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The Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act (FMLA) generally requires covered employers to allow eligible employees to take unpaid, job-protected leave for certain reasons. Covered employers must also continue the employee's group health benefits while on leave and restore the employee to the same or equivalent job upon return from leave.

The FMLA generally applies to employers with **50 or more employees** during 20 or more calendar workweeks in the current or preceding calendar year.

OVERVIEW OF THE FMLA

The FMLA was enacted in 1993 to allow eligible employees to take unpaid, job-protected leave for certain family and medical reasons, such as to care for an immediate family member with a serious health condition or for the birth or adoption of a child. Two years later, the Department of Labor (DOL) issued regulations implementing the FMLA.

In 2008, President George W. Bush signed the first major revision to the FMLA since its enactment, expanding the FMLA for military families. The DOL issued revised regulations, effective Jan. 16, 2009, to update and further clarify the law and original regulations. In October and December of 2009, President Obama signed laws that further expanded FMLA leave rights.

On Feb. 6, 2013, the DOL released a set of final FMLA regulations, which became effective on March 8, 2013. The final regulations implemented two statutory expansions of FMLA leave protections for families of eligible military veterans and airline personnel and flight crews.

In connection with the final regulations, the DOL updated some of its model FMLA forms, including the model FMLA poster. The model FMLA forms are available on the DOL's FMLA webpage.

> On Feb. 25, 2015, the DOL issued a final rule that expands the FMLA leave protections for employees with same-sex spouses. Under the final rule, eligible employees in same-sex marriages may take FMLA leave to care for their spouses or family members, regardless of where the same-sex couple resides. The final rule becomes effective on **March 27, 2015**.

COVERED EMPLOYERS

The FMLA applies to all:

- Public agencies, including state and federal employers;
- Public and private elementary and secondary schools; and
- Private-sector employers with **50 or more employees** during 20 or more calendar workweeks in the current or preceding calendar year.

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ELIGIBLE EMPLOYEES

Employees are eligible for FMLA leave if they:

- Currently work for a covered employer;
- Have worked for this employer for a total of **12 months** (need not be consecutive, and can look back up to several years);
- Have worked at least **1,250 hours** over the previous 12 months (however, special hours of service rules apply to airline flight crew members);
- Work in the United States or any territory or possession of the United States; and
- Work at a location where the employer has **50 or more employees** within a **75-mile radius** at the time the employee requests leave.

Special Rules for Airline Flight Crew Members

Whether an employee who is an **airline flight crew member** meets the hours of service requirement is determined by assessing the number of hours the employee has worked or been paid over the previous 12 months. An airline flight crew member will be considered to meet the hours of service requirement if he or she has:

- Worked or been paid for not less than **60 percent of the employee's applicable total monthly guarantee** during the previous 12-month period; and
- Worked or been paid for not less than **504 hours** during the previous 12-month period.

LEAVE ENTITLEMENT

12 WORKWEEKS IN ANY 12-MONTH PERIOD

Eligible employees may take up to **12 weeks** of leave during any 12-month period for any of the following reasons:

- Birth and care of a newborn child* of the employee;
- Placement of a child* under the age of 18 with the employee for adoption or foster care;
- Care for an immediate family member (spouse, child* or parent) with a serious health condition;
- The employee is unable to work because of his or her own serious health condition; or
- Any qualifying exigency arising out of the covered active duty or impending call/order to covered active duty of a family member (spouse, son, daughter or parent) in the Armed Forces.

*On June 22, 2010, the DOL-Wage and Hour Division issued an Administrator's Interpretation letter expanding the definition of "son or daughter" under the FMLA as it applies to an employee standing "in loco parentis" to a child. The Administrator's Interpretation letter concludes that either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child. This is a broad interpretation in favor of expanded coverage for nontraditional family relationships.

26 WORKWEEKS DURING A SINGLE 12-MONTH PERIOD

Covered employers must grant eligible employees up to a total of **26 weeks** of unpaid leave during a single 12-month period to care for a covered service member with a serious injury or illness who is their spouse, son, daughter, parent or next of kin.

SPECIAL RULES FOR ELIGIBLE AIRLINE FLIGHT CREW MEMBERS

Eligible airline flight crew employees are entitled to:

- **72 days** of leave during any 12-month period for FMLA-qualifying reasons other than military caregiver leave; and
- **156 days** of leave during any single 12-month period for military caregiver leave.

Serious Health Condition Defined

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

- Any period of incapacity or treatment connected with inpatient care in a hospital, hospice or residential medical care facility, or any period of incapacity or subsequent treatment in connection with this inpatient care; or
- Continuing treatment by a health care provider that includes any period of incapacity (that is, inability to work, attend school or perform other regular activities) due to:
    - A health condition (including treatment for, or recovery from) lasting more than three consecutive full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes:
        - Treatment two or more times within 30 days of the first day of incapacity, unless extenuating circumstances exist, by or under the supervision of a health care provider; or
        - One treatment by a health care provider with a continuing regimen of treatment (the treatment must involve an in-person visit to a health care provider that takes place within seven days of the first day of incapacity);
    - Pregnancy or prenatal care (a visit to the health care provider is not necessary for each absence);
    - A chronic serious health condition that continues over an extended period of time, requires periodic visits to a health care provider, and may involve occasional episodes of incapacity (for example, asthma or diabetes). A visit to a health care provider is not necessary for each absence;
    - A permanent or long-term condition for which treatment may not be effective (for example, Alzheimer's, a severe stroke or terminal cancer). Only supervision by a health care provider is required, rather than active treatment; or
    - Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three full days if not treated (for example, chemotherapy or radiation treatments for cancer).

