

THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993¹ (FMLA) gives many workers the right to take time off from work because of their own serious illness, or the serious illness of a parent, child or spouse and return to the same or equivalent job. The FMLA also gives the same leave rights to workers for the birth of a child and for the placement of an adopted or foster care child with the worker.

RIGHTS UNDER THE FMLA

FMLA allows an eligible employee to take up to 12 weeks of **unpaid** leave during any 12-month period. **During this leave time, the job of the eligible employee is protected. This means that when the eligible employee returns from his or her FMLA leave, he or she must be restored to his or her original job or to an equivalent job with equal pay and benefits.**

Also during FMLA leave, an employer is required to **maintain group health insurance benefits** for the eligible employee on the same terms and the same manner as if the employee had continued to work. If his or her health insurance plan covers his or her partner or dependents, it must continue to cover them during the employee's FMLA leave. (An employer must continue dental and vision coverage, as well as general health coverage.) If an employee normally pays a portion of the health care premium while working, he or she must continue to do so during leave. It is incumbent on an employer to tell the eligible employee how to pay the premiums.²

Amendments to the FMLA by the National Defense Authorization Act for FY 2008 (NDAA), Public Law 110-181, expanded the FMLA to allow eligible employees to take up to 12 weeks of job-protected leave in the applicable 12-month period for any "qualifying exigency" arising out of the fact that a covered military member is on active duty, or has been notified of an impending call or order to active duty, in support of a contingency operation. The NDAA also amended the FJLA to allow eligible employees to take up to 26 weeks of job-protected leave in a "single 12-month period" to care for a covered servicemember with a serious injury or illness.

EMPLOYERS COVERED BY THE FMLA

An employer in the private sector is subjected to the provisions of the FMLA if the employer meets two requirements. First, the employer must be engaged in commerce or in any industry or activity affecting commerce. Second, the employer must have 50 or more employees each working day during at least 20 calendar workweeks or more in the current or preceding calendar year. Thus, for example, a cookie factory in North Carolina that runs a national mail order business, employs 55 people, and operates 365 days a year, falls within the ambit of the FMLA.

The FMLA also applies to all public agencies, including state, local and federal employers and local education agencies (schools). These employers do not need to meet the 50-employee test.

EMPLOYEES ELIGIBLE FOR FMLA LEAVE

An employee is eligible for FMLA leave if he or she meets the following four criteria. First, he or she must work in the U.S. for a covered employer (see above). Second, the employee must have worked for his or her employer for 12 months or more. (The 12 months do not have to be continuous or consecutive; all time worked for the employer is counted.) Third, the employee must have worked at least 1,250 hours over the last 12 months (an average of just over 24 hours a week for 12 months). Fourth, he or she must work at a location where his or her employer has at least 50 employees within 75 miles.

WHEN CAN AN EMPLOYEE TAKE FAMILY OR MEDICAL LEAVE?

A covered employer must give an eligible employee up to a total of 12 weeks unpaid job-protected leave during any 12-month period for one or more of the following reasons:

- for the birth and care of a newborn child;
- for the placement with the employee of a child for adoption or foster care, and to care for the newly placed child;
- to care for an immediate family member (spouse, child, or parent – but not a parent-in-law) with a serious health condition;
- when the employee is unable to work because of a serious health condition; **OR**
- for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status as a member of the National Guard or Reserves in support of a contingency operation.

A covered employer also must grant an eligible employee who is a spouse, son, daughter, parent, or next of kin of a current member of the Armed Forces, including a member of the National Guard or Reserves, with a serious injury or illness up to a total of **26 workweeks of unpaid** leave during a "single 12-month period" to care for the servicemember.

Spouses employed by the same employer are jointly entitled to a **combined** total of 12 workweeks of FMLA leave unless they are taking leave because of their own serious health condition.

REQUIRMENTS FOR FMLA LEAVE

Birth or Adoption

An employee's entitlement to leave for the birth and care of newborn child or the care and placement of an adopted or foster care child must conclude within 12 months of the birth or placement.

