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FMLA



# THE FAMILY AND MEDICAL LEAVE ACT

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*This booklet provides an overview of the more significant provisions of the Family and Medical Leave Act (“FMLA”, or “the Act”). It is intended to serve as a guideline for compliance with the FMLA, and to help identify those situations in which more specific information may be needed.*

*This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult your lawyer concerning your particular situation and any specific legal questions you may have. Employers operating in multiple states are specifically encouraged to consult an attorney to determine whether they are subject to other unique state requirements that extend beyond the scope of this booklet.*

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## OVERVIEW OF THE ACT

The Family and Medical Leave Act (FMLA) became law in 1993. According to its Congressional sponsors, the purpose of FMLA was to promote development of the family unit and to enhance worker productivity. The Act was also intended to address the potential for discrimination against women, who have traditionally been the primary caretakers in our society. In the process of addressing these laudable goals, however, Congress has created one of the most complex statutes of all those that mandate employment related benefits. It imposes significant restrictions on a company's treatment of employees who request, take and return from leave.

FMLA generally requires covered employers to provide eligible employees with up to 12 weeks of unpaid leave in any 12-month period:

- for the birth of a son or daughter, and to care for the newborn child;
- for placement of a son or daughter for adoption or foster care;
- to care for the employee's spouse, child, or parent with a serious health condition; or
- because of the employee's own serious health condition that renders the employee unable to perform one or more of the essential functions of the job.

During this period of time the employee's job and accrued benefits must be protected, and health benefits must be continued under the same terms as prior to the leave.

For most employers, FMLA took effect on August 5, 1993. For those employees governed by a collective bargaining agreement on that date, the Act took effect upon the termination of the agreement or February 5, 1994, whichever was earlier. The final regulations, which now govern all FMLA issues, became effective on April 6, 1995.

# ARE YOUR EMPLOYEES ENTITLED TO FMLA BENEFITS?

The first step in evaluating your employees' rights and obligations under FMLA is to determine whether your company is covered by the Act to begin with. If covered, you must then go on to determine whether the employee at issue is eligible for benefits under FMLA.

## A. ARE YOU COVERED?

You are a covered employer under FMLA if you:

- employ 50 or more employees
- each working day
- for 20 or more calendar workweeks (not necessarily consecutive)
- in the current or preceding calendar year.

The test of “employment” is relatively broad, and it includes:

- employees on the payroll even if no compensation is received;
- employees on leave if there is a reasonable expectation that they will return; and
- part-time employees.

The number of employees employed during a calendar workweek does not include those:

- who have been laid off (temporarily or permanently);
- who begin work after the first working day of a calendar week; or
- who terminate employment before the last working day of a calendar week.

The term “employer” includes any persons who act directly or indirectly in the interest of an employer. This means that *individuals*, such as corporate officers, may be liable for FMLA violations. An employer remains covered until it no longer employs 50 employees for 20 workweeks in the current and preceding calendar years.

## B. IS THE EMPLOYEE ELIGIBLE?

Even if you meet the coverage test, not all of your employees are eligible. An “eligible employee” is one who has been employed:

- for at least 12 months (not necessarily consecutive);
- for at least 1,250 hours during the previous 12-month period; and
- who is employed at a worksite where 50 or more employees are employed within 75 surface miles.

If an employee is maintained on your payroll for any part of a week, including periods of leave, that week counts as a week of employment. (Note that this is different from the test for coverage, where employees must be employed for a *full* week to be counted toward coverage). For purposes of determining whether intermittent employment qualifies as “at least 12 months,” 52 weeks is deemed to be equal to 12 months.

The 12-month and 1,250 hour test is determined as of the date leave is to commence, rather than the date leave is requested. If you confirm eligibility at the time of notice, however, you may not subsequently challenge eligibility. If you do not advise the employee of his or her eligibility for FMLA leave before the leave starts (or two days later, if the employee did not provide more than two days advance notice), then the employee may be deemed eligible. If you fail to maintain accurate records of hours worked, then you have the burden of showing that an employee has not worked the requisite number of hours.

