



Family Medical Leave Act

The Family and Medical Leave Act



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

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Presentation Topics

- Introduction to the FMLA
- Family Relationships under the FMLA
- FMLA-Protected Leave Reasons
- Taking FMLA Leave
- Administering FMLA Leave
- Employee Rights
- Helpful Resources



Introduction to the FMLA

Employee Benefits and Protections

- Up to 12 workweeks of leave each leave year for family and medical reasons
- Up to 26 workweeks of leave in a single leave year to care for a covered military member with a serious injury or illness
- Continuation of group health benefits under the same conditions as if the employee did not use leave
- Return to work at the same or virtually identical job at the end of the leave period
- Protection from interference and retaliation

Reasons for Using Family and Medical Leave

- Because of the birth of a child or placement of a child for adoption or foster care, and to bond with a newborn or newly-placed child
- To care for a covered family member with a serious health condition
- Because of the employee's own serious health condition

Support for Military Families – Military Family Leave

- Qualifying Exigency Leave – for qualifying reasons when an employee’s family member is on a deployment to a foreign country
- Military Caregiver Leave – care for a current servicemember or a recent veteran, who has suffered a serious injury or illness, when the employee is the servicemember or veteran’s spouse, child, parent or next of kin

Employee Eligibility

At the time the employee's FMLA leave will start, the employee:

- Works for a covered employer
- Works at a worksite where the employer employs at least 50 employees within 75 miles
- Has worked for the employer in total at least 12 months
- During the previous 12 months, worked at least 1,250 hours

Employer Coverage

The FMLA applies to:

- Private sector employers with 50 or more employees
- All public agencies
- All public and private elementary and secondary schools

Special Hours of Service Rule - Airline Flight Crew Employee Eligibility

During the previous 12 months, the employee must have:

- Worked or been paid for not less than 60 percent of the applicable monthly guarantee and
- Worked or been paid for not less than 504 hours



Family Relationships under the FMLA

Child

- A biological, adopted, or foster child, stepchild, legal ward, or child of someone who is *in loco parentis*, i.e., in the role of a parent, and
- At the time the employee's FMLA leave is to start:
 - under age 18 *or*
 - 18 or over *and* incapable of self-care because of a mental or physical disability
- For military family leave, an employee's child may be any age

Parent

- A biological, adoptive, step or foster parent, or someone who stood *in loco parentis*, i.e., in the role of a parent to the employee when the employee was a child
- Does not include a parent-in-law

In Loco Parentis - In the Role of a Parent to a Child

- Day-to-day responsibilities to care for or financially support the child
- Biological or legal relationship to the child not required
- Grandparents or other relatives, such as siblings, may stand *in loco parentis*

Spouse

- A “husband or wife” as defined or recognized in the state where the employee was married
- Includes married same-sex couples
- Includes common-law marriages
- Does not include civil unions or domestic partnerships

Next of Kin – Military Caregiver Leave

- An employee may use military caregiver leave to care for a servicemember or veteran when the employee is the servicemember or veteran's next of kin
- “Next of kin” means the servicemember's nearest blood relative, other than the servicemember's spouse, parent, son, or daughter, in order of priority:
 - All blood relatives who have been granted legal custody of the servicemember
 - All brothers and sisters
 - All grandparents
 - All aunts and uncles
 - All first cousins
- If the servicemember designates in writing a next of kin, that relative is the only next of kin for FMLA leave purposes.

Documentation of Family Relationships

- Employers may require reasonable documentation of a family relationship
- Employee may provide a simple written statement or provide a copy of an official document for review and return to the employee
- No certification may be required for bonding with a newborn or newly placed child, unless the leave is to care for the child because the child has a serious health condition under the FMLA



FMLA-protected Leave Reasons

Birth, Adoption, or Foster Care Placement

- Parents may use FMLA leave for the birth, adoption, or foster care placement of a child, and to bond with their newborn or newly-placed child
- Leave for bonding is only available for one year following a child's birth or placement
- In some situations, employees may take FMLA leave before the actual adoption or placement

