

## **Family Leave Provisions of the FMLA (Family Medical Leave Act)**

### **Frequently Asked Questions and Answers**



The following are answers to commonly asked questions about the Family and Medical Leave Act (FMLA) regulations.

#### 1. Q. What is FMLA?

A. The [Family and Medical Leave Act \(FMLA\)](#) provides certain employees with up to 12 weeks of unpaid, job-protected leave per year. In addition, it provides eligible employees of covered employers with job-protected leave for qualifying family and medical reasons and requires continuation of their group health benefits under the same conditions as if they had not taken leave. FMLA leave may be unpaid or used at the same time as employer-provided paid leave. Employees must be restored to the same or virtually identical position when they return to work after FMLA leave.

#### 2. Q. What events qualify for FMLA?

A. The birth of a child or placement of a child with the employee for adoption or foster care,

The care for a child, spouse, or parent who has a serious health condition,

A serious health condition that makes the employee unable to work, and

Reasons related to a family member's service in the military, including:

Qualifying exigency leave - Leave for certain reasons related to a family member's foreign deployment, and

Military caregiver leave – leave when a family member is a current servicemember or recent veteran with a serious injury or illness.

#### 3. Q. What is a serious health condition?

A. You may take FMLA leave to care for your spouse, child or parent who has a serious health condition, or when you are unable to work because of your own serious health condition. A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. The

“continuing treatment” test for a serious health condition under the regulations may be met through:

- (1) a period of incapacity of more than three consecutive, full calendar days plus treatment by a health care provider twice, or once with a continuing regimen of treatment,
- (2) any period of incapacity related to pregnancy or for prenatal care,
- (3) any period of incapacity or treatment for a chronic serious health condition,
- (4) a period of incapacity for permanent or long-term conditions for which treatment may not be effective, or
- (5) any period of incapacity to receive multiple treatments (including recovery from those treatments) for restorative surgery, or for a condition which would likely result in an incapacity of more than three consecutive, full calendar days absent medical treatment.

#### Use of FMLA



4. Q. How much time off will I get under FMLA?

A. Eligible employees may take:

Up to 12 work weeks of leave in a 12-month period for any FMLA leave reason except military caregiver leave, and

Up to 26 workweeks of military caregiver leave during a single 12-month period.

Examples:

Sheila works 32 hours a week. When Sheila needs to take FMLA leave for 12 weeks, she may use up to 32 hours of FMLA leave a week for 12 weeks.

Chester works 40 hours a week. When Chester needs to take FMLA leave for 12 weeks, he may use up to 40 hours of FMLA leave a week for 12 weeks.

Kayden works 50 hours a week. When Kayden needs to take FMLA leave for 12 weeks, he may use up to 50 hours of FMLA leave a week for 12 weeks.

5. Q. What is intermittent or reduced schedule leave?

A. Employees have the right to take FMLA leave all at once, or, when medically necessary, in separate blocks of time or by reducing the time they work each day or week. Intermittent or reduced schedule leave is also available for military family leave reasons. However, employees

may use FMLA leave intermittently or on a reduced leave schedule for bonding with a newborn or newly placed child only if they and their employer agree.

Examples:

Sheila has a daughter who serves in the Armed Forces and was seriously injured during deployment overseas. Sheila needs FMLA leave for one-half of her usual workweek (16 hours) over the next six months to assist with her daughter's care.

Chester has a serious mental health condition that sometimes affects his ability to work. Occasionally, when Chester is unable to work because of his mental health, he takes FMLA leave, usually for one to three weeks at a time. Chester also takes FMLA leave every now and then for an hour or two when he has an appointment to see his doctor or attend therapy to treat his condition.

Kayden works Tuesday through Saturday. His father has a serious health condition. Kayden and his siblings take turns bringing his father to dialysis during the week. Every other Friday evening Kayden uses five hours of FMLA leave to help his father. Even though his siblings help, Kayden also occasionally uses five hours of FMLA leave on other evenings to help his father.

6. Q. I thought FMLA was only for people who did not have any sick or vacation time. Do I have to use my accrued time and FMLA together?

