

FMLA: Everything You Need to Know

Support Materials

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For P

Transcript

In 1993, Congress made huge improvements to the rights and flexibility employees enjoy in the workplace. The Family Medical Leave Act was signed into law expanding the rights of employees to take unpaid medical or military leave for themselves or to care for qualified family members without the possibility of negative job repercussions. Employee rights continue to be expanded as the bill has seen updates over the years, most recently in 2015. While the FMLA is simple in its premise, the actual law can be quite complicated for employers and employees alike. Let's take a look and see if we can make some sense of it.

It's important to note that the law only applies to employers who have 50 or more employees within a 75 mile radius and to all public employers and local public schools regardless of employee count.

Some states have also enacted laws of their own with different qualifying thresholds. In situations where state or local governments have enacted FMLA laws, the employer should follow the law that is most advantageous to the employee. Currently employers in Maine, Maryland, Oregon, Rhode Island, Vermont, Washington and the District of Columbia have such laws in place. To be certain you are current with state and local legislation and to remain compliant, stay mindful that laws are always changing.

Eligibility:

In order for an employee to be eligible for coverage by the Act he or she needs to have worked for the current employer for 12 months and to have logged at least twelve hundred fifty hours during the last year. The 12 months of employment don't need to be consecutive, however the twelve hundred fifty hours in the last year are required to be in consecutive months in order to receive benefits under the Act.

Employees can take FMLA leave for themselves or for their spouse, parents or children. The FMLA's definition of eligible spouse, parent or child is as follows:

Spouse: Spouse means a husband or wife as defined under state marriage laws and includes common law and same-sex marriages. In 2015, the law was amended to include same sex partners legally married in states where same sex marriage is recognized but who reside in states that do not legally recognize same-sex marriage. All legally married same sex partners are now eligible under the Act.

Parent: The FMLA uses the term "In Loco Parentis" to define parent under the Act. This means that any individual who provided day-to-day care or financial support to a child before his or her 18th birthday is considered a parent under the Act. This includes biological, adoptive, step or foster father or mother, or

any other individual who stood in loco parentis to the employee when the employee was a child. This also means an uncle, aunt, sibling or anyone else who provided the primary care and financial support of a child could be considered a parent under the Act. However, this term does not include parents “in law.”

Son or Daughter: Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to begin.

This means that a parent may take leave for a child who is 18 years or older, if that child is incapable of caring for his or her self.

Coverage:

The FMLA mandates that an eligible employee can take up to twelve unpaid workweeks of leave in a 12-month period:

- For the birth of a child and to care for the newborn child within one year of birth; including time for both mothers and fathers to bond with the child.
- For leave by mothers and fathers when a child is placed with the employee for adoption or foster care and to care for the newly placed child for one year thereafter.
- For care of an employee’s spouse, child, or parent who has a serious health condition.
- For an employee who is unable to perform the essential functions of his or her job due to a serious health condition.

(and)

- For any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty.”

The law also mandates that up to twenty-six workweeks of unpaid leave can be taken during a single 12-month period for:

- Military caregiver leave to care for a covered service member with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, parent, or next of kin.

The FMLA does **not** cover:

- Time off to care for elderly relatives other than parents.
- Time off to care for pets.

- Short term illnesses like the common cold or flu unless these illnesses leave the employee or his or her spouse, child or parent incapacitated for three or more consecutive days.
- Routine medical care such as check-ups.

Multiple FMLA leaves cannot be combined to exceed a total of 12 weeks for any serious health condition or military exigency within a 12 month period. For example, Sara could take a maternity leave, a qualifying leave to care for her husband undergoing major surgery and leave for a military exigency so long as the total amount of time for all FMLA leave does not exceed 12 weeks.

If multiple FMLA leaves include military caregiver leave they must not exceed 26 weeks. In addition, if military caregiver leave is combined with military exigency or serious health condition leave, the total amount of leave taken for military exigency or for the serious health condition still cannot exceed 12 weeks. For example, if Bob has taken leave to recover from a car accident and has also taken leave to care for his son who is a service member injured in the line of duty, the total leave may not exceed 26 weeks and of those only 12 weeks can be for his own serious health condition.