The determination of whether 50 employees are employed within 75 surface miles of the worksite is made at the time of notice of leave. An employee’s worksite will ordinarily be the site to which he or she reports, or from which the work is assigned. An employee’s initial eligibility is not affected by any subsequent change in the number of employees employed.

## PROCESSING A LEAVE REQUEST

Once coverage and eligibility are established, you must go on to determine whether the employee’s request triggers a FMLA right or obligation. It is important to remember that, while FMLA protection is typically initiated by a leave request, employees need not expressly assert FMLA rights by name, or even make a formal leave request, in

order to obtain protection. Rather, the Act imposes obligations on an employer as soon as it acquires knowledge that an absence is potentially FMLA-qualifying.

If you lack sufficient information to determine whether the leave qualifies under FMLA, then it is your obligation to inquire further. Nonetheless, an employee giving notice of the need for unpaid FMLA leave must explain the reasons for leave so as allow you to make this determination.

### **A. EVALUATING SUFFICIENCY OF THE NOTICE**

Employees are generally required to provide you with advance notice of the need for leave. Where leave is foreseeable, the employee must provide 30 days' notice before the date leave is to begin. If leave is not foreseeable, the employee must provide such notice as "is practicable." Where leave is for the care of a family member, or the employee's own serious health condition, and is foreseeable based on planned medical treatment, the employee must also try to schedule the treatment so as not to unduly disrupt your operations.

Failure to comply with the notice requirement may result in a delay in commencement of FMLA leave until requisite notice is given. But, if a collective bargaining agreement, state law, or your own applicable leave plan (e.g., your vacation plan if FMLA leave is to be paid under it) provides for lesser notice requirements, you cannot require compliance with the stricter FMLA requirements.

### **B. IDENTIFYING A SERIOUS HEALTH CONDITION**

If the reason for leave is the medical need of the employee or a close family member, then you must go on to determine whether the illness is a "serious health condition" (SHC) under FMLA. This is perhaps the most vague and troubling concept under the Act.

FMLA defines a SHC as an illness, injury, impairment, or physical or mental condition that involves:

- inpatient care in a hospital, hospice, or residential medical care facility; or
- continuing treatment by a health care provider.

"Inpatient care" includes any period of incapacity or

any subsequent treatment in connection with the inpatient care. “Continuing treatment by a health care provider” means one of the following:

- a period of incapacity of more than three days and:
  - any subsequent treatment or period of incapacity that involves multiple treatments, or
  - a regimen of continuing treatment;
- a period of incapacity due to pregnancy or prenatal care;
- any period of incapacity or treatment for a chronic SHC, such as asthma, diabetes, epilepsy, etc;
- a period of incapacity which is permanent or long-term, such as Alzheimer’s or a severe stroke; or
- any period of absence to receive multiple treatments, including recovery time such as:
  - cancer (chemotherapy, radiation, etc.),
  - severe arthritis (physical therapy), and
  - kidney disease (dialysis).

“Treatment” does *not* include routine:

- physical exams,
- eye exams, or
- dental exams.

A “regimen of continuing treatment” generally does not include:

- over-the-counter medications,
- bed-rest,
- drinking fluids,
- exercise, and
- other similar activities that can be initiated without a visit to a health care provider.

Generally, the common cold, flu, earaches, upset stomachs, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease, etc. are not considered serious health conditions.

Substance abuse may be a SHC if the other conditions for SHC are met, and FMLA leave may be taken for treatment of substance abuse by a health care provider, such as enrollment in a drug treatment program. Under this same rationale, an employee may also take FMLA leave to care for a close family member who is receiving treatment for substance abuse. Absence because of the substance abuse itself (as opposed to treatment) does not qualify for FMLA leave, however, and discipline may be taken against any employee for violating a uniformly-applied substance abuse policy.

