

Family Medical Leave Act (“FMLA”)

Frequently Asked Questions

Disclaimer

We share this information with our clients and friends for general informational purposes only. It does not necessarily address all of your specific issues. It should not be construed as, nor is it intended to provide, legal advice. Questions regarding specific issues and application of these rules to your plans should be addressed by your legal counsel.

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1. What does the Family and Medical Leave Act provide?

The Family and Medical Leave Act (“FMLA”) provides eligible employees up to 12 workweeks of unpaid leave a year for their own, or a family member’s serious health condition, and requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave. An employee is also entitled to return to the same or an equivalent job at the end of FMLA leave.

The FMLA also provides certain military family leave entitlements. Eligible employees may take up to 12 workweeks of leave for specified reasons related to certain military deployments of their family members. Eligible employees may take up to 26 weeks of FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness.

2. Does FMLA apply to my organization?

The FMLA applies to all public agencies, including local, state, and federal employers, and local education agencies (schools), as well as, all private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year.

3. Am I required to tell my employees of the existence of FMLA and their right to take FMLA leave?

If you are covered by the FMLA, then you are required to post and keep posted on your premises a notice explaining the FMLA’s provisions and providing information concerning the procedures for filing complaints of FMLA violations with the Department of Labor’s Wage and Hour Division. If you willfully violate this posting requirement, then you may be subject to a civil monetary penalty. Additionally, you must include this general notice in your employee handbook or other written guidance to employees concerning benefits, or, if no such materials exist, then you must distribute a copy of the notice to each new employee upon hiring.

4. Which of my employees are eligible for FMLA leave?

In order to be eligible to take leave under the FMLA, an employee must:

- work for a covered employer;
- have worked 1,250 hours during the 12 months prior to the start of leave (special hours of service rules apply to airline flight crew members);
- work at a location where you have 50 or more employees within 75 miles; and
- have worked for you for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. In general, only employment within seven years is counted unless the break in service is due to an employee’s fulfillment of military obligations, or is governed by a collective bargaining agreement or other written agreement.

5. If I do not have any FMLA eligible employees, do I still need to satisfy FMLA's posting requirement?

Yes. If your organization is subject to the FMLA, you must comply with the notice posting requirement even if none of your employees is currently eligible for FMLA leave. The only thing that matters is that you are subject to FMLA.

6. When can an eligible employee use FMLA leave?

You must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12 month period for one or more of the following reasons:

- for the birth of a son or daughter, and to bond with the newborn child;
- for the placement of a child for adoption or foster care, and to bond with that child;
- to care for an immediate family member (spouse, child, or parent – but not a parent “in-law”) with a serious health condition;
- when the employee is unable to work because of a serious health condition; or
- for qualifying exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces.

Moreover, the FMLA also allows eligible employees to take up to 26 workweeks of unpaid, job-protected leave in a single 12-month period to care for a covered servicemember with a serious injury or illness.

7. What is a serious health condition?

The most common serious health conditions that qualify for FMLA leave are:

- conditions requiring an overnight stay in a hospital or other medical care facility;
- conditions that incapacitate the employee or his family member for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);
- chronic conditions that cause occasional periods when you or your family member are incapacitated and require treatment by a health care provider at least twice a year; and
- pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).



8. Can I require the employee to document the family relationship in cases where the FMLA leave is based on a familial relationship (i.e., to care for a parent, spouse etc.)?

You may, but are not required to, request that an employee provide reasonable documentation of the qualifying family relationship. An employee may satisfy this requirement by providing either a simple statement asserting that the requisite family relationship exists, or other documentation such as a child's birth certificate or a court document.

9. When do employees need to inform me of their need to take FMLA leave?

Employees seeking to use FMLA leave are required to provide you with 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. If the need for leave is unforeseeable, the employee must provide notice as soon as practicable. Employees must provide you with sufficient information so that you can reasonably determine whether the FMLA may apply to the leave request. When an employee seeks leave for an FMLA-qualifying reason for the first time, the employee is not required to assert FMLA rights or even mention the FMLA.