Employee Benefits:

During any serious health condition, military exigency or military caregiver leave, the employer must provide employees the same health insurance benefits that would have been received while working. However, employees are still responsible for the same employee contributions they would have paid if they were still at work.

No employee will accrue employee benefits like additional sick or vacation time while on FMLA leave.

Job Reinstatement

When an employee returns from leave the employer must:

- Provide the same position or an equivalent one if the same position is not available. The position should have the same pay, benefits and responsibility as the employee's previous position.
- Provide full reinstatement of all employee benefits that were enjoyed before the leave.
- Provide protection from any retaliation as a result of the leave.

What is a Serious Health Condition?

The following are considered serious health conditions and qualify for FMLA coverage:

- A condition that requires an overnight stay in a hospital or other medical care facility.
- A condition that incapacitates an employee or the employee's immediate family member, as previously defined, for three or more consecutive days and requires ongoing medical treatment. This means a condition such as the flu is eligible for FMLA leave if it keeps the affected person out of work or school for at least 3 consecutive days.
- Chronic medical conditions that cause intermittent incapacitation and require treatment by a health care provider at least twice a year.
- Pregnancy - including prenatal treatment, morning sickness and medically required bed rest.

Intermittent Leave

In situations when the employee does not take an extended leave of absence, but continues to work during an illness, an employer must allow for intermittent leave for doctor appointments and treatment.

For example, an employee who is battling cancer might continue to work but may need to take FMLA leave several times a week for treatment or appointments.

Employers are permitted to move an employee to an alternate position better suited for the need to take intermittent leave, so long as the new position has the same salary and benefits.

What is a Qualifying Military Exigency?

A qualifying military exigency is for Reserve, National Guard and certain retired military members, but not for active duty military members. A qualifying exigency includes one of the following:

- The need for any exigency that both the employee and employer have agreed upon.
- The need for up to 15 days leave to spend time with a family member who is on short-term, temporary *Rest and Recuperation* leave during deployment.
- The need to address financial and legal arrangements pertaining to a covered military member's absence.
- The need to attend post active duty military ceremonies, events or programs such as support groups for a period of 90 days.
- The need to attend non-healthcare provided counseling for one's self, the covered military member or children of the covered military member as

long as the counseling is a direct result of the covered military member's deployment.

- The need to address childcare or school issues arising out of the active duty or call to active duty of the covered military member; such as providing childcare in emergency situations, like a school snow day, that normally would have been handled by the covered military member. Regular daily childcare is not covered.
- The need to address issues that occur due to a "short notice deployment" - a deployment with less than 7-days notice.

As a general guideline, if the need for time off is a direct result of circumstances related to the covered military member's deployment, it should be allowed. For instance, a meeting at a child's school regarding academic or disciplinary issues directly related to a military member's absence would be covered; however time off to attend a school play would not. Another example would be covered counseling sessions to help a spouse cope with the absence of a covered military member, yet counseling sessions to stop smoking would not be covered.

Military Caregiver Leave:

An eligible employee who is the spouse, son, daughter or parent of a covered service member with a serious injury or illness is eligible to take FMLA leave to provide care to that service member. Additionally, the military caregiver portion of the Act adds "next of kin" to the list.

The next of kin of a covered service member is the nearest blood relative (other than a spouse, parent, son or daughter) in the following order of priority: a blood relative designated in writing by the service member, blood relatives who have been granted legal custody of the service member, siblings, grandparents, aunts and uncles, and first cousins.

To be a covered service member, the individual must be a member of the armed forces receiving medical treatment or therapy or recuperating from the result of injuries or illnesses incurred in the line of duty. Service members on the temporary disability retired list are also eligible for care under military caregiver leave. If the service member is a veteran, military caregiver leave must begin within five years of his or her discharge date. Veterans who have been dishonorably discharged are not considered covered service members.