A. FMLA is job-protected, unpaid leave. Employees may use employer provided paid leave at the same time that they take FMLA leave if the reason they are using FMLA leave is covered by the employer's paid leave policy. An employer may also require an employee to use their paid leave during FMLA leave.

Examples:

Sheila works for an organization which provides her with one week of paid vacation time every year. The organization always requires employees to use their paid vacation time when they take time off from work for any reason, even if they are not taking a vacation. When Sheila takes 16 hours of FMLA leave because of her daughter's deployment with the Armed Forces to a foreign country, her employer pays her for her FMLA time off and deducts 16 hours from her one week of vacation time.

When Chester needs FMLA leave for their own serious health condition. Even though they use paid sick leave during their time off, they are also designating these hours as FMLA related. This is providing him with extra protection for their time away from work. It also signals to their supervisor they are utilizing their earned time for a qualifying medical event.

7. Q. I don't want to use FMLA. Can I refuse it?

A. If an employee is out due to a qualifying medical event they may not refuse use of FMLA.

### Eligibility



8. Q. I have 12 months of service with my employer, but they are not consecutive. Do I still qualify for FMLA?

A. You may. To be eligible to take leave under the FMLA, an employee must meet the following criteria:

(1) work for a covered employer (which the City/County are!)

(2) work 1,250 hours during the 12 months prior to the start of leave

(3) work at a location where 50 or more employees work at that location or within 75 miles of it

(4) have worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. However, if the break in service was longer than 7 years and was not related to military obligations or outlined by a collective bargaining or other written agreement, then the prior years of services would not be counted.

9. Q. If I have to miss work due to National Guard or Reserve duty, will this affect my eligibility for FMLA leave?

A. No. Those serving in the military who take a break in service due to an employee's fulfillment of military obligations must be taken into consideration when determining whether an employee has been employed for 12 months or has the required 1,250 hours of service.

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), hours an employee would have worked but for his or her military service are credited toward the employee's required 1,250 hours worked for FMLA eligibility. Similarly, the time in military service also must be counted in determining whether the employee has been employed at least 12 months by the employer.

Example:

Dean worked for his employer for six months in 2008, then was called to active duty status with the Reserves and deployed to Iraq. In 2009, Dean returned to his employer, requesting to be reinstated under the USERRA. Both the hours and the months that Dean would have worked but for his military status must be counted in determining his FMLA eligibility.

## Employer Notice Requirements



10. Q. What are an employer's posting and general notice requirements?

A. Employers must post a general notice explaining the FMLA's provisions and providing information regarding procedures for filing a claim under the Act in a conspicuous place where it can be seen by employees and applicants. Under the regulations, this posted notice includes additional information regarding the definition of a serious health condition, the new military family leave entitlements, and employer and employee responsibilities. Employers must also include the information in this general notice in any employee handbook or other written policies or manuals describing employee benefits and leave provisions. Additionally, under the regulations, an employer without a handbook or written guidance is required to provide this general notice to new employees upon hiring.

11. Q. Is there a penalty if an employer fails to post the required FMLA notice?

A. An employer that willfully fails to post the required FMLA notice may be assessed a civil monetary penalty. Under the regulations, the penalty is increased to \$110.

12. Q. How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?

A. Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

13. Q. Does an employer have to provide employees with information regarding their specific rights and responsibilities under the FMLA?

A. At the same time an employer provides an employee notice of the employee's eligibility to take FMLA leave, the employer must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, the employer must inform the employee whether the employee will be required to provide certification of the FMLA-qualifying reason for leave and the employee's right to substitute paid leave (including any conditions related to such substitution, and the employee's entitlement to unpaid FMLA leave if those conditions are not met). If the information included in the notice of rights and responsibilities changes, the employer must inform the employee of such changes within five business days of receipt of the employee's first notice of the need for FMLA leave subsequent to any change. Employers are expected to responsively answer questions from employees concerning their rights and responsibilities.

14. Q. How soon after an employee provides notice of the need for leave must an employer notify an employee that the leave will be designated and counted as FMLA leave?