10. Must the employee's notice of the need for leave be in writing?

No, the notice can be provided either orally or in writing.

11. Is an employee required to follow my normal call-in procedures when taking FMLA leave?

Yes, an employee must comply with your 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).

12. How soon after the employee requests leave must I inform the employee whether he or she is eligible for FMLA leave?

You should begin the FMLA leave process as soon as you have enough information that indicates that the employee's need for leave may be for an FMLA-qualifying reason. Moreover, within five days after the initial request for leave, you must provide the employee with an Eligibility Notice. If you determine that the employee is not eligible for FMLA leave, then you must state at least one reason why the employee is not eligible. The Department of Labor has provided a model Eligibility and Rights and Responsibilities Notice, which is available via this [LINK](#).

13. Do I have to provide employees with information regarding their specific rights and responsibilities under the FMLA?

At the same time that you provide an employee with an Eligibility Notice, you must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, you must inform the employee

whether he or she 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). In addition, you must also provide notice of how premiums are to be paid during unpaid FMLA leave. If you intend to recover premiums paid on behalf of the employee in order to continue coverage, then you must include a notice that the employee may be required to reimburse you for the employee's share of health insurance premiums paid on his behalf during the FMLA leave. The DOL has provided a model Eligibility and Rights and Responsibilities Notice, which is available via this [LINK](#).

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

You must notify the employee as to whether the leave will be designated as FMLA leave within five business days of learning that the leave is being taken for an FMLA-qualifying reason, absent extenuating circumstances. If applicable, the Designation Notice must also state whether paid leave will be substituted for unpaid FMLA leave and whether you 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 you may provide oral notice of this requirement).

If the amount of leave needed is known, you must inform the 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), you 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. The DOL has provided a model Designation Notice, which is available via this [LINK](#).

15. Is the employee required to prove that he has a serious health condition?

You may require that the need for leave for a serious health condition be supported by a certification issued by a health care provider. If you decide to require a certification, you must allow the employee at least 15 calendar days to obtain the medical certification. The DOL has provided a model medical certification for an employee's own serious health condition, which is available via this [LINK](#) and a model medical certification for a family member's own serious health condition, which is available via this [LINK](#).

16. What happens if the employee fails to submit a requested medical certification?

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.

17. What happens if I find the employee's medical certification to be incomplete?

If you find the medical certification to be incomplete, you must allow the employee a reasonable opportunity to cure the deficiency. You must state in writing what additional information is necessary to make the certification complete and sufficient, and you must allow the employee at least seven calendar days to cure the deficiency, unless seven days is not practicable under particular circumstances despite the employee's diligent good faith efforts.

18. May I obtain additional clarification if I have a question about a medical certification?

Once you receive a complete and sufficient certification, you may not request additional information from the health care provider. However, you may use a human resources professional, a leave administrator, another health care provider, or a management official to contact the health care provider to authenticate or to clarify the certification. For example, your representative could ask the health care provider if the information contained on the form was completed or authorized by the health care provider, or ask questions to clarify the handwriting on the form or the meaning of a response. Under no circumstances may the employee's direct supervisor contact the employee's health care provider.

19. Can I make the employee get a second opinion?

You may require a second or third medical opinion (at your expense) if you have reason to doubt the validity of the medical certification.

20. How soon after an employee requests leave do I have to request a medical certification of a serious health condition?

You should request a medical certification, in most cases, at the time the employee gives notice of the need for leave or within five business days. If the leave is unforeseen, you should request a medical certification within five days after the leave begins. Moreover, you may request a certification at a later date if the employer has reason to question the appropriateness or duration of the leave.

21. Can I require an employee to sign a medical release as part of a medical certification?

No. You may not require an employee to sign a release or waiver as part of the medical certification process.



