HR COMPLIANCE OVERVIEW

The Family and Medical Leave Act: Common Questions

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons. For example, under the FMLA, eligible employees may take leave for their own serious health conditions, for the serious health conditions of family members, to bond with newborns or newly adopted children or for certain military family reasons.

In addition to providing eligible employees with an entitlement to leave, the FMLA requires that employers maintain employees' health benefits during leave and restore employees to their same or equivalent job positions after leave ends. The FMLA also sets requirements for notices, by both the employee and the employer, and provides employers with the right to require certification of the need for FMLA leave in certain circumstances.

This Compliance Overview includes common questions about the FMLA.

LINKS AND RESOURCES

- The DOL's FMLA webpage, which includes links to the DOL's model FMLA forms
- The DOL's FMLA poster
- The Employer's Guide to the FMLA, a publication of the DOL's Wage and Hour Division

Covered Employers

- Private-sector employers with 50 or more employees;
- Public agencies, including state and federal employers; and
- Local educational agencies.

Eligible Employees

- Work for a covered employer;
- Have worked for the employer for at least 12 months;
- Have at least 1,250 hours of service for the employer during the 12-month period immediately before the FMLA leave; and
- Work at a location within a 75-mile radius of which the employer has at least 50 employees.

Overview

What employers are covered by the FMLA?

The FMLA applies to private employers with **50 or more employees** on each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. It is not necessary that an employee actually performs work on each working day or receives compensation for the week to be counted as employed, as long as the employee's name appears on the employer's payroll. Employees on leave are counted as employed if the employer has a reasonable expectation that they will return to active employment.

The FMLA applies to public agencies and to public and private elementary and secondary schools, regardless of the number of employees.

Who enforces the FMLA?

The DOL's Wage and Hour Division investigates FMLA complaints. If violations cannot be satisfactorily resolved, the DOL may bring an action in court to compel compliance. Individuals may also bring a separate private civil action against an employer for violations. Complaints or actions can be filed within two years of the last violation or within three years if the violation was willful.

Who is eligible for FMLA leave?

An employee is eligible for FMLA leave if the employee has been employed by a covered employer for at least 12 months and has worked at least 1,250 hours for that employer during the previous 12-month period. An eligible employee must also be employed at a worksite where the employer employs at least 50 employees within a 75-mile radius of the worksite.

A flight crew member will be considered to have met the hours-of-service requirement if he or she:

- Has worked or been paid for not less than 60 percent of the applicable total monthly guarantee for the previous 12-month period; and
- Has worked or been paid for not less than 504 hours during the previous 12-month period.

What are the qualifying reasons for FMLA leave?

The following circumstances qualify for **12 workweeks** of FMLA leave:

- ☑ Birth and care of an employee's son or daughter;
- ☑ Placement of a son or daughter with the employee for adoption or foster care;
- ☑ Care for an employee's spouse, son, daughter or parent who has a serious health condition;
- ☑ An employee's own serious health condition that makes the employee unable to perform any one of the essential functions of the employee's position; or
- ☑ Any qualifying exigency arising out of the fact that a family member (spouse, son, daughter or parent of the employee) is a covered military member on covered active duty or has been notified of an impending call or order to covered active duty in the Armed Forces.

In addition, eligible employees may take **26 workweeks** of leave in a single 12-month period to care for a spouse, son, daughter, parent or next of kin who is a covered service member with a serious injury or illness.

What is a "serious health condition" under the FMLA?

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves **inpatient care** or **continuing treatment** by a health care provider. The FMLA does not apply to routine medical examinations, such as a physical, or to common medical conditions, such as an upset stomach, unless complications develop.

For all conditions, "incapacity" means inability to work, including being unable to perform any one of the essential functions of the employee's position, or inability to attend school, or perform other regular daily activities due to the serious health condition, treatment of the serious health condition, or recovery from the serious health condition. The term "treatment" includes, but is not limited to, examinations to determine if a serious health condition exists and evaluations of the condition.

Serious health conditions may include conditions that involve an inpatient hospital stay or ones that include one or more visits to a health care provider and ongoing treatment. Chronic conditions and long-term or permanent periods of incapacity may also meet the requirements. Certain conditions requiring multiple treatments may also be FMLA-qualifying.

Who is a "covered service member"?

A covered service member is:

- A **current member of the Armed Forces** (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation or therapy, is in outpatient status, or is on the temporary disability retired list, for a serious injury or illness; or
- A **veteran** who is undergoing medical treatment, recuperation or therapy for a serious injury or illness, and who was discharged within the previous five years before the employee takes military caregiver leave to care for the veteran.