A. Under the regulations, an employer must notify an employee whether leave will be designated as FMLA leave within five business days of learning that the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances. The designation notice must also state whether paid leave will be substituted for unpaid FMLA leave and whether the employer will require the employee to provide a fitness-for-duty certification to return to work (unless a handbook or other written document clearly provides that such certification will be required in specific circumstances, in which case the employer may provide oral notice of this requirement). Additionally, if the amount of leave needed is known, an employer must inform an employee of the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (e.g., where the leave will be unscheduled), an employer must provide this information upon request by the employee, but no more often than every 30 days and only if leave was taken during that period.

15. Q. If an employer fails to tell an employee that leave has been designated as FMLA leave, can the employer count the leave against the employee's FMLA leave entitlement?

A. The regulations revise the designation provisions to comply with the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). *Ragsdale* ruled that a "categorical" penalty for failure to appropriately designate FMLA leave was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement to demonstrate individual harm. Under the regulations, retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave (and notify the employee of the designation). The employer may be liable, however, if the employee can show that he or she has suffered harm or injury as a result of the failure to timely designate the leave as FMLA. Additionally, an employee and employer may agree to retroactively designate an absence as FMLA-protected.

Example:

Henry plans to take 12 weeks of FMLA leave beginning in August for the birth of his second child. Earlier in the leave year, however, Henry took two weeks of annual leave to care for his mother following her hospitalization for a serious health condition. Henry's employer failed to notify him at the time of his mother's hospitalization that the time he spent caring for his mother would be counted as FMLA leave. If Henry can establish that he would have made other arrangements for the care of his mother if he had known that the time would be counted against his FMLA entitlement, the two weeks his employer failed to appropriately designate may not count against his FMLA entitlement.

## Employee Notice Requirements



16. Q. How much notice must an employee give before taking FMLA leave?

A. When the need for leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give at least 30 days' notice. If 30 days' notice is not possible, an employee is required to provide notice "as soon as practicable." Employees must also provide notice as soon as practicable for foreseeable leave due to a qualifying exigency; regardless of how far in advance such leave is foreseeable (see FAQ for military family leave for additional information). The regulations clarify that it should be practicable for an employee to provide notice of the need for leave that is foreseeable either the same day or the next business day. In all cases, however, the determination of when an employee could practically provide notice must account for the individual facts and circumstances.

When the need for leave is unforeseeable, employees are required to provide notice as soon as practicable under the facts and circumstances of the particular case, which the regulations clarify will generally be within the time prescribed by the employer's usual and customary notice requirements applicable to the leave.

Example:

When Mandy goes to her Monday physical therapy appointment for her serious health condition, she finds out that the appointment she had previously scheduled for Thursday has been changed to Friday. Upon her return to work after the Monday appointment, Mandy informs her employer that she will no longer need leave on Thursday for physical therapy but will need leave on Friday instead. Mandy has provided notice of her need for foreseeable leave as soon as practicable.

17. Q. What information must an employee give when providing notice of the need for FMLA leave?

A. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA. The employee must, however, provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

The regulations provide additional guidance for employees regarding what is "sufficient information." Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty and that the requested leave is for a

qualifying exigency; if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered service member with a serious injury or illness; and the anticipated duration of the absence if known.

Additionally, the regulations require an employee seeking leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave either to reference specifically the qualifying reason for leave or the need for FMLA leave. In all cases, an employer should inquire further if it is necessary to have more information about whether FMLA leave is being sought by an employee.

18. Q. Is an employee required to follow an employer's normal call-in procedures when taking FMLA leave?

A. Yes. Under the regulations, an employee must comply with an employer's call-in procedures unless unusual circumstances prevent the employee from doing so (in which case the employee must provide notice as soon as he or she can practicably do so). The regulations make clear that, if the employee fails to provide timely notice, he or she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer's rules provide.

Example:

Sam has a medical certification on file with his employer for his chronic serious health condition, migraine headaches. He is unable to report to work at the start of his shift due to a migraine and needs to take unforeseeable FMLA leave. He follows his employer's absence call-in procedure to timely notify his employer about his need for leave. Sam has provided his employer with appropriate notice.