Employee Reporting:

Employees must report FMLA leave 30 days in advance of taking leave unless the need for the leave is unforeseeable, like in the case of an accident or

extended flu. In unforeseeable cases the employee must report the need for leave as soon as possible - preferably the same or next day.

When employees ask for leave they must be as specific as possible so the employer can determine if the FMLA applies. Employees do not have to mention the FMLA by name. If an employee's circumstances fit the criteria for FMLA then the employer must abide by the law.

Employees have the right to take sick and vacation leave concurrently with the FMLA leave to help offset the loss in pay that they will incur. However, if employees choose not to take accrued leave as part of their FMLA leave, employers still have the right to require it.

Employees must follow the employer's regular call-in procedures when taking intermittent FMLA leave.

Key Employees:

If the employee taking FMLA leave is salaried and among the top 10% most highly compensated individuals in the company, the employee may take FMLA leave; however, the employer does not have to provide a key employee the same or equivalent position upon return if doing so would cause "substantial and grievous economic injury" to the employer.

The employer must inform the key employee in writing if he or she will not be reinstated and give the employee ample opportunity to come back to work. If the key employee does not return to work when notified, the employer must continue to provide the same health benefits until the FMLA leave is complete, upon which time the key employee still has the right to apply for reinstatement.

Employer Responsibilities:

Some of the major employer responsibilities under the Act include:

- Providing general notice to all employees by placing a notice of employees' rights under the FMLA in a conspicuous location like a break room or restroom and by including FMLA rights in an employee handbook or by handing them out when employees are hired.
- Notifying employees of their eligibility status and their rights under the FMLA.
- Employers must notify employees of employer responsibilities under the FMLA.
- Employers must notify employees when their leave qualifies as FMLA leave and how much time will count against their yearly allotment.

- Employers must keep FMLA files separate from regular employee files. FMLA files must be secured and only disclosed on a need-to-know basis.

Medical Certification:

Employers have the right to ask for a medical certification which supports the need for FMLA leave provided that the request is made within 5-days of the employee's request for time off. A request may be made at a later date if the employer has reason to question the appropriateness of the leave.

Employers also have the right to:

- Ask for 2nd and 3rd opinions, however they must be done at the employer's expense.
- Contact the healthcare provider directly if they are given written permission by the employee and the person contacting the healthcare provider is not the employee's direct supervisor.
- Ask for additional certifications provided the length of time needed for leave stated on the original or subsequent certifications has expired and that they are not requested any more than once every 30-days.
- Ask for a certification once every six months even if the current certification has not expired.

Employees who do not provide a medical certification upon request run the risk of having their FMLA leave and/or job reinstatement denied.

Light Duty:

Light duty is a reduced workload position or a toned down version of a job.

Employers may offer employees the alternative of temporary light duty in lieu of FMLA leave, but they cannot require it. If light duty is selected, a list of an employee's essential job functions may be submitted to the employee's healthcare provider to determine the activities he or she may perform during the duration of the serious health condition.

In addition, when an employee returns to work after FMLA leave the employer has the right to ask that employee to work a light duty job until fully ready to resume the equivalent or same position.

Light duty cannot count against the employee's FMLA time.

Fitness-for-Duty Certification:

When an employee is returning from leave due to a serious health condition that left him or her unable to perform essential functions of his or her job, an employer maintains the right to require a fitness-for-duty certification from the employee's healthcare provider. The certification should indicate that the employee is fit to return to work. Such certification can only be requested if the following criteria are met:

- The employer has a uniform policy applied to all "similarly situated" employees and the policy is in writing.
- The request is relative only to the serious health condition for which leave was originally taken.

The employer may request that the certification specifically address an employee's essential job functions if:

- At the time of FMLA designation, the employer both indicated that this would be a requirement upon reinstatement and provided a list of the essential job functions to the employee.

Employers generally may not request fitness-for-duty certification from employees who are returning from individual intermittent absences unless they believe a "reasonable safety concern" exists. Under this provision an employer may request the certification up to every 30 days when there is belief that the employee presents a serious safety hazard to him or her self or to other employees.