### **C. CERTIFYING THE SERIOUS HEALTH CONDITION**

You may require any employee to verify a leave request based upon a SHC with certification from a health care provider. FMLA regulations provide a specific form that may be used for this purpose. Normally, you must request this certification within two days of receiving notice of the need for leave, and you must provide the employee with at least 15 days to respond to your request. Failure to supply required certification may lead to delay of FMLA leave until the certification is provided. If the certification is never provided, then the leave is not FMLA leave.

If you wish to challenge the validity of the certification, you may require a second certification by a health care provider of your choice, provided you do not otherwise utilize the second health care provider on a regular basis. If the two opinions differ, you may require a third certification by a health care provider chosen jointly by you and the employee. The opinion of the third provider is final and binding, and these additional certifications are at your expense.

You may also require the employee to furnish subsequent recertifications on a reasonable basis. Generally, you may not request a recertification until the duration of the need for leave specified in the initial certification expires, and no more than every 30 days thereafter, unless the circumstances described by the previous certification have changed significantly. The employee incurs the expense of recertification.

Finally, you may require the employee to furnish periodic reports on his or her status and intent to return to

work. If the employee gives unequivocal notice of intent not to return, then your obligation to maintain health benefits under FMLA ceases (subject to COBRA requirements).

#### **D. DESIGNATING THE LEAVE AS FMLA LEAVE**

Once you have acquired knowledge that the leave is FMLA-qualifying, it is your responsibility to designate the leave as FMLA leave. This designation must be made promptly upon receiving notice of the need for leave.

Once leave is designated, you must immediately (within two business days after notice of the need for leave, if feasible) notify the employee of your designation. The notice may be oral, but must be confirmed in writing by the next payday (or by the subsequent payday if the next payday is less than one week away). If leave has already begun, the notice should be mailed to the employee's home address.

Your written designation notice must set out clearly the obligations of the employee during leave, and any consequences for failing to meet these obligations. The notice must also provide:

- that the leave will count against the employee's annual FMLA entitlement;
- any requirements for furnishing medical certification, and the consequences for failing to do so;
- the employee's right to substitute paid leave, whether you will require substitution, and any conditions related to substitution;
- any requirements for making premium payments to maintain health benefits, the arrangements for making such payments, and the consequences for failing to make such payments timely;
- any requirements for presenting fitness for duty certificates prior to returning to work;
- the employee's status as a "key employee," if applicable, and the consequences if you choose to deny the employee the right to return to work, along with the conditions required for denial (this is described in more detail below);

- the employee’s right to the same or an equivalent job upon return from leave (unless they are designated a “key employee”); and,
- the employee’s potential liability for payment of health benefit premiums paid by the company during leave, if he or she fails to return.

Failure to provide this notice may result in the forfeiture of the few rights an employer has under FMLA, including counting leave taken against the employee’s annual 12-week entitlement.

If you know the reason for leave but have not been able to confirm that it qualifies under FMLA, or if you are awaiting requested certification, you should preliminarily designate the leave as FMLA leave. You may withdraw this designation if you later determine that the leave was not FMLA-qualifying.

Although leave typically may not be designated as FMLA leave after the employee returns to work, you may designate the leave retroactively (within two days of the return) if you learn of the reason for absence only after the employee’s return.

#### **E. SUBSTITUTING ACCRUED PAID LEAVE**

FMLA leave is generally unpaid, but an employee may elect, or you may require, that paid leave be substituted for unpaid FMLA leave. If your paid leave plan imposes lesser certification or notice requirements, then the employee need only satisfy those requirements.

Both types of leave will be expended concurrently if you designate paid leave as FMLA leave within two business days after acquiring knowledge that the paid leave qualifies as FMLA leave, and if you provide notice to the employee as described above. Leave under a temporary disability benefit plan (e.g. birth of a child) and leave under workers’ compensation may also run concurrently.