Serious Health Condition

The FMLA defines "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."

The following situations generally qualify for FMLA leave: an employee or a spouse, parent or child of that employee who stays overnight in a hospital, hospice, or residential care facility; an employee or a spouse, parent or child of that employee who has a chronic condition that requires periodic visits for treatment by a health care provider and continues over an extended period of time; an employee or a spouse, parent or child of that employee who is incapacitated for more than three days in a row and sees a doctor or health care provider who prescribes medication or continuing treatment; an employee or a spouse, parent or child of that employee who experiences difficulties during pregnancy or visits a doctor for prenatal care.

Also, some examples of conditions generally considered serious include: heart conditions, strokes, back conditions, injuries caused by accidents, pregnancy and related conditions such as miscarriages and morning sickness, cancer, asthma, pneumonia, diabetes, epilepsy, serious infections, Alzheimer's and arthritis.

Intermittent or Reduced Leave

An eligible employee may take FMLA leave intermittently or work a reduced workweek when medically necessary for the worker's own or a family member's (spouse, parent or child) serious health condition. Thus, an eligible worker can take leave as needed -- a day, a week, or even a few hours at a time. For example, an employee who suffers from migraine headaches and needs to take time off from work when the pain is severe may do so under the FMLA.

An employee who would like to take intermittent leave for the birth and care of a newborn child or for the care and placement of an adopted or foster care child must first seek approval from his or her employer. For example, with the employer's permission, an employee could stay home full-time with his or her newborn for six weeks and then take the remaining six weeks of FMLA leave by working half time for 12 weeks.

Leave Notice

An eligible employee must give his or her employer at least 30 days advance notice of his or her need for FMLA leave unless the need is not foreseeable. When the need for leave is unforeseeable, (i.e., an emergency situation or unplanned medical condition) an employee or his or her representatives should advise the employer as soon as possible (usually within 2 business days).

An eligible employee is not required to expressly assert rights under the FMLA or even mention the FMLA to give notice of his or her need for leave. However, an employee must explain the reasons for the needed leave so that an employer can determine that the requested leave qualifies as FMLA leave. (Note: When an employee seeks leave, due to a FLMA-qualifying reason for which the employer has previously provided the employee with FMLA-protected leave, the employee must specifically reference wither the qualifying reason fro leave or the need for FMLA leave.)

In response, an employer must provide a written notice designating the leave as FMLA leave and detailing specific expectations and obligations of an employee who is exercising his or her FMLA entitlements. The employer may use the “Employer Response to Employee Request For Family or Medical Leave” (optional form WH-381) to meet this requirement. (This form is available on-line at: www.dol.gov/esa/whd/forms/WH-381.pdf. The employer notice should be provided to the employee within one or two business days after receiving the employee’s notice of need for leave.

Medical Certification

FMLA does not require an employee to provide certification of a serious health condition from a doctor or other health care provider unless the employer requests it. An employer who asks for medical certification must give the employee written notice of this requirement, and the anticipated consequences for failing to meet this requirement, when the employee gives notice of the need for leave. An employer who does not ask for certification is not entitled to it.

The certification should include the following: a description of the serious health condition; the date that the condition began or treatment became necessary; and the expected duration of the condition or treatment. An employee may use the “Certification of Heath Care Provider” (optional form WH-380) to obtain the necessary certifications. (This form is available on-line at: www.dol.gov/esa/whd/forms/WH-380-F.pdf.)

The employer may require an employee to obtain a second opinion from a health care provider that the employer chooses. If the second opinion differs from the first, then the employee and the employer must agree on a third health care provider to support a third opinion. The employee and employer must accept the third opinion as final. The employer pays for the second and third opinions.

Paid Leave

FMLA leave is **unpaid**. However, an employee **may choose** or an employer **may require** that the employee use certain kinds of paid leave (such as accrued sick or vacation leave) during some or all the FMLA absence. An employer is responsible for designating leave as FMLA if the employee's use of paid leave qualifies under FMLA.

