



Family and Medical Leave Act (FMLA)

Inevitably, most employers will have an employee who needs to take some time off from work to recover from an illness or take care of a sick family member. When this occurs, employers are required to follow the guidelines of the Family and Medical Leave Act (FMLA). Below are some commonly asked questions and answers designed to help you better understand this law.

What is the FMLA?

The FMLA requires employers to provide up to 12 weeks of leave during any 12-month period for any one of the following situations:

- An employee's own serious, disabling illness;
- The serious illness of the employee's spouse, child, or parent; and
- The birth or adoption of the employee's child, or placement of a foster child in the employee's care.

A couple of points to note:

-If spouses work for the same employer, they are entitled to a combined 12 weeks of FMLA leave.

-A week that contains a holiday has no effect on FMLA leave. However, if a business closes down its operations (i.e. a plant for repairs, or a school during the summer), and employees are not expected to report to work for one or more weeks, that time cannot be counted against an employee's FMLA leave.

What employers are covered?

FMLA applies to employers with 50 or more employees working for at least 20 weeks during the current or preceding year. If the employee population drops below 50 during the current year, but remained at or above 50 the prior year, the employer must follow the law during the current year.

Who is eligible for FMLA leave?

Any individual who has been employed for at least 12 months and has worked a minimum of 1250 hours during the previous 12-month period. The employee must also be employed at a worksite where there are at least 50 employees within a 75-mile radius.

What notice must employers provide to employees regarding the FMLA?

There are three different notification requirements employers must follow. First, a notice needs to be prominently posted explaining an employee's rights and responsibilities. Second, employers must include FMLA information in written form to employees, usually in the employee handbook. Third, an employer must provide written notification of an employee's rights and obligations within two days of learning of the need of a particular employee's need to take FMLA leave. If an employer requires that paid leave (i.e. sick or

vacation days) is substituted for unpaid FMLA leave, that needs to be included in the letter as well.

When do employees need to notify employers of their need to take FMLA leave?

It really all depends on the situation faced by the employee. In general, employees need to give employers as much notice as possible. Thirty days advance notice is usually required, however, situations will vary depending on the medical condition and foreseeable plan of treatment. The employer may accept verbal or written notice from either the employee or spokesperson (usually a family member).

What medical conditions qualify for FMLA leave?

An individual must have a "serious health condition" that involves (1) inpatient care followed by a period of incapacity or subsequent treatment, or (2) continuing treatment by a health care provider. Continuing treatment is established by one of the following circumstances:

- (a) A period of incapacity lasting at least 3 days and involving a certain level of treatment, such as visiting a doctor at least twice, or following an ongoing medically-supervised regimen (i.e. prescription medication).
- (b) Any period of incapacity due to a chronic health condition, like asthma or diabetes.
- (c) Absence to receive multiple treatments for a condition that would lead to incapacity if untreated. For instance, radiation, chemotherapy, physical therapy, and dialysis would all apply.

Without complications, the common cold, flu, earaches, upset stomach, minor ulcers, non-migraine headaches and dental problems are not serious health conditions. In addition, if the treatment does not require visiting a doctor, such as taking over-the-counter medications or drinking fluids, this would not be considered a regimen of continuing treatment for the purposes of FMLA.

Can employers require medical certification for an employee's FMLA leave?

Yes, employers may require medical certification, second or third medical opinions (at the employer's expense) and a periodic re-certification. In addition, employers can request periodic reports during the leave regarding the employee's status and intent to return to work.

What information must be included in the certification of a serious health condition?

A medical certification generally includes the information listed below, though an employer can require less information if so desired.

- The date on which the condition began and estimated duration;
- The medical facts supporting the "serious health condition";
- The employee's need for intermittent leave or to work a reduced schedule;
- Impact on the employee's ability to perform one or more of the essential job functions; and
- For leave involving a family member, the care to be provided and the estimated time period.

Where must an employer maintain FMLA-related medical records?

FMLA records, including medical certifications of employees and/or family members, must

be maintained separately from the personnel files. These records must be stored confidentially, however, managers and safety personnel may be informed of FMLA medical information as necessary.

Do employers need to keep records in order to comply with the FMLA?

