expert witness fees; and
- Interest at the prevailing rate.

Conclusion

The Family Medical Leave Act regulations are complex, and the administration of such can be cumbersome. Absences that qualify as FMLA leave cannot be counted as absences under a “no fault” attendance policy. Supervisors and managers, therefore, need to understand basic FMLA principles. If they have an employee that is beginning to have attendance problems that could be FMLA-related, an interactive discussion needs to take place with the employee, reminding him/her of his/her rights under the Act.

Early intervention can go a long way toward preventing time-consuming Wage Hour investigations and costly litigation. Effective communications between the employer and the employee are crucial in maintaining a positive employer-employee relationship. Employees understand what they can expect from the employer and what the employer expects from them. Discussions with employees regarding their FMLA rights are in accordance with open communications practices in the workplace.

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