The FMLA Definition of a Serious Health Condition

- Eligible employees may use FMLA leave because of their own serious health condition or
- To care for a family member with a serious health condition
- Under the FMLA, serious health condition means:
 - An illness, injury, impairment or physical or mental condition involving:
 - Inpatient Care, or
 - Continuing Treatment by a Health Care Provider

Inpatient Care

- An overnight stay in a hospital, hospice, or residential medical facility
- Includes elective surgery that necessitates an overnight stay
- Includes any related incapacity or subsequent treatment

Continuing Treatment by a Health Care Provider

- Incapacity Plus Treatment
- Pregnancy
- Chronic Conditions
- Permanent/Long-term Conditions
- Absence to Receive Multiple Treatments

Mental Health and the FMLA

- Mental health conditions are serious health conditions under the FMLA if they require inpatient care or continuing treatment by a health care provider
- Examples:
 - An overnight stay in a treatment center for addiction or eating disorders
 - Chronic conditions such as anxiety, depression, or dissociative disorders

Incapacity

- Inability to work, attend school or perform other regular daily activities due to the serious health condition
- Employee is unable to work if unable to perform any one of the essential functions of the employee's position due to the serious health condition
- Incapacity includes treatment or recovery from the serious health condition

Physical or Psychological Care

- Leave to care for a family member includes providing physical care and psychological comfort
- The employee need not be the only individual or family member able to provide care

Health Care Provider

- Licensed M.D.s and osteopaths
- Podiatrists, dentists, clinical psychologists, optometrists, chiropractors - with limitations
- Clinical social workers, nurse practitioners, nurse-midwives, and physician assistants
- Christian Science Practitioners
- Any health care provider from whom the employer's group health plan will accept certification
- Health care providers authorized to practice in a country other than the United States

Qualifying Exigency Leave

- Employee's spouse, child, or parent
- In the Regular Armed Forces
 - Deployed to a foreign country
- In the Reserve components of the Armed Forces (National Guard and Reserves)
 - Deployed to a foreign country under a call or order to active duty in support of a contingency operation

Qualifying Exigencies

- Short-notice deployment - up to seven days
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Non-medical counseling
- Care of the military member's parent
- Rest and recuperation - up to fifteen days
- Post-deployment activities - 90-day period
- Additional activities by agreement

Military Caregiver Leave

- Employee is the servicemember's spouse, parent, child, or next of kin
- A current member of the Armed Forces
 - Undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness
- Veteran of the Armed Forces
 - Undergoing medical treatment, recuperation, or therapy for a serious injury or illness and
 - Discharged under conditions other than dishonorable within the five-year period before the employee first takes military caregiver leave

Serious Injury or Illness – Current Servicemember

- Incurred in the line of duty on active duty, or
- A pre-existing condition that was aggravated by service in the line of duty on active duty
- May render servicemember medically unfit to perform duties
- May be mental health condition, for example:
 - Post traumatic stress disorder (PTSD)
 - Traumatic brain injury (TBI)
 - Depression

Serious Injury or Illness - Veteran

An injury or illness that was incurred or aggravated by service in the line of duty on active duty in the Armed Forces, that manifested before or after the servicemember became a veteran, and that is either:

- A continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating, or
- A condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, including a rating based on multiple conditions, *or*
- A condition that substantially impairs the veteran's ability to work because of a disability related to military service, or would do so absent treatment, *or*
- An injury that is the basis for the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers
- May be mental health condition such as PTSD, TBI, or depression



Taking FMLA Leave

Amount of Leave

- Eligible employees may use up to 12 workweeks of FMLA in a 12-month period for:
 - Birth or placement of a child for adoption or foster care
 - Care for a spouse, son, daughter, or parent with a serious health condition
 - Employee's own serious health condition
 - Qualifying exigencies related to the employee's family member's deployment to a foreign country
- Eligible employees may use up to 26 workweeks of FMLA in a "single 12-month period" for military caregiver leave