Notification Requirements

What notices must employers provide to employees regarding the FMLA?

General Notice

Covered employers must prominently post a **general FMLA notice** where it can be readily seen by employees and applicants for employment. The general notice explains an employee's rights and responsibilities under the FMLA and provides information concerning the procedures for filing complaints of violations. The DOL has developed a model general notice for employers to use.

Covered employers must post this general notice even if no employees are eligible for FMLA leave. Electronic posting is sufficient to meet this posting requirement. An employer that willfully violates this posting requirement may be subject to a **fine of up to $189 for each separate offense**. In addition, covered employers that have eligible employees must **provide** this general notice to each employee by:

- Including the notice in any written guidance to employees, such as an employee handbook, that explains other employee benefits or leave rights, if such written guidance exists; or

- Distributing a copy of the general notice to each new employee upon hiring.

In either case, this may be done electronically.

Eligibility Notice

When an employee requests FMLA leave, or when the employer learns that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within **five business days**, absent extenuating circumstances.

The eligibility notice must state whether the employee is eligible for FMLA leave, and, if not eligible, the notice must state at least one reason why the employee is not eligible. The DOL has provided a sample eligibility notice for employers to use.

Rights and Responsibilities Notice

Each time the eligibility notice is provided, employers must provide a written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice may be accompanied by any required certification form. The DOL has provided a sample rights and responsibilities notice for employers to use.

The rights and responsibilities notice must include, as appropriate, the following information:

- A statement that the leave may be designated and counted against the employee's annual FMLA leave entitlement and the applicable 12-month period for FMLA entitlement;
- Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness or qualifying exigency arising out of covered active duty and the consequences of failing to do so;
- A description of the employee's right to substitute paid leave and whether the employer will require it and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
- Any requirement for the employee to make any premium payments to maintain health benefits and related information;
- The employee's status as a "key" employee and related issues of reinstatement;
- The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or equivalent job upon return from FMLA leave;

- The employee's potential liability for employer payment of health insurance premiums if the employee fails to return to work; and
- Other information as appropriate.

If the specific information provided by the rights and responsibilities notice changes, the employer must, within five business days of receipt of the employee's first notice of need for leave following any change, provide written notice referencing the prior notice and containing any of the information in the notice that has changed.

Employers must responsively answer any questions from employees concerning their rights and responsibilities under the FMLA.

Designation Notice

In all circumstances, the employer is responsible for designating leave as FMLA-qualifying and for giving written notice of the designation to the employee within five business days of receiving sufficient information to grant or deny FMLA leave.

If possible, the notice must include the number of days, hours or weeks that will be counted against the employee's annual allotment of FMLA leave, and must address whether paid leave will be substituted for any portion of unpaid FMLA leave. The notice must notify the employee if a fitness-for-duty exam will be required prior to the employee's return to work as well as a list of essential functions so the health care provider can address these duties in the fitness-for-duty certification. The DOL has provided a sample designation notice for employers to use.

If the information provided by such notice changes, the employer must, within five business days of receipt of the employee's first notice of need for leave following any change, provide written notice of the change.

If the leave is not designated as FMLA leave because it does not meet the requirements of the FMLA, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

When should an employee provide notice of his or her need for FMLA leave?

Employees should give employers as much notice as possible when requesting leave under the FMLA. While not required to use the term "FMLA" when seeking leave, the employee must provide sufficient information for the employer to determine if the leave qualifies for FMLA protection. When an employee seeks leave due to an FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave in notifying the employer.

If leave is foreseeable for the birth of a child, to adopt or place a foster child, for planned medical treatment of a serious health condition of the employee or family member, or for the planned medical treatment for a serious injury or illness of a covered service member, employees must provide the employer with **at least 30 days' advance notice** before the leave

begins. If 30 days' advance notice is not provided, the employer has the right to delay the taking of FMLA until 30 days' notice is provided.

When leave will begin in less than 30 days, employees must give notice to an employer as soon as practicable.

For foreseeable qualifying exigency leave, notice must be provided as soon as practicable, regardless of how far in advance the leave is foreseeable.

When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular situation.

> An employer may require an employee to comply with the employer's **usual and customary notice and procedural requirements** for requesting leave, absent unusual circumstances (for example, no one answers the call-in number and the voicemail box is full). Where an employee does not comply with the employer's usual procedure, and no unusual circumstances justify that failure, the employer may properly delay or deny FMLA leave.

