Brought to you by Ardent Solutions

FMLA Common Questions—Administration

The Family and Medical Leave Act of 1993 (FMLA) gives eligible employees the right to take unpaid, job-protected leave each year in certain situations, including the birth, adoption or foster care placement of a child, their own or a family member's serious health condition and a family member's military service.

This Legislative Brief provides answers to commonly asked questions regarding the administration of FMLA leave.

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.

When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave. However, this period cannot be greater than one hour and an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. Nonetheless, where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift (such as a flight attendant), the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.

Under the final regulations, if an airline flight crew employee takes leave intermittently or on a reduced schedule, the employer must account for the leave using an increment no greater than one day.

FMLA Common Questions—Administration

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. The DOL has provided a sample designation notice for employers to use. 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 of time 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.

Under the FMLA, must an employer keep track of an employee's hours of service?

If a covered employer fails to keep accurate records of the hours an employee works, the employer has the burden of clearly demonstrating the employee has not worked the requisite hours, or the employee will be presumed to have worked the necessary 1,250 hours for purposes of FMLA eligibility.

Does the age of a child being adopted or placed for foster care affect an employee's right to FMLA leave?

When leave is for placement for adoption or foster care, the child must be under age 18 or, if older, incapable of self-care because of a mental or physical disability at the time the FMLA leave begins.

9/10; EM 3/15

Is psychological care an appropriate reason for an employee to take FMLA leave?

Leave taken to care for a child, spouse or parent with a serious health condition or a covered service member with a serious injury or illness can include the giving of psychological comfort and reassurance which would be beneficial if that person is receiving either inpatient or home care.

Can an employee take FMLA leave to care for a same-sex spouse?

Due to the U.S. Supreme Court's decision in *United States vs. Windsor*, which invalidated Section 3 of the federal Defense of Marriage Act (DOMA), eligible employees in same-sex marriages are allowed to take FMLA leave to care for their spouses or family members. Eligible employees may take:

- FMLA leave to care for their same-sex spouse with a serious health condition;
- Qualifying exigency leave due to their same-sex spouse's covered military service; or
- Military caregiver leave for their same-sex spouse.

In addition, eligible employees are entitled to take FMLA leave to care for their stepchild (the child of the employee's same-sex spouse) or a stepparent who is the same-sex spouse of the employee's parent.

In August 2013, the DOL issued Fact Sheet #28F to clarify the scope of an employer's obligation to make FMLA available to same-sex spouses. This fact sheet provided that, under the FMLA, the term "spouse" includes a same-sex spouse if the marriage is recognized under the laws of the state in which the employee resides. On Feb. 25, 2015, the DOL issued a final rule that expands protections under the FMLA for same-sex spouses. Under the final rule, eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouses or family members, regardless of where they live. The final rule becomes effective on **March 27, 2015**.

What are secondary employers' job restoration responsibilities under the FMLA?

As secondary employers, clients of agencies providing temporary help are under an explicit duty to accept an employee returning from FMLA leave in place of the replacement employee if the client continues to utilize the agencies' employees. A client is also responsible for compliance with the prohibited acts provisions of the FMLA (for example, the FMLA prohibits interfering with an employee's exercise of rights under the FMLA) with respect to its jointly employed employees, whether or not the agency is covered by the FMLA.

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 to 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

9/10; EM 3/15

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.

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 the employee's 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.

A predecessor employer's employee who begins FMLA leave before a successor employer takes over must be restored to employment by the successor. Additionally, secondary employers, including clients of temporary agencies, must accept the same temporary employee upon the employee's return from FMLA leave if the secondary employer continues to utilize an employee from the temporary agency and the temporary agency still provides the employee to the employer.

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.

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.

9/10; EM 3/15

FMLA Common Questions—Administration

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.

Further, 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.

How is service member family leave limited in a single 12-month period?

During a single 12-month period, an eligible employee may only take a combined total of 26 workweeks of leave for the birth/adoption/foster care of a son or daughter, for a family member's serious health condition, for the employee's own serious health condition, for any qualifying exigency, and for a covered service member's serious injury or illness. The 12-month period to be used for purposes of tracking this leave begins when the employee starts using his or her FMLA leave. An employee is not entitled to more than 26 weeks of FMLA leave during the 12-month period that begins with the need for leave. Nonetheless, an employee may take 26 weeks of leave in consecutive 12-month periods for family members covered by the provision since it is applied on a per-covered-service member, per-injury basis.

MORE INFORMATION

More information from the DOL on the FMLA, including sample FMLA forms, is available on the DOL's FMLA webpage.

9/10; EM 3/15