22. How often may I ask for medical certifications for an on-going serious health condition?

You are not allowed to ask for a recertification more often than every 30 days. For conditions that are certified as having a minimum duration of more than 30 days, then you must wait to request a recertification until the specified period has passed, except that in all cases you may request recertification every six months in connection with an absence by the employee. Additionally, you 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.

23. Does an employee have to take leave all at once or can leave be taken periodically or to reduce the employee's schedule?

When it is medically necessary, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee's usual weekly or daily work schedule.

24. Can I change an employee's job when the employee takes intermittent or reduced schedule leave?

Employees needing intermittent/reduced schedule leave for foreseeable medical treatments must work with you to schedule the leave so as not to disrupt your operations, subject to the approval of the employee's health care provider. In such cases, you may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodate recurring periods of leave better than the employee's regular job.

25. Am I required to pay the employee during FMLA leave?

The FMLA only requires unpaid leave. However, the law permits an employee to elect, or for you to require the employee, to use accrued paid vacation leave, paid sick, or paid family leave for some or all of the FMLA leave period. An employee must follow your normal leave rules in order to substitute paid leave. When paid leave is used for an FMLA-covered reason, the leave is FMLA-protected.

26. Can an employee use paid leave as FMLA leave?

An employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of your applicable paid leave policy. If an employee chooses this option, then the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA.

27. How is the 12-month period calculated under the Family and Medical Leave Act?

You may select one of four options for determining the 12-month period:

1. the calendar year;



2. any fixed 12-month “leave year” such as a fiscal year, a year required by state law, or a year starting on the employee’s “anniversary” date;
3. the 12-month period measured forward from the date any employee’s first FMLA leave begins; or
4. a “rolling” 12-month period measured backward from the date an employee uses FMLA leave.

Whichever method you choose, you must apply it uniformly and consistently to all employees. The only exception is if you are a multi-state employer that has eligible employees in a state with a state family and medical leave statute that requires a specific method for determining the leave period. If this is the case, then you may comply with the state provision for all employees within that state, and uniformly use one of the four methods described above for all other employees. If you fail to select a 12-month period, then you must use the method that is most beneficial to the employee.

28. Can I change the method used to calculate the 12-month leave period?

Yes, but only after providing 60 days’ notice of the intended change to all employees. During the transition, employees must retain the full benefit of 12 workweeks of leave under whichever method provides the most benefit to an employee seeking leave.

29. Can my employees take FMLA leave in periods less than 1 full day?

Yes. An employee may take FMLA leave in periods of weeks, days, hours, and in some cases even less than an hour.

30. For my employees who work part-time and take a week of FMLA leave, how do I calculate the FMLA leave taken?

Only the amount of leave actually taken may be counted against the employee’s leave entitlement. Time that an employee is not scheduled to report for work may not be counted as FMLA leave. When an employee’s schedule varies from week to week so much that it is not possible to determine how many hours the employee would have worked during the week had the employee not taken FMLA leave, then you may use a weekly average to calculate the employee’s FMLA leave entitlement. The weekly average is determined by the hours scheduled over the 12 months prior to the beginning of the leave and includes any hours for which the employee took any type of leave.

31. Must I maintain all of an employee’s benefits while on FMLA leave?

No. During any FMLA leave, you must maintain the employee’s coverage under any “group health plan” on the same basis as coverage would have been provided if the employee had been continuously employed during the entire leave period. An employee’s entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) will be determined by your policy for providing such benefits.



“Group health plan” means any plan to provide health care to employees, former employees, or the families of employees or former employees. The requirement to maintain coverage under a group health plan during FMLA leave extends to any employer-sponsored plan that provides medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, health flexible spending account, etc.

32. If I provide a new health plan to my employees, when must I give an employee on FMLA leave the opportunity to enroll in the newly offered plan?