Amount of Leave - Airline Flight Crew Employees

- The FMLA leave entitlement for airline flight crew employees is based on a uniform six-day workweek.
- Eligible airline flight crew employees may use up to 72 days of FMLA leave in a 12-month period for:
 - Birth or placement of a child for adoption or foster care
 - Care for a spouse, son, daughter, or parent with a serious health condition
 - Employee's own serious health condition
 - Qualifying exigencies related to the employee's family member's deployment to a foreign country
- Eligible airline flight crew employees may use up to 156 days of FMLA leave in a "single 12-month period" for military caregiver leave

12-Month Period or Leave Year

- Employers may select from:
 - Calendar year
 - Any fixed 12-month leave year
 - A 12-month period measured forward
 - A rolling 12-month period measured backward
- Same 12-month period for all employees
- Regardless of the 12-month period selected for other FMLA leave, the single 12-month period for military caregiver leave begins on the first day the employee takes leave for this reason and ends 12 months later

Workweeks of Leave

- An employee's entitlement to FMLA leave is measured in "workweeks"
- When an employee uses FMLA leave for less than one full workweek, the amount of FMLA leave used is determined as a proportion of the employee's actual workweek
- When a holiday falls during a week that an employee is taking a full workweek of FMLA leave, the entire week is counted as FMLA leave
- When an employee works part of a week with a holiday the employee would not have been scheduled to work, the holiday/day off does not count as a leave day
- If an employer stops business activities for one or more weeks, the time is not counted as leave

Intermittent or Reduced Schedule Leave

- Employee is entitled to take FMLA leave in separate blocks of time, or intermittently, or on a reduced schedule, by working fewer hours each day or week, for:
 - Employee's or family member's serious health condition when the leave is medically necessary
 - Covered servicemember's serious injury or illness when the leave is medically necessary
 - A qualifying exigency arising out of a military member's covered active duty status
- Leave to bond with a child after the birth or placement can be intermittent or reduced schedule leave, but only if the employer agrees

Planned Medical Treatment

- Employee should generally make a reasonable effort to schedule planned medical treatments to minimize disruption to employer operations
- Employer may temporarily transfer employee to alternative job with equivalent pay and benefits when the employee needs intermittent or reduced schedule leave that is foreseeable based on planned medical treatment, if the position better accommodates recurring periods of leave

Calculation of Intermittent/Reduced Schedule Leave

- Employer must calculate leave in the shortest increment the employer uses to account for other types of leave - may not use increments greater than one hour
- For airline flight crew employees, employers must calculate leave in increments no greater than one day
- Special rule where it is physically impossible for an employee to begin or end work mid-way through a shift

Special Rules for Schools

- Special leave use rules generally apply to instructional employees of public and private elementary and secondary schools and public school boards
- Instructional employees are those whose main job is to teach and instruct students in a class, small group, or individual setting.
- For example:
 - Teachers, coaches, and special education assistants
 - Does not include aids, counselors, or curriculum specialists

Schools - Intermittent or Reduced Schedule Leave

- When an instructional employee needs to use a substantial amount of intermittent or reduced schedule FMLA leave that is foreseeable based on planned medical treatment, the employee may be required to choose between:
 - Taking leave for a set period not greater than the duration of the leave need, rather than intermittently, or
 - Transferring temporarily to an available alternative position

Schools - Leave Near the End of an Academic Term

- Instructional employees starting leave near the end of an academic term may be required to continue taking leave until the end of the term under certain circumstances
- Generally, whether the employee may be required to continue leave depends upon how close to the end of the term the leave begins and how much leave the employee needs

Use of Paid Leave Benefits During FMLA Leave

- Employees may choose or employers may require employees to use accrued paid leave, such as vacation or sick leave, if applicable, at the same time FMLA leave is used
- Employees may be eligible to use other benefits while they are using FMLA leave, including:
 - Workers' compensation
 - Short-term disability
 - Leave provided as an accommodation under the Americans with Disabilities Act (ADA)
 - Paid leave mandated under state or local law