An employee taking leave for planned medical treatment for a serious health condition or a serious injury or illness must also make a reasonable effort to schedule treatments so an employer's operations are not unduly disrupted.

Can employers require a certification regarding an employee's FMLA leave?

Employers may require employees who wish to use FMLA leave to provide the following:

- Medical certification supporting the need for leave due to a serious health condition affecting the employee or an immediate family member (or the next of kin regarding leave taken to care for a covered service member for a serious injury or illness), second or third medical opinions (at the employer's expense), annual medical certifications and a periodic recertification;
- Periodic reports during FMLA leave regarding the employee's status and intent to return to work; and
- A certification in the event that leave is requested because of any qualifying exigency arising out of a family member's covered active duty or call to covered active duty in the Armed Forces.

Must an employee document family relationships when taking FMLA leave?

Employers may require employees who take leave to care for a family member to provide reasonable documentation of the required family relationship. An employee may satisfy this requirement either by providing documentation (such as a marriage license or a court document) or by providing a simple statement asserting that the necessary family relationship exists. According to the DOL, it is the employee's choice whether to provide a simple statement or another type of document.

Employers may not use a request for confirmation of a family relationship in a manner that interferes with an employee's FMLA rights.

Administration Issues

Can an employee take leave as intermittent or reduced leave under the FMLA?

Yes. Under the FMLA, employees may take leave in several ways. Continuous leave, such as several weeks in a row, may be the most common type of leave taken by employees. In certain circumstances, however, leave can be taken intermittently or on a reduced leave schedule.

Intermittent leave is taken in separate blocks (for example, from an hour up to several weeks), rather than continuously. A reduced leave schedule reduces an employee's usual number of hours per workweek or hours per workday.

In general, intermittent leave or a reduced leave schedule can be taken for the birth, adoption or foster care placement of an employee's child only if the employer agrees.

Intermittent or reduced leave can also be used to care for a spouse, child or parent with a serious health condition, for the employee's own serious health condition or for a covered service member with a serious injury or illness if it is medically necessary and such medical need can be best accommodated through an intermittent or reduced leave schedule.

If an employee requests intermittent leave or a reduced leave schedule that is foreseeable based on planned medical treatment, an employer may require an employee to transfer temporarily to an available alternative position. The employee must be qualified for the alternative position, the position must provide equivalent pay and benefits (though not equivalent duties) and the position must better accommodate recurring periods of leave than the employee's regular position.

Intermittent or reduced leave can also be used because of any qualifying exigency which arises as a result of an employee's spouse, son, daughter or parent serving on covered active military duty.

Are employers responsible for designating FMLA leave?

Yes. Employers are responsible for designating any leave taken as FMLA leave and for notifying an employee of the designation. This should take place within **five business days** of an employer's learning that the leave is being taken for an FMLA purpose, absent extenuating circumstances. The designation notice to the employee must be in writing. Only one notice is required in the case of intermittent leave or leave on a reduced schedule for each FMLA-qualifying reason per applicable 12-month period.

When an employer wants to substitute an employee's paid leave for unpaid FMLA leave or count paid leave under an existing leave plan as FMLA leave, the decision must be made within five business days of the time an employee gives notice of a need for leave, unless the employer does not have sufficient information to determine that the paid leave qualifies as FMLA leave. If the employer learns that leave is for an FMLA purpose after leave has begun, the paid leave may be retroactively counted to the extent it qualifies as FMLA leave, provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

Any dispute over whether paid leave qualifies as FMLA leave should be resolved through discussions between the employer and the employee. Documentation of those discussions and the decision is required by the FMLA.

How do temporary disability plans fit within the FMLA?

Employees who are absent and receiving benefits under a temporary disability plan or are out on workers' compensation are not on unpaid leave, and, therefore, the FMLA substitution of paid leave rules do not apply. Nevertheless, absences that qualify as serious health conditions may be designated as FMLA leave. The leave would be counted as running concurrently for purposes of the benefit plan, workers' compensation and FMLA. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan or workers' compensation benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

Does "light duty" affect an employee's right to FMLA leave?

If an employee is certified as able to return to work in a light-duty job, but is unable to return to the same or equivalent job, the employee has the option of declining to return and remaining on unpaid FMLA leave until the 12-week FMLA entitlement period is exhausted. This decision may result in the loss of workers' compensation benefits, at which point the provision for substitution of paid leave becomes applicable. Either the employer may require or the employee may elect the use of accrued paid leave.