If you provide a new health plan or change health benefits or plans while an employee is on FMLA leave, then the employee on FMLA leave is entitled to the new or changed plans/benefits to the same extent as if the employee were not on leave. For instance, if you add a new coverage option under your group health plan providing coverage for dental care, then each employee on FMLA leave must be given the same opportunity as other employees to obtain the dental care coverage. Moreover, notice of an opportunity to change health plans or benefits must be given to any employee on FMLA leave.

33. May an employee change his or her benefits elections during FMLA leave?

Yes. Under certain circumstances, employees on FMLA leave may change their benefit elections. For example, an employee can make the same election changes as an employee on non-FMLA leave during annual enrollment.

34. If an employee goes on intermittent FMLA leave and the employee’s total hours fall below the hours normally considered to be full-time, can I drop the employee’s coverage?

No. You must maintain the employee’s coverage under a group health plan as if the employee were still working full-time even if the employee is on intermittent FMLA leave and the employee’s total hours fall below the hours normally considered to be full-time.

35. Must an employee continue to pay his share of group health plan premiums while on FMLA leave?

Yes. During the FMLA leave period, an employee must continue to pay his share of group health plan premiums.

36. When does my obligation to maintain group health plan coverage end?

You are not obligated to maintain the group health plan coverage of an employee who is on FMLA leave when: the employee chooses not to retain the coverage during FMLA leave; the employee fails to pay his share of the premiums for the coverage; the employment relationship would have terminated if the employee had not taken FMLA leave (such as, if the employee’s position is eliminated as part of a non-discriminatory reduction in force and the employee would not have been transferred to another position); the employee informs you that he will not be returning to work; the employee



fails to return to work; and the employee continues on leave after exhausting his FMLA leave.

37. If the employee fails to pay his portion of the premiums while on FMLA leave, when can I terminate coverage?

Your obligation to maintain health insurance coverage for an employee on FMLA leave ceases if the employee's payment of his share of the premium is more than 30 days late. In order to drop coverage on this basis, however, you must provide written notice to the employee that payment hasn't been received. The notice must be mailed to the employee at least 15 days before coverage is to cease and must advise the employee that coverage will be dropped on a specified date at least 15 days after the date of the letter, unless payment has been received by that specified date. If you have a policy with a longer grace period, then you must adhere to that policy.

38. If an employee fails to pay his premiums while on FMLA leave and I terminate the employee's coverage, must I reinstate coverage when the employee returns to work?

Yes. Upon the employee's return to work, even if his benefits were terminated because of non-payment of premiums while on FMLA leave, you must restore the employee's health insurance.

39. Can I recover premium payments if the employee fails to return to work?

Yes, you may recover from an employee any health plan or other non-health plan benefit premiums paid during the employee's unpaid FMLA leave if the employee fails to return to work. However, you cannot recover the premium payments if the employee does not return to work due to the continuation, recurrence, or onset of a serious health condition that would have otherwise entitle the employee to FMLA leave, or other circumstances beyond the employee's control.

Moreover, you may recover the employee's share of any premium payments missed by the employee for any period of FMLA leave during which you maintained the employee's health coverage by paying the employee's share. This recovery may be made whether or not the employee returns to work.

40. Do employees have rights to continue benefits other than health benefits during FMLA leave?

An employee's rights to benefits other than group health insurance while on FMLA leave depend upon your established policies. Any benefits that would be maintained while the employee is on other forms of leave, including paid leave if the employee substitutes accrued paid leave during FMLA leave, must be maintained while the employee is on FMLA leave.



41. How does my obligation to restore benefits upon an employee's return from FMLA leave impact benefits other than group health insurance?

Employees are entitled to restoration of benefits when they return from FMLA leave, with no waiting period or requalification requirement. This includes benefits such as life insurance, disability coverage, and similar benefits. You are not required to continue non-health benefits during unpaid FMLA leave unless you would continue them during other forms of leave. However, even if you do not usually continue non-health benefits, for example, life insurance while employees are on unpaid leave, you may have to continue that benefit for an employee on FMLA leave, if a gap in coverage would require the employee to requalify for insurance. If you continue an employee's benefits for this reason, you can recover the employee's share of the premium after the employee returns to work.