Administering FMLA Leave

Initiation of FMLA Leave

- Employer's usual procedures for requesting leave generally apply
- Employee need not specifically mention the FMLA but must:
 - Provide sufficient information for employer to recognize leave may be covered by the FMLA
 - Once an employee's leave has been approved for a particular FMLA leave reason, if additional leave is needed for the same reason, the employee must specifically reference the qualifying reason or need for FMLA leave in subsequent requests
- Timing
 - 30 days notice or, if 30 days is not possible or practical, as soon as practicable--if the FMLA leave need is foreseeable
 - As soon as practicable--if FMLA leave need is not foreseeable

Employer Notice Requirements

- Post a general notice, and provide general notice in employee handbook or other written guidance to employees
 - Electronic posting and distribution permitted
 - The Department may assess a civil money penalty for willful posting violation
- Provide Eligibility Notice, and Rights and Responsibilities Notice
- Provide Designation Notice
- Translate notices where significant portion of workers are not literate in English

Timing

- **Eligibility Notice & Rights and Responsibilities Notice**
 - Within five business days of leave request (or knowledge that leave may be FMLA-qualifying)
 - Provided the first time the employee takes FMLA leave for an FMLA-qualifying reason in the applicable 12-month leave year
 - New notice for subsequent qualifying reason if eligibility status changes
- **Designation Notice**
 - Within five business days of having enough information to determine that leave is for an FMLA-qualifying reason
 - Once for each FMLA-qualifying reason per applicable 12-month period, and additional notice if any changes in notice information

Eligibility Notice and Rights and Responsibilities Notice

- **Eligibility Notice**
 - Informs the employee whether they are eligible for FMLA leave
 - May be oral or in writing
 - Provide a reason if employee is not eligible
- **Rights and Responsibilities Notice**
 - Must be in writing
 - Must include a statement that leave may be counted as FMLA, the 12-month period that applies, any certification requirements, any substitution requirements, arrangements for premium payments and potential employee liability, “key” employee status, and job restoration and maintenance of benefits rights
- **Optional WH-381**

Designation of Leave Notice

- Must be in writing and include designation determination, substitution of paid leave information, and fitness for duty information
- Must provide the amount of leave that is designated and will be counted against the employee's leave entitlement, if known, may be payroll notation
 - If unknown, provide to employee upon request at least once in 30 day-period of leave use
- If leave determined not to be FMLA qualifying, notice may be a simple written statement that leave does not qualify
- Retroactive designation permitted if no harm to employee from failure to timely designate

FMLA Record Keeping Requirements

- Basic payroll information
- Copies of leave notices
- Documents describing benefits/leave policies
- Premium payments of employee benefits
- Dates FMLA leave is taken
 - Hours of leave if leave is taken in less than one full day
- Records of disputes
- Documents relating to medical conditions, certifications, and histories must be maintained as confidential medical records

Leave Certification, Generally

- Employer may request certification of a serious health condition, qualifying exigency, or serious injury or illness of a covered servicemember
 - Must notify employee of request in writing within 5 days of learning of the FMLA leave need
 - Must allow employee at least 15 calendar days to submit
- Employee is responsible for cost
- Optional forms WH-380-E, WH-380-F, WH-384, WH-385 and WH-385-V available on the WHD website

Serious Health Condition Certification

- Medical facts appropriate for inclusion will vary
- Second and third opinions at employer's cost
 - If employer questions the validity of the certification, may require a second opinion
 - May require a third opinion if the first and second opinions differ
- Recertification if need continues for an extended period or if it changes significantly

Military Family Leave Certification

- **Qualifying exigency certification**
 - Employer may request a copy of military member's active duty orders
 - When the leave involves a meeting with a third party, may request contact information with the third party to confirm the meeting
 - No second or third opinions
- **Military caregiver leave certification**
 - May be completed by a Department of Defense (DOD), Veterans Affairs (VA), or Tricare health care provider, or by a private health care provider
 - Limited second and third opinions
- **No recertification**