Yes, employers must maintain the following records for a minimum of three years:

- Payroll and identifying employee data;
- Dates of FMLA leave, including hours if taken in increments of less than a day;
- All notices and correspondence between employer and employee;
- Documents explaining benefits, including substitution of paid for unpaid leave;
- Employee's premium payments for health insurance; and
- Records of any disputes regarding the designation of leave.

Is FMLA leave paid or unpaid?

Usually FMLA leave is unpaid. However, an employee may elect (or an employer may require) to substitute paid vacation or sick time for FMLA leave. When this occurs, the FMLA leave runs concurrently with the paid leave. In other words, the total amount of leave is still 12 weeks. It is not extended by the amount of paid vacation or sick days that are being used.

If an employee substitutes paid days for unpaid leave, the less stringent policy in terms of supporting documentation would apply. For instance, if an employee substitutes paid sick days for unpaid FMLA leave, the employee would only need to follow the employer's sick leave guidelines, not the FMLA certification requirements.

How do temporary disability, workers' compensation, and FMLA fit together?

It is important to distinguish between these three benefits because each is designed to protect employees in different ways. *Temporary (or short-term) disability plans* provide a source of income to employees who suffer an illness or injury while away from work.

Workers' compensation provides income as well as coverage for medical expenses related to injuries suffered on the job. *FMLA* provides job protection and continuation of health insurance benefits when an employee is unable to work due to a serious illness or injury incurred either on or off the job.

In most circumstances, an employee who qualifies for workers' compensation or short-term disability will also meet the FMLA requirements. Therefore, the benefit periods will run concurrently. It is important to note, however, that if employees receive workers' compensation or disability payments, they cannot substitute paid vacation or sick leave for unpaid FMLA days.

Does an employer have to maintain an employee's health benefits while the employee is on FMLA leave?

Yes, an employer must maintain an employee's health insurance while on FMLA leave. The same level of benefits and contribution amounts should be in place as when the employee was working. If the employee does not return to work, the employer may request reimbursement from the employee for the health insurance premium paid.

An employer may only cancel the health insurance when an employee fails to pay his or her share of the premium. At a minimum, the grace period for paying the premium is 30 days from the due date. The employer must provide written notice at least 15 days before

coverage is to terminate. Therefore, about midway through the grace period, if payment is not received, the employer should send notice to the employee that the health insurance policy will be terminated 15 days from the date of the letter. If payment is received during the 15-day period, the health insurance cannot be canceled. If the policy is terminated due to nonpayment, it must be reactivated once the employee returns to work.

If an employee does not return from FMLA leave, does an employer have to offer COBRA?

Yes, a COBRA-qualifying event occurs on the last day of FMLA leave. The employee and any dependents covered by the health plan on the day before the FMLA period began are entitled to COBRA. If an employee who is on FMLA leave notifies an employer that s/he will not be returning to work, a COBRA-qualifying event occurs on the date of notification, not at the end of the FMLA period. Also, it is important to note that termination of health benefits due to the employee's nonpayment of premium is not a COBRA-qualifying event.

Can an employee take FMLA on an intermittent or reduced basis?

Yes, an employee can take leave in a number of different ways. While the most common leave lasts for several weeks in a row, an employee can take leave intermittently. This leave can last from a few hours to a few days at a time. In addition, an employee may take leave on a reduced basis, which would involve working fewer hours per day or per workweek. Employers only need to accommodate this type of leave for situations involving a serious medical condition. Employers do not have to grant intermittent or reduced leave to employees for the birth, adoption, or foster care placement of a child.

It can be challenging for employers and employees to balance intermittent or reduced work schedules with a workload that requires full-time hours. Therefore, an employer may require an employee to transfer temporarily to an available alternative position. In order for this to occur, the employee must be qualified for the position and the position must provide equivalent pay and benefits.

Must an employer restore an employee to the same position held before taking FMLA leave?

In general, an employee is entitled to return to either the same job, or an equivalent position with the same pay and benefits. The one exception involves key employees, defined as those who make a salary in the top ten percent of the company. If job restoration to a highly paid employee would cause economic hardship to the company, the employer may not have to reinstate the employee at the same level. Employers in this situation must carefully adhere to the guidelines in order to avoid any potential disputes.

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