

Fun With FMLA

The Basics

Employer Coverage

The FMLA applies to all public agencies, including state, local and federal employers, local education agencies (schools), **and** private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors of covered employers.

Employee Eligibility

To be eligible for FMLA benefits, an employee **must**:

- Work for covered employer;
- Have worked for the employer for a total of 12 months;
- Have worked at least 1,250 hours over the previous 12 months; and
- Work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles

Leave Entitlement

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

- For the birth and care of a newborn child of the employee;
- For placement with the employee of a son or daughter for adoption or foster care;
- To care for a spouse, son, daughter, or parent with a serious health condition;
- To take medical leave 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 service member.

Under some circumstances, employees may take FMLA leave intermittently - taking leave in separate blocks of time for a single qualifying reason - or on a reduced leave schedule - reducing the employee's usual weekly or daily work schedule. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operation. If FMLA leave is for birth and care, or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.

Under certain conditions, employees **or** employers may choose to “substitute” (run concurrently) accrued **paid** leave (such as sick or vacation leave) to cover some or all of the FMLA leave. An employee’s ability to substitute accrued paid leave is determined by the terms and conditions of the employer’s normal leave policy.

“Serious health condition” means an illness, injury, impairment, or physical or mental condition that involves either:

- Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; **or**
- Continuing treatment by a health care provider, which includes:
 - A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that **also** includes:
 - Treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); **or**
 - One treatment by a health care provider (i.e., and in-person visit within 7 days of the first day of capacity) with a continuing regiment of treatment (e.g., prescription medication, physical therapy); **or**

- Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; **or**
- Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; **or**
- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; **or**
- Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

Maintenance of Health Benefits

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 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.

Notice and Certification

Employee Notice

Employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. If leave is foreseeable less than 30 days in advance, the employee must provide notice as soon as practicable- generally, either the same or next business day. When the need for leave is not foreseeable, the employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Absent unusual circumstances, employees must comply with the employer's usual and customary notice and procedural requirements for requesting leave.

Employees must provide sufficient information for an employer reasonably to determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that the employee is incapacitated due to pregnancy, has been hospitalized overnight, is unable to perform the functions of the job, and/or that the employee or employee's qualifying family member is under the continuing care of a health care provider.

When an employee seeks leave for a FMLA-qualifying reason for the **first** time, the employee need not expressly assert FMLA rights or even mention the FMLA. When an employee seeks leave, however, due to a FMLA-qualifying reason for which the employer has previously provided the employee FMLA-protected leave, the employee **must** specifically reference either the qualifying reason for leave or the need for FMLA leave.

Employer Notice

Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under the FMLA. An employer that willfully violates this posting requirement may be subject to a civil money penalty of up to \$110 for each separate offense. Additionally, employers must either include this general notice in employee handbooks or other written guidance to employees concerning benefits, or must distribute a copy of the notice to each new employee upon hiring. Employers may use the notice prepared by U.S. Department of Labor to meet this requirement.

When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA purpose, the employer must notify the employee of his or her eligibility to take leave, and inform the employee of his/her rights and responsibilities under the FMLA. When the employer has enough information to determine that leave is being taken for a FMLA-qualifying reason, the employer must notify the employee that the leave is designated and will be counted as FMLA leave.

Forms WH-381 and WH-382 DOL

Medical Certification

Employers may require that an employee's request for leave due to a serious health condition affecting the employee or a covered family member be supported by a certification from a health care provider. An employer may require second or third medical opinions (at the employer's expense) and periodic recertification of a serious health condition. An employer may use a health care provider, a human resource professional, a leave administrator, or a management official - but not the employee's direct supervisor - to authenticate or clarify a medical certification of a serious health condition. An employer may have a uniformly-applied policy requiring employees returning from leave for their own serious health condition to submit a certification that they are able to resume work. If reasonable safety concerns exist, an employer may, under certain circumstances, require such a certification for employees returning from intermittent FMLA leave. Employers may use the optional forms WH-380-E and WH-380-F prepared by the U.S. Department of Labor for obtaining medical certifications of serious health conditions.

Unlawful Acts

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by the FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA

- U.S. Department of Labor- Wage and Hour Division (WHD)-
Fact Sheet

Eligibility

1. More Adult Children Will Meet the Definition of “Child” Based on the ADAAA.

The ADA Amendments Act (“ADAAA”) expanded more than just employer liability for disability claims; it also broadened the scope of FMLA leave that employees may take to care for adult children. An employee is entitled to FMLA leave to care for a child (which included a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*), who is age 18 or older who is “incapable of self-care because of a mental or physical or mental disability” at the time that FMLA leave is to commence. 29 C.F.R. § 825.122 (c). Thus, the child must be both “incapable of self-care” and have a “physical or mental disability” at the time that the FMLA leave commences.

Is the Eligibility requirement met when:

Jane's daughter suffered two broken femurs, a small hole in her lung and a small hole in her bladder after an automobile accident. Jane helped her daughter use a bed pan, gave her sponge baths, transported her, washed her hair, helped her out of bed and brought her meals. This continued for a few months.

Susan wants FMLA leave to care for her 18 year old daughter who experienced two weeks of postpartum depression.

Raphael requests leave 3 years after he adopted his brother's children.