#### **Certification of Need for FMLA Leave**



19. Q. Do I have to give my employer my medical records for leave due to a serious health condition?

A. No. An employee is not required to give the employer his or her medical records. The employer, however, does have a statutory right to request that an employee provide medical certification containing sufficient medical facts to establish that a serious health condition exists.

20. Q. What if I do not want my employer to know about my medical condition?

A. If an employer requests it, an employee is required to provide a complete and sufficient medical certification in order to take FMLA-protected leave due to a serious health condition.



21. Q. How soon after I request leave does my employer have to request a medical certification of a serious health condition?

A. Under the regulations, an employer should request medical certification, in most cases, at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave begins.

An employer may request certification at a later date if it has reason to question the appropriateness or duration of the leave.

22. Q. What happens if my employer says my medical certification is incomplete?

A. An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The regulations require that the employer state in writing what additional information is necessary to make the certification complete and sufficient. The regulations also require that the employer allow the employee at least seven calendar days to cure the deficiency, unless seven days is not practicable under the particular circumstances despite the employee's diligent good faith efforts.

23. Q. May my employer contact my health care provider about my serious health condition?

A. The regulations clarify that contact between an employer and an employee's health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. Under the regulations, employers may contact an employee's health care provider for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official. In order to address employee privacy concerns, the rule makes clear that in no case may the employee's direct supervisor contact the employee's health care provider. In order for an employee's HIPAA-covered health care provider to provide an employer with individually identifiable health information, the employee will need to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the employer. Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.

24. Q. Must I sign a medical release as part of a medical certification?

A. No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide a

complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.

25. Q. How often may my employer ask for medical certifications for an on-going serious health condition?

A. The regulations allow recertification no more often than every 30 days in connection with an absence by the employee unless the condition will last for more than 30 days. For conditions that are certified as having a minimum duration of more than 30 days, the employer must wait to request a recertification until the specified period has passed, except that in all cases the employer may request recertification every six months in connection with an absence by the employee. The regulations also allow an employer to request recertification in less than 30 days if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly, or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

Additionally, the regulations codify a 2005 Wage and Hour opinion letter that stated that employers may request a new medical certification each leave year for medical conditions that last longer than one year. Such new medical certifications are subject to second and third opinions.

Examples:

Janie takes six weeks of FMLA leave for a cancer operation and treatment and gives her employer a medical certification that states that she will be absent for six weeks. Because her certification covers a six-week absence, her employer cannot ask for a recertification during that time. At the end of the six-week period, Janie asks to take two more weeks of FMLA leave; her employer may properly ask Janie for a recertification for the additional two weeks.

Joe takes eight weeks of FMLA leave for a back operation and intensive therapy and gives his employer a medical certification that states that he will be absent for eight weeks. At the end of the eight-week period, Joe tells his employer that he will need to take three days of FMLA leave per month for an indefinite period for additional therapy; his employer may properly request a recertification at that time. Six months later, and in connection with an absence for therapy, the employer may properly ask Joe for another recertification for his need for FMLA leave.

26. Q. Can employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?

A. Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for such conditions to

submit a certification from the employee's own health care provider that the employee is able to resume work. Under the regulations, an employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the employer has appropriately notified the employee that this information will be required and has provided a list of essential functions. Additionally, an employer may require a fitness-for duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the condition for which leave was taken.

27. Q. What happens if I do not submit a requested medical or fitness-for-duty certification?

A. If an employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the employee never provides a medical certification, then the leave is not FMLA leave.

If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.

#### **Miscellaneous Questions**



28. Q. My medical condition limits me to a 40-hour workweek but my employer has assigned me to work eight hours of overtime in a week. Can I take FMLA leave for the overtime?

A. Yes. Employees with proper medical certifications may use FMLA leave in lieu of working required overtime hours. The regulations clarify that the hours that an employee would have been required to work but for the taking of FMLA leave can be counted against the employee's FMLA entitlement. Employers must select employees for required overtime in a manner that does not discriminate against workers who need to use FMLA leave.