Here are a couple of examples:

An employee is expecting a baby and would like to take off as much time as possible to recover from childbirth and to care for her newborn. She has accrued three weeks of paid sick leave and three weeks of annual leave and would like to use this paid leave and then take 12 weeks of unpaid FMLA leave. Her employer prefers that she use her accrued sick and annual leave as part of her FMLA leave. Can the employer insist that the employee use her paid leave as FMLA leave? Yes. In general, an employer may count an employee's sick and vacation leave as part of his or her 12 weeks of FMLA leave. However, an employer does not have to insist on this course of action.

An employee has accrued four weeks of paid sick leave and two weeks of paid vacation leave. He suffered a stroke and cannot afford to take 12 weeks of unpaid leave. Can the employee use his paid sick and annual leave so that he receives a paycheck during part of his FMLA leave? Yes. Even if his employer does not want to pay him during this leave, the employee may insist that his accrued paid sick and annual leave be used. However, this paid leave will count against the 12 weeks of unpaid leave he is entitled to under the FMLA.

Maintenance of Health Benefits

As noted previously, a covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of the health insurance premiums while on leave. In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

Job Restoration

Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. An employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, nor be counted against the employee under a "no fault" attendance policy.

EMPLOYER PROHIBITIONS

It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under the FMLA. Also it is unlawful for any employer to discharge or discriminate against an employee for filing a complaint or opposing a practice made unlawful under the FMLA. In addition, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; nor can FMLA leave be counted under “no fault” attendance policies.

FILING A COMPLAINT

The FMLA is administered and enforced by the Employment Standards Administration’s Wage and Hour Division of the U.S. Department of Labor. An employee who believes that his or her rights under the FMLA have been violated should contact the Wage and Hour Division office in his or her area to speak with an investigator and file a complaint.

A complaint may be filed in person, by letter or by telephone, but it also must be in writing. The FMLA has a 2-year statute of limitation from the date of the violation. However, in the event that the employer’s violation was willful a 3-year statute of limitations applies.

Once a complaint has been filed an investigator determines if the law has been violated. If violations are found, the U.S. Department of Labor (DOL) tries to negotiate a resolution of the matter that is acceptable to the employee and employer and consistent with the FMLA’s provisions. DOL may file suit to insure compliance and recover damages if a complaint cannot be resolved administratively. An employee also has a private right of action without involvement of DOL to correct violations and recover damages through the courts.

REMEDIES

A court may award the following remedies for an employee who has successfully brought legal action against an employer for violations of the FMLA: injunctive relief to bring the company into compliance with the law; reinstatement to the employee’s former job; declaratory relief; compensatory damages;³ punitive damages; attorney’s fees and costs; pre-and post-judgment interest.

STATE FAMILY LEAVE LAWS

The FMLA allows states to set standards that are more expansive than the federal law. Many states have done so. Some states have a more expansive definition of a “family member” and some states provide coverage for employees of smaller employers. Please check with your state labor department to see what is available in your state.

FURTHER INFORMATION

The Wage and Hour Division has written materials about the FMLA, including copies of the law itself and the regulations, which you can obtain for free. These and other helpful materials are available on the Department's web site at: <http://www.wagehour.dol.gov> and/or call the toll-free information and help line at 1-866-487-9243.

The information contained in this article is for general informational purposes only. It is not intended to serve as legal advice and it does not substitute for legal counsel.

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¹ 29 U.S.C. Section 2601 et seq; 29 C.F.R. 825.

² If an employee tells his or her employer that he or she is not coming back to work after the leave, the employer's obligation to continue health care coverage ceases at the time he or she gives this notice. Also, if the employee does not return to his or her job after the leave – or if he or she returns for less than 30 calendar days – the employer may recover the cost of the health care premiums it paid to continue benefits during his or her leave. An employer cannot recover these costs from an employee who fails to return because of reason of a serious health condition, a family member's serious health condition, or other circumstances beyond the employee's control.

³ Compensatory damages may include: back pay; front pay; benefits and other compensation the employee would have received if he/she had continued working there; and emotional distress, pain and suffering, and related medical expenses.