George was discharged after failing to call in after a four-day absence. Previously, he applied for and received six months of intermittent leave to care for his mother who was diabetic and suffering from high blood pressure and arthritis. The care consisted of providing meals to his mother and taking her to see her doctor. During George's four-day absence, he claimed that he was busy cleaning up his mother's basement, which had flooded. George argued that it was imperative that he clean the basement because the condition could have aggravated his mother's hepatitis.

While vacationing with her family, Tallulah's daughter fell and sustained a serious head injury that necessitated she be airlifted to Florida for emergency surgery. Tallulah notified her employer of the accident and was told to take as long as she needed. She ultimately requested FMLA leave from March 20 to May 5. Although Tallulah remained in Florida with her until mid-April, on April 12 she returned home to Texas to attend to household matters, including preparing the house for the daughter's return home.

Sam requests leave to care for his domestic partner.

Phyllis requests leave to care for the biological child of her domestic partner. Phyllis provides childcare (stay at home mom) but no financial support.

Notice

- An employee does not have to use the words “FMLA leave” or “FMLA” to give notice.
- If the employee sufficiently describes a potential qualifying reason the employer must determine if it qualifies for FMLA.
- Notice of unforeseeable leave – as soon as practicable.
- An employee must comply with employer’s usual and customary notice requirements, including a requirement for a written request.

Ariel calls in drunk to ask for sick leave. Later after the leave is denied she claims that the intoxication was caused by depression

Tiana sustained an on the job injury that resulted in hospitalization. She did not specifically request leave but was unable to return to work.

Behavior Changes and Deteriorating Job Performance: Can They Serve As Adequate Notice?

Gaston was fired for sleeping on the job and failing to attend a meeting with management regarding his job performance. Prior to taking leave to be treated for depression and a sleep disorder, he had not expressly stated that he needed to take time off from work. Shortly after he took leave he was terminated.

Claire's employer knew she had been hospitalized for a psychiatric condition and was getting outpatient treatment. When she returned to work her performance deteriorated. Her behavior became volatile and she was sent home from work.

What is a “Serious Health Condition”?

Tristan was knocked off his bicycle by a car and was diagnosed with a lumbar strain. At the time of the accident, he initially declined medical treatment but later that day went to the emergency room and was prescribed pain medication. He did not fill the prescription. He returned a day later, complaining of back pain. Tristan eventually submitted a doctor's note stating that he should be off work for several weeks. The back pain did not significantly limit his movement or lifting ability.

- Chris misses work on Thursday and Friday due to the flu. He visits his doctor once, and she tells him to drink lots of fluid and stay in bed and rest. Chris returns to work on the following Monday, completely recovered, and wants to know if his absence due to the flu is covered under the Family and Medical Leave Act.
- Mary is in her second month of pregnancy. She is experiencing severe morning sickness. She told you about this condition and, subsequently, misses two days of work because she is too sick to get out of bed.

- Jeff's mother, who is an older woman with a serious heart condition living in Philadelphia, wants to attend her best friend's funeral being held in Northern New Jersey. Jeff misses a day of work to drive his mother to the funeral and back once it is over. Jeff wants to know if he can take that day as an FMLA leave day.
- Mel is an alcoholic. One night he drinks too much and does not make it to work the next day.

- Phaedra is unable to work because of the need to recover from the death of a family member.
- Charles needs continuing allergy treatment via allergy shots, but was not incapacitated by his condition.

- NeNe needs leave due to the emotional impact of a miscarriage and severe morning sickness.
- Sal experiences complications from removal of an ingrown toenail.
- Porsche had a single asthma attack and wants leave.

**Leave Abuse:
How can you address it?**

Belle asked for leave to transport her mother to the doctor. Surveillance revealed that her car never left home. When asked to explain she said her brother picked her up from the back door. The nursing home and doctor's information is not consistent with this explanation.

Joseph's doctor has certified that he is unable to perform any work because of a back injury. Several employees saw him at a baseball game walking, sitting and cheering.

Wesley went out on an intermittent FMLA leave, because of back surgery. Wesley works for another employer during his leave.

Bob used his FMLA leave to play golf and work on his sprinkler system, instead of dedicating his entire time to taking care of his father. He also lied about returning a day late from his leave.

The Test:

Does the employer have a “reasonable belief” that the employee is abusing leave?

How can you avoid a Retaliation Claim?

Sara was terminated after she took leave for an overseas adoption. The drug company she worked for claims she was terminated for donating drug samples to the orphanage. No other employee involved with the donation was terminated and Sara was terminated 3 weeks after returning from leave.

Lily was terminated after taking FMLA leave on several different occasions over a period of several years. She had always received positive performance reviews prior to taking FMLA leave, but started receiving reviews that made a point of documenting how much leave she'd taken in the time period covered by the review. When Lily questioned why she didn't receive a higher merit raise one year and no merit raise in another year, her supervisor responded that she had taken too much time off from work.

Hermoine had a well-documented history of deficient work performance, “particularly her frequent unavailability” prior to taking FMLA leave for exhaustion and depression. Due to her performance shortcomings, she had been put on probation prior to requesting leave, and the probation continued subsequent to her return from leave. Less than two months after returning from FMLA leave, Hermoine began to exhibit the same types of performance problems that had plagued her employment previously, and she was involved in an incident involving dishonest conduct. She is fired.

Avoid Retaliation Claims by:

1. Educating your supervisors about what is permissible.
2. Be aware of the timing of the decision.
3. Require legitimate, non-FMLA reasons for discipline.