Covered Service Member Defined

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 a member of the Armed Forces, including a member of the National Guard or Reserves, and was

discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the veteran.

For a current service member, a "serious injury or illness" is an injury or illness that was incurred by the service member in the line of duty on active duty (or existed before the beginning of active duty and was aggravated by service in the line of duty on active duty) and that may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating.

For a veteran, a "serious injury or illness" means a qualifying injury or illness that was incurred by the service member in the line of duty on active duty (or existed before the beginning of active duty and was aggravated by service in the line of duty on active duty) and that manifested itself either before or after the service member became a veteran.

Qualifying Exigency Defined

A qualifying exigency is:

- **Short-notice deployment**. This leave can be used for a period of seven calendar days beginning on the date the covered military member is notified of a call to active duty;
- **Military events and related activities**, such as attendance at official ceremonies, programs/events, family support or assistance programs and informational briefings;
- **Childcare and school activities**, such as arranging for alternative childcare when the active duty requires a change to the existing childcare, providing childcare on an urgent, immediate need basis, enrolling in or transferring to a new school or day care or attending school meetings;
- **Financial and legal arrangements**, such as addressing or updating financial and healthcare powers of attorney and wills or appearing before agencies regarding military benefits;
- **Attending counseling**, arising from the active duty status;
- **Rest and recuperation**. This leave can be used for up to 15 days for each instance of rest and recuperation to spend time with a covered military member on short-term leave;
- **Parental care**. Under this type of leave, an eligible employee may take qualifying exigency leave to care for the parent of a military member, or someone who stood in loco parentis to the military member, when the parent is incapable of self-care and the need for leave arises out of the military member's covered active duty or call to covered active duty status;
- **Post-deployment activities**, such as attending arrival ceremonies or any other official ceremony or program for a period of 90 days following the termination of active duty status, and addressing issues that arise from the death of a covered military member;
- **Additional activities**, such as to address other events that the employer and employee agree qualify as an exigency.

RESTRICTIONS ON HOW FMLA LEAVE CAN BE TAKEN

Covered spouses of the same employer may be limited to a **combined total of**:

- **12 weeks of family leave**, if the leave is taken for the birth or placement of a child, or for the serious health condition of an employee's parent.

- **26 weeks of leave** during a single 12-month period, if the leave is taken to care for a covered service member or a combination of leave is taken to care for a covered service member and for the birth or placement of a child or for the serious health condition of an employee's parent.

Leave for a child's birth or placement for adoption or foster care must be concluded within 12 months of the birth or placement.

In some cases, employees may take FMLA leave intermittently. When leave is taken after a child's birth or after the placement of a child for adoption or foster care, an employee may take intermittent leave only if the employer agrees. However, an employee is entitled to take leave because of a serious health condition or to care for a covered service member on an intermittent or reduced leave schedule when medically necessary.

If intermittent leave is taken, the employee may be transferred to an alternative position (with equal pay and benefits) that better accommodates the intermittent periods of leave.

SUBSTITUTION OF SICK PAY, VACATION BENEFITS AND HOLIDAYS

Employers and employees may choose to use accrued paid leave (for example, sick or vacation leave) to cover some or all of the unpaid FMLA leave.

Holidays occurring during FMLA leave do not extend the leave. However, if the workplace shuts down temporarily for one or two weeks (for example, for a summer vacation or a plant closing for retooling or repairs), this period does not count against the FMLA leave entitlement.

PAYMENT ON LEAVE

Generally, FMLA leave is unpaid. Although an employer or employee can choose to apply accrued sick, vacation or other benefits toward FMLA leave, the employer is not required to continue to pay the employee under federal law.

MAINTENANCE OF HEALTH BENEFITS DURING FMLA LEAVE

While an employee is on FMLA leave, the employer must maintain the employee's coverage under any group health plan on the same terms as if the employee continued to work. An employee, while on leave, is required to pay the employer his or her portion of the group health benefit premiums.

In the absence of an established employer policy providing a longer grace period, an employer's obligation to maintain health coverage ceases under the FMLA if an employee's premium is **more than 30 days late**. The employer must provide written notice to the employee at least 15 days before coverage will terminate. The employer should also inform the employee that coverage will expire 15 days after the date of the letter unless payment is received.

Employers may terminate an employee's health benefits retroactively if:

- The employer has policies offering other forms of unpaid leave and those policies permit the employer to terminate coverage retroactively to the first date of the period to which the unpaid premium applies; and
- The employee was provided with a 15-day notice.

