

# LEGISLATIVE BRIEF

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## FMLA Common Questions—Definitions

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 basic provisions of the FMLA.

### ***What is the Family and Medical Leave Act (FMLA)?***

The FMLA was enacted in 1993 to help employees balance their work and family life. The law was amended in 2008 and 2009 to include additional leave provisions for military families. Final regulations were issued by the Department of Labor (DOL) and became effective on Jan. 16, 2009. Additional final regulations on the FMLA's military family leave provisions and rules related to airline personnel and flight crews were released on Feb. 6, 2013.

In general, the law requires employers with 50 or more employees to offer eligible employees up to 12 workweeks of unpaid leave for the birth, adoption or foster care placement of a child, to care for a sick family member, for the employee's own illness, or for any "qualifying exigency" which arises as a result of a family member serving on covered active military duty.

The law also requires that eligible employees receive up to 26 workweeks of unpaid leave during a single 12-month period to care for a covered service member who is their spouse, son, daughter, parent or next of kin. However, eligible employees are limited to a total of 26 workweeks of FMLA-protected leave during such 12-month period. For example, an employee cannot take 26 workweeks of FMLA leave to care for a covered service member and then also take 12 more weeks for other FMLA qualifying reasons.

### ***What employers are covered by 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, so 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 as well as private elementary and secondary schools, regardless of the number of employees employed.

### ***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** (need not be consecutive months, but must not be more than a seven-year break in service, except in certain circumstances, such as military service or collective bargaining agreements) 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.

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For purposes of determining whether an employee who is a flight crew member meets the hours of service requirement above, the employee will be considered to meet the 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 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 (coverage is limited to children under age 18 unless a child is incapable of self-care because of a mental or physical disability);
- Care for an employee's spouse, son, daughter or parent who has a serious health condition (Coverage is limited to children under age 18 unless a child is incapable of self-care because of a mental or physical disability; parent does not include parent-in-law);
- 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 qualifies as a "serious health condition" under the FMLA?***

A serious health condition is an illness, injury, impairment or physical or mental condition that involves:

- (1) **Inpatient care** and any corresponding period of incapacity or subsequent treatment; or
- (2) **Continuing treatment** by a health care provider.

Continuing treatment may be established under any one of the following sets of circumstances:

- A period of incapacity that lasts more than three consecutive full calendar days and any following treatment or period of incapacity related to the same condition, that also involves:
  - Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider; or
  - Treatment by a health care provider on at least one occasion which results in a regimen of continuing supervised treatment, including a course of prescription medication or therapy requiring special equipment).
- The treatment must involve an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.
- Any period of incapacity due to pregnancy or for prenatal care;
- Any period of incapacity due to a chronic serious health condition (such as asthma, diabetes or epilepsy);

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- Permanent or long-term incapacity due to a condition for which treatment may be ineffective if there is continuing supervision by a health care provider (such as for Alzheimer's, severe stroke or the terminal stages of disease); or
- Any period of absence to receive multiple treatments either for restorative surgery after an accident or other injury or for a condition likely to result in incapacity of more than three full days absent medical intervention (such as radiation or chemotherapy for cancer, physical therapy for severe arthritis or dialysis for kidney disease).

Periods of incapacity due to pregnancy or chronic serious health conditions are not subject to a three-day minimum duration or to any requirement that treatment be received. Generally, treatment that includes taking over-the-counter medications or bed rest, drinking fluids, exercise and other similar activities that can be initiated without a visit to a health care provider is not, by itself, sufficient to constitute a regimen of continuing treatment.

Substance abuse may qualify as a serious health condition. Leave is available for the treatment of substance abuse, but absence due to an employee's use of the substance does not qualify for FMLA leave. An employer retains the right to terminate an employee under an established substance abuse policy.

Without complications, the common cold, flu, earaches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, and periodontal disease ordinarily are not serious health conditions. Allergies or mental illness resulting from stress may be serious health conditions if all other conditions are met.

Employees may take FMLA leave for a serious health condition of common-law spouses in states that recognize common-law marriages.

## ***Is FMLA leave paid or unpaid?***

In general, FMLA leave is unpaid. However, an employee may elect, or an employer may require an employee, to substitute any accrued paid leave for FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses or an employer requires substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. If the employee does not comply, the employee is not entitled to substitute accrued paid leave.

If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave, the employee will remain entitled to all the paid leave earned or accrued under the terms of the employer's plan.

## ***Who is a "health care provider" under the FMLA?***

Health care providers include: state authorized doctors of medicine or osteopathy; podiatrists; dentists; clinical psychologists; optometrists; chiropractors in limited circumstances; nurse practitioners; nurse-midwives; clinical social workers; physician assistants; and Christian Science practitioners.

The FMLA also recognizes any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits. Finally, the FMLA recognizes a health care provider listed above who practices and is authorized to practice in a country other than the United States.

## ***What are unlawful acts under the FMLA?***

It is unlawful for any employer to interfere with, restrain or deny the exercise of any right provided by the FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing or complaining about any illegal practice, or because of the employee's involvement in any proceeding related to the FMLA. Additionally, an employer is prohibited from discriminating against an employee or prospective employee who has used FMLA leave. Employees cannot waive and employers cannot induce employees to waive their prospective rights under the FMLA.

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This does not prevent the voluntary settlement or release of FMLA claims by employees based on past employer conduct.

Receiving notice of FMLA complaints pending against a covered predecessor employer may be relevant in determining a successor employer's liability for the predecessor's FMLA violations.

## ***How does the FMLA affect other laws or agreements?***

The FMLA does not affect any other federal or state law which prohibits discrimination. It does not supersede any state or local law which provides greater family or medical leave protection, and it does not affect an employer's obligation to provide greater leave rights under a collective bargaining agreement or employee benefit plan. The FMLA also encourages employers to provide more generous leave rights.

Salaried executive, administrative, professional or computer employees of covered employers who meet the Fair Labor Standards Act (FLSA) criteria for exemption from minimum wage and overtime under federal regulations, 29 CFR Part 541, do not lose their FLSA-exempt status by using any unpaid FMLA leave.

## ***What does "next of kin" mean?***

Next of kin means the nearest blood relative of a covered service member other than the service member's spouse, parent, son or daughter, in the following order of priority:

- Blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions;
- Brothers and sisters;
- Grandparents;
- Aunts and uncles; and
- First cousins.

If the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA, the designated individual must be deemed to be the covered service member's only next of kin. When there is no such designation, and there are multiple family members with the same level of relationship to the covered service member, all such family members must be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously.

## ***Who is a "covered service member"?***

A covered service member is:

- A member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or is otherwise on the temporary disability retired list, for a serious injury or illness; or
- A veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness and who was a member of the Armed Forces, including a member of the National Guard or Reserves, at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation or therapy.

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## ***Does the definition of “spouse” cover a same-sex spouse?***

Yes. 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.

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**.

The final rule defines “spouse” as follows:

“Spouse” means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage:

- As defined or recognized under state law for purposes of marriage in the state in which the marriage was entered into; or
- In the case of a marriage entered into outside of any state, if the marriage is valid in the place where entered into and could have been entered into in at least one state.

This definition includes an individual in a same-sex or common law marriage that either:

1. Was entered into in a state that recognizes such marriages; or
2. If entered into outside of any state, is valid in the place where entered into and could have been entered into in at least one state.

## **MORE INFORMATION**

More information from the DOL on the FMLA, including sample FMLA forms, is available on the DOL’s [FMLA webpage](#).

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