Incomplete or Insufficient Certification

- Employer must give employee written notice and at least 7 calendar days to resubmit
 - Incomplete: one or more applicable entries not completed
 - Insufficient: information is vague, ambiguous, or non-responsive
- Employer, but not the employee's supervisor, may contact health care provider to authenticate or clarify information
- Qualifying exigency certification
 - Employer may verify meetings with a third party and may contact DOD to verify the military member's covered active duty status

Fitness-for-Duty Certification

- For an employee's own serious health condition, employers may require certification that the employee is able to resume work
 - Employer must have a uniformly-applied policy or practice of requiring fitness-for-duty certification for all similarly-situated employees
- If state or local law or collective bargaining agreement is in place, it governs the return to work
- Not permitted for intermittent or reduced schedule leave unless reasonable safety concerns exist
- Authentication and clarification
- Employee responsible for any cost



Employee Rights

Job-Protected Leave

- After FMLA leave, employee has the right to return to work in the same job, or one that is nearly the same
 - Same duties, responsibilities, status
 - Same level of skill, effort, responsibility and authority
 - Identical pay, including premium pay, overtime and bonus opportunities
 - Identical benefits, such as life insurance, disability insurance, sick leave, vacation, educational benefits, pensions, etc.
- Employees are not entitled to any additional benefits other than those they would have been entitled to if they had not taken FMLA leave

Limitations on Restoration

- Employee uses all available FMLA leave and is not able to return to work
- Employer denies key employee return to work to prevent substantial and grievous injury to operations
 - Key employee means among highest paid 10% of all employees within 75 miles of the worksite
 - Employer must provide key employee notice
- Employment changes, such as a layoff or reduced hours, which would have occurred without FMLA leave

Continuation of Health Insurance Coverage

- An employee has a right to continuation of group health insurance coverage during FMLA leave on the same terms as if they had continued to work
 - For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave
- During FMLA leave, the employee will need to continue to pay whatever share of group health plan premiums they typically paid before FMLA leave to maintain coverage during leave

Limits to Continuation of Health Insurance Coverage

- An employee may choose not to retain group health insurance coverage during FMLA leave
 - However, when the employee returns from FMLA leave, the employee is entitled to reinstatement of benefits on the same terms as before the leave
- FMLA requirements to continue coverage generally do not apply if an employee is laid off or terminated unrelated to the FMLA, chooses not to return to work for the employer, or is unable to return to work after FMLA ends
 - The Consolidated Omnibus Budget Reconciliation Act (COBRA) may require that an employee's group health coverage continue for a limited period

Prohibited Employer Actions

- Employers cannot:
 - Interfere with, restrain, or deny employees' FMLA rights
 - Discriminate or retaliate against an employee for having exercised FMLA rights
 - Use the taking of FMLA leave as a negative factor in employment actions
 - Discharge or in any other way discriminate against an employee because of involvement in any proceeding related to the FMLA

Enforcement of the FMLA

- To enforce FMLA rights, employees may:
 - File a complaint with Wage and Hour Division
 - File a private lawsuit under section 107(a)
- Lawsuit must be filed within two years after the last action which the employee alleges was in violation of the Act, or three years if the violation was willful

The FMLA and Other Laws

- The FMLA may apply in addition to other federal laws, state laws, an employer's policies, or a collective bargaining agreement
- Nothing in the FMLA supersedes any provision of state or local law that provides greater family or medical leave rights than those provided by the FMLA
- An employer's practices, policies, benefit programs, or plans, including a collective bargaining agreement (CBA), may not reduce or deny FMLA benefits and protections

FMLA Resources

Visit <http://www.dol.gov/agencies/whd/fmla> for links to:

- Title I of the FMLA, as amended (29 U.S.C. 2601—2654)
- Regulations (29 C.F.R. Part 825)
- *The Employer's Guide to the FMLA*
- *The Employee's Guide to the FMLA*
- *The Employee's Guide to Military Family Leave under the FMLA*
- FMLA Forms and Forms Frequently Asked Questions
- FMLA Fact Sheets
- FMLA Posters (WH-1420)
- FMLA Frequently Asked Questions
- FMLA elaws Advisor