Voluntary offering and acceptance of light duty does not count against the employee's FMLA entitlement and does not reduce an employee's right to restoration to the same or an equivalent position. The right to restoration is held in abeyance during the period the employee performs a light-duty assignment. That right is not unlimited and ceases at the end of the applicable 12-month FLMA leave year. Restoration is dependent on the employee's ability to perform the essential functions of the same or equivalent position at the end of FMLA leave.

Do holidays and temporary closings subtract from FMLA leave?

A week that contains a holiday has no effect on counting FMLA leave usage—it is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, when an employer's business activities temporarily cease, such as a plant closing for repairs or a school closing for summer vacation, and employees are generally not expected to report for work for one or more weeks, that time cannot be counted against an employee's FMLA leave entitlement.

Does the FMLA affect public employees' compensatory time?

Under the Fair Labor Standards Act (FLSA), an employer always has the right to cash out an employee's compensatory time or require the employee to use the time. Thus, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires this use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

Must an employer maintain an employee's health benefits while the employee is on FMLA leave?

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave on the same terms as if the employee had continued to work. However, an employee may choose not to retain group health plan coverage while on FMLA leave. When the employee returns from leave, though, the employee is entitled to be reinstated on the same terms as prior to taking the leave. The employee cannot be required to re-qualify or meet any other conditions prior to being reinstated to the group health plan.

Under the FMLA, can an employer cancel an employee's health insurance for lack of premium payment?

Employers must notify employees on FMLA leave before health care coverage is dropped for lack of premium payments. Generally, an employer must provide written notice to the employee at least 15 days before coverage is to cease. The notice must explain that the payment has not been received and that coverage will be dropped on a date that is at least 15 days after the date of the letter, unless payment is received by that date.

Upon the employee's return from FMLA leave, the employer must unconditionally restore the employee to the same coverage and benefits the employee would have had if leave had not been taken and the employee's share of the premium payments had not been missed. If the employer pays the employee's share in order to maintain health coverage, an employer may generally recover the employee's share of any premium payments that the employer paid while the employee was on FMLA leave.

Must an employer restore an employee to his or her job after FMLA leave?

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment. Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly paid "key" employees after using FMLA leave during which health coverage was maintained. In order to do so, the employer must:

- Notify the employee in writing of his or her status as a "key" employee in response to the employee's notice of intent to take FMLA leave, or when FMLA leave commences, if earlier;
- Notify the employee in writing, in person or by certified mail as soon as the employer decides it will deny job restoration, and explain the reasons for this decision;
- Offer the employee a reasonable opportunity to return to work from FMLA leave after this notice; and
- Make a final determination as to whether reinstatement will be denied if the employee requests restoration at the end of the leave period, and notify the employee of the determination in writing, in person or by certified mail.

A "key" employee is a salaried FMLA-eligible employee who is among the highest paid 10 percent within 75 miles of the worksite.

Does a COBRA-qualifying event occur if an employee does not return from FMLA leave?

The taking of leave under the FMLA is not a qualifying event under COBRA. However, a qualifying event occurs if an employee (or the employee's spouse or dependent child) is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave) under a group health plan of the employer, the employee does not return to work at the end of the FMLA leave, and the employee (or the employee's spouse or dependent child) would, in the absence of COBRA continuation coverage, lose coverage under the group health plan. The COBRA qualifying event occurs on the last day of FMLA leave. In general, the maximum coverage period is measured from the last day of FMLA leave.

A COBRA qualifying event also occurs on the date an employee, either before starting FMLA leave or while currently on FMLA leave, notifies the employer that he or she will not be returning to work. Additionally, if coverage under a group

health plan is lost at a later date and the plan provides for the extension of the required periods, COBRA coverage begins on the date when group health coverage is actually lost.

Must an employer grant pay increases and bonuses to an employee on FMLA leave?

Employees are entitled to any unconditional pay increases (cost of living) that occur during FMLA leave. Pay increases conditioned on seniority, length of service or work performed are subject to the employer's policies or practices for other employees on an equivalent leave status for a reason that does not qualify as FMLA leave.

Furthermore, if a bonus or other payment is based on the achievement of a specified goal, such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

Is an employee entitled to other benefits while on FMLA leave?

An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. An employee's entitlement to benefits such as holiday pay is to be determined by the employer's established policy for providing such benefits when an employee is on other forms of leave, such as paid or unpaid, as appropriate.

However, at the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, though the employee is subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce. Upon return from FMLA leave, the employee cannot be required to re-qualify for any benefits the employee enjoyed before the leave began.