If an employee does not provide a fitness-for-duty certification upon request when the employer has met all proper conditions, the employee runs the risk of not being reinstated.

In conclusion:

Although cumbersome, the FMLA provides key benefits for both employees and employers. Employees have the ability to balance professional lives with personal and family health needs without the worry of losing their jobs during their greatest times of need. Employers, while assisting their well-trained and seasoned employees, enjoy the benefit of not only aiding in times of need, but of preserving their ability to maintain their most precious assets – their employees.

Employee Quiz

- 1) The FMLA applies to:
 - A) Companies with 50 or more employees located within a 75 mile radius
 - B) Public employers
 - C) Local public schools
 - D) All of the above
- 2) In situations where state and local governments have enacted FMLA laws, the employer should follow the law that is most advantageous to the employee?
 - A) True
 - B) False
- 3) In order to be eligible for coverage by the Act employees need to have:
 - A) Worked for their current employer for at least 12 months and to have logged 1250 hours in the last calendar year.
 - B) Worked for their current employer for 5 years.
 - C) Logged 5000 hours in their last two jobs.
 - D) There are no minimums. Employees are immediately eligible for coverage by the FMLA.
- 4) Employees may take FMLA leave for themselves and for their spouses, but never for their parents or children.
 - A) True
 - B) False
- 5) Which of the following is a situation covered by the FMLA.
 - A) Regular check-ups from a family physician.
 - B) Teeth cleaning.
 - C) Care of a new born child for up to one year.
 - D) Care for a child who is home sick from school for the day with a cold.
- 6) Employees may take up to 15 weeks of unpaid leave for serious health conditions.
 - A) True
 - B) False
- 7) When an employee returns from FMLA leave employers must:
 - A) Provide a job in the same department but not necessarily with the same pay, benefits or responsibility.
 - B) Allow the employee to interview for the old position.
 - C) Provide the same position or an equivalent one with the same pay, benefits and responsibility.
 - D) Provide a job anywhere in the company.

- 8) If an employee or an immediate family member of the employee has a condition that leaves them incapacitated for 48 hours it is considered a serious health condition under the FMLA.
- A) True
 - B) False
- 9) The FMLA allows how many weeks of unpaid leave for Military Caregiver Leave?
- A) 26 weeks
 - B) 21 weeks
 - C) 7 weeks
 - D) 14 weeks
- 10) During FMLA leave employers do NOT need to provide healthcare benefits.
- A) True
 - B) False
- 11) The FMLA covers leave for the birth of a child, however it does not provide coverage for morning sickness and bed rest.
- A) True
 - B) False
- 12) An employee with a serious illness has the option of continuing to work and taking intermittent leave for treatment and appointments.
- A) True
 - B) False
- 13) A qualifying military exigency is for Reserve, National Guard and some retired military members but not for active duty military.
- A) True
 - B) False
- 14) An employee may take FMLA leave to spend time with a spouse who is on temporary rest and recuperation leave from serving in the Reserve or National Guard as long as the FMLA leave does not exceed 30 days.
- A) True
 - B) False
- 15) To be a covered service member under Military Caregiver leave, the individual must be a member of the armed forces receiving medical treatment or therapy or recuperating from the result of injuries or illnesses incurred in the line of duty.
- A) True

B) False

- 16) Employees may not take vacation and sick leave concurrently with FMLA leave. These days must be taken at a different time.
A) True
B) False
- 17) Although eligible employers are required to provide FMLA leave, they do not have to educate their employees about the Act. It's up to employees to assert their rights under the FMLA.
A) True
B) False
- 18) An employer may offer an employee the option of light duty – a reduced workload or toned down position of a job, however they cannot require it.
A) True
B) False
- 19) When an employee is returning from leave due to a serious health condition that left him or her unable to perform essential functions of his or her job, an employer maintains the right to require a fitness for duty certification from the employee's healthcare provider.
A) True
B) False
- 20) Under no circumstances may an employer require a fitness for duty certification from an employee who is taking intermittent leave under the FMLA.
A) True
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