If benefits are cancelled as a result of a failure to pay premiums, the employer must restore the employee to benefits equivalent to those the employee would have had if leave had not been taken, including family or dependent coverage, upon his or her return to work. The employee may not be required to serve a new pre-existing condition waiting period, wait for open enrollment or pass a medical examination to obtain reinstatement of coverage.

3/01; EM 3/15

CERTIFICATION TO SUPPORT A REQUEST FOR FMLA LEAVE

An employer may require an employee to provide a certification if the employee requests FMLA leave:

- To care for a family member with a serious health condition;
- Due to the employee's own serious health condition;
- To care for a covered service member with a serious injury or illness; or
- Because of a qualifying exigency.

The DOL has provided several sample certification forms for this purpose. The employer may require the certification to be returned within **15 days**, unless it is not practicable for the employee to meet this deadline despite his or her diligent, good faith efforts.

If an employer has reason to doubt the validity of the certification of the health care provider, it may require the employee to obtain a second (or third) opinion at the employer's expense. The employee is entitled to continue leave while the employer seeks this information. In addition, the employee may request a copy of the second or third medical opinion. If the additional certifications do not establish the employee's entitlement to leave, the leave may be retroactively designated non-FMLA leave.

An employer may directly contact the employee's health care provider to seek clarification or authentication of the medical certification, but only after the employer has given the employee seven days to cure any deficiency. To make such contact, the employer may use a health care provider representing the employer, a human resources professional, a leave administrator or a management official. If the FMLA leave and workers' compensation leave run concurrently, the employer may contact the employee's workers' compensation health care provider if the state worker's compensation law allows employers to contact the employee's workers' compensation health care provider.

An employer may request recertification every 30 days in connection with an absence unless the medical certification indicates that the minimum duration is more than 30 days. If a longer period is provided, certification cannot occur before the time period expires, unless circumstances change, or an employer has reason to doubt the validity of the initial certification. In all cases, however, employers can request recertification every six months, even where the certification states a longer period. Each new leave year gives the employer the opportunity to obtain a new "initial" certification, and thus obtain second and third opinions.

EMPLOYEE'S NOTICE TO EMPLOYERS

If leave is foreseeable, the employee must provide the employer with at least **30 days' advance notice** whenever practicable. If a 30-day notice is not possible or if leave is not foreseeable, notice must be given **as soon as practicable**. As soon as practicable ordinarily means an employee would provide verbal notice to his or her employer within one or two business days of when the need for leave becomes known to the employee.

An employer may also require that an employee needing FMLA leave follow the employer's usual and customary notice and procedural requirements for requesting leave (for example, call-in procedures), absent unusual circumstances. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example.

Employees may be required to provide the employer with **two business days' advance notice** of any change in circumstances that requires an extension of leave or an early return to work.

When the leave is due to the active duty of a family member in the Armed Forces and the leave is foreseeable, the employee must provide notice to the employer **as is reasonable and practicable**.

The Family and Medical Leave Act (FMLA)

DESIGNATING FMLA LEAVE

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 form for this purpose. 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.

EFFECT ON OTHER LAWS

Relationship between the FMLA and COBRA

A COBRA qualifying event occurs on the last day of FMLA leave if the employee on leave does not return to work. Additionally, cancellation of group health coverage for nonpayment of premiums during an FMLA leave, regardless of whether the employee returns to work, is not a qualifying event under COBRA.

If group health coverage is maintained by the employer during FMLA leave despite nonpayment of premiums, the employer may seek recovery for the premiums paid even if the employee later states that coverage was not desired. Employers cannot condition COBRA continuation coverage upon repayment of group health premiums if employees default on premium payments while on FMLA leave.

Relationship between the FMLA and the Americans with Disabilities Act (ADA)

Employers must comply with both the FMLA and the ADA. Employee rights under the (ADA) are cumulative with the employee's rights under the FMLA. For example, an employee whose health condition qualifies as a disability under the ADA may also be entitled to leave benefits and protection under the FMLA.

Relationship between the FMLA and Workers' Compensation Programs

Employee rights under the FMLA and workers' compensation plans are cumulative. Therefore, an employee with an on-the-job injury that also qualifies as a serious health condition may receive benefits under the FMLA and state workers' compensation laws.

However, employees cannot receive workers' compensation benefits and paid FMLA leave concurrently. For example, if an employee receives workers' compensation benefits, neither the employee nor employer can require substitution of paid leave for unpaid leave. An employer or employee may, however, substitute paid leave for unpaid leave when workers' compensation benefits cease. Further, an employer and employee 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.

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Relationship between State FMLA Laws and the Federal FMLA

The federal FMLA does not supersede any state or local law that provides greater family or medical leave rights. Not all employers will be "covered employers" under both state and federal law. A thorough review of both laws should be made. Where both laws apply, the employee is entitled to the greater of the two benefits.

MORE INFORMATION

The DOL's website has additional information on the FMLA, including the DOL's sample forms.

3/01; EM 3/15