42. Do individuals on FMLA leave have rights during annual enrollment?

Yes. Individuals on FMLA leave have rights during annual enrollment and must be given the same benefit options as employees not on FMLA leave, such as the opportunity to move from an HMO to a PPO.

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

Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, you may have a uniformly applied policy or practice that requires all similarly situated employees to submit a certification from a health care provider indicating that the employee is able to resume work. You may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if you have appropriately notified the employee that this information will be required and you have already provided a list of essential functions.

44. What happens if the employee fails to submit a requested fitness-for-duty certification?

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

45. What does Military Family leave under the FMLA provide?

The military family leave provisions of the FMLA entitle eligible employees of covered employers to take FMLA leave for:

- Any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the Armed Forces, or



- To care for a covered servicemember with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin ("military caregiver leave").

46. When can an employee take a qualifying exigency leave?

An eligible employee may take qualifying exigency leave when the employee's spouse, son, daughter, or parent who is a member of the Armed Forces (including the National Guard and Reserves) is on covered active duty or has been notified of an impending call or order to covered active duty.

47. How much leave may an employee take to care for a covered servicemember?

An eligible employee is entitled to take up to 26 workweeks of leave during a "single 12-month period" to care for a seriously injured or ill covered servicemember. The "single 12-month period" begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.

48. Can an employee take FMLA leave to both care for a covered servicemember and for another FMLA qualifying reason during this "single 12-month period?"

Yes. An eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in this single 12-month period, provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period. For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave, but could not take 16 weeks of leave to care for a newborn child and 10 weeks of military caregiver leave.

49. How is leave designated if it qualifies as both military caregiver leave and leave to care for a family member with a serious health condition?

For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that you must designate the leave as military caregiver leave first. The regulations prohibit an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee's entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other FMLA-qualifying reasons.

50. What type of notice must an employee provide when taking FMLA leave because of a qualifying exigency?

An employee must provide notice of the need for qualifying exigency leave as soon as practicable. For example, if an employee receives notice of a family support program a week in advance of the event, it should be practicable for the employee to provide



notice of the need for qualifying exigency leave the same day or the next business day. When the need for leave is unforeseeable, an employee must comply with your normal call-in procedures absent unusual circumstances.

51. Are the certification procedures (timing, authentication, clarification, second and third opinions, recertification) the same for qualifying exigency leave and leave due to a serious health condition?

The same timing requirements for certification apply to all requests for FMLA leave, including those for military family leave. Thus, an employee must provide the requested certification to you within the time frame requested (at least 15 calendar days after your request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. If the qualifying exigency involves a meeting with a third party, you may verify the schedule and purpose of the meeting with the third party. Additionally, you may contact the appropriate unit of the Department of Defense to confirm that the military member is on covered active duty or call to covered active duty status. However, you are not permitted to require second or third opinions on qualifying exigency certifications.

52. How much FMLA leave may an employee take for qualifying exigencies?

An employee may take up to 12 workweeks of FMLA leave for qualifying exigencies during the twelve-month period established by the employer for FMLA leave. Qualifying exigency leave may also be taken on an intermittent or reduced leave schedule basis.

53. How much leave can an employee take if he needs leave for both a serious health condition and a qualifying exigency?

Qualifying exigency leave, like leave for a serious health condition, is a FMLA-qualifying reason for which an eligible employee may use his or her entitlement for up to 12 workweeks of FMLA leave each year. An eligible employee may take all 12 weeks of his or her FMLA leave entitlement as qualifying exigency leave or the employee may take a combination of 12 weeks of leave for both qualifying exigency leave and leave for a serious health condition, but the total number of weeks for both types of leave may not exceed 12 weeks in the applicable 12-month period.