If an employee seeks an extension of leave during paid leave and you discover that a FMLA-qualifying event occurred during the period of paid leave, you may still count the leave used after the FMLA-qualifying event against the 12-week entitlement.

**Example:** An employee takes two weeks of paid vacation to go skiing, and mid-way through the second week notifies you that he has broken his leg. You may designate the balance of the second week and any subsequent leave for treatment of the leg as FMLA leave.

If you wish to substitute paid leave for unpaid leave, this decision must be made within two business days of the employee's leave notification. Your designation must be made before the leave begins, unless you first learn of the reasons for the leave after commencement.

If you have sufficient knowledge to determine that the paid leave is for a FMLA-qualifying event and you fail to designate it as FMLA leave, the employee's FMLA leave entitlement begins to run only after a specific designation is made. In this case, you may only reduce the 12-week leave entitlement prospectively (and not retroactively). Moreover, the employee remains protected by FMLA even during the period not designated as FMLA leave.

## RIGHTS AND OBLIGATIONS DURING FMLA LEAVE

Eligible employees are entitled to job-protected benefits for the duration of their FMLA leave, which may last up to 12 weeks during any 12-month period. These benefits include maintenance of health benefits, and the right to return to the same or an equivalent position upon return from leave with no loss of accrued benefits. In certain cases, leave may be taken intermittently or on reduced schedule.

### A. CALCULATING THE TWELVE-MONTH PERIOD

The 12-month period may be calculated by any of the following methods:

- a calendar year;
- any fixed 12-month period, such as a fiscal year or anniversary date;
- a moving period measured forward from the leave commencement date; or,
- a rolling 12-month period measured backward from the date of leave.

The majority of employers find the rolling 12-month period is most beneficial, since it prevents “stacking,” or joining of multiple leave periods together, back-to-back.

You must choose from one of these methods, and apply it uniformly (unless you are operating under unique state requirements). If you fail to select a method and notify employees of your selection, then the option most beneficial to them will be used. To change methods, you must give employees 60 days’ advance notice.

## **B. DEALING WITH INTERMITTENT LEAVE**

Leave for the care of family members or due to the employee’s serious health condition may be taken intermittently or on a reduced leave schedule when medically necessary. You may limit intermittent leave increments to the shortest period of time used by your payroll system to account for absences, but only the amount of leave actually taken may be counted against the 12-week entitlement.

**Example:** Joe normally works a 5-day week. If he takes one day of intermittent leave, he has used 1/5 of a week of FMLA. Jane normally works a 30-hour week. If she takes 10 hours of intermittent leave, then she has used 1/3 of a week.

If the employee’s schedule varies from week to week, a weekly average of the hours worked over the previous 12 weeks is used to calculate his or her normal workweek. Unfortunately, this means an employee could continue to work on an intermittent or reduced leave schedule indefinitely, yet never use up 12 weeks in any 12-month period of leave entitlement.

### **1. Temporary transfers**

If employees request foreseeable intermittent leave or leave on a reduced schedule, you may require them to temporarily transfer to available alternative positions for which they are qualified, and which have equivalent pay and benefits (no need for equivalent duties) that better accommodate recurring periods of leave. You may increase the pay and benefits of an existing alternative position to meet this requirement.

When the employee returns from leave, he or she must still be placed in the same or an equivalent position.

Benefits may not be reduced or eliminated, but you may proportionately reduce benefits, such as vacation, where the normal practice is to base such benefits on the number of hours worked.

## **2. Deductions for exempt employees**

If an employee is exempt from overtime requirements of the Fair Labor and Standards Act, deducting their salary for intermittent FMLA leave does not affect their exempt status. Note, however, that an employee paid under the fluctuating workweek method for computing overtime may only be compensated on an hourly basis for hours worked during the intermittent leave period, even during weeks when no leave is taken. If you do not elect to convert the employee's compensation to hourly pay, no salary deduction is allowed.

## **3. Leave for Birth or Placement**

Leave for the birth or placement of a child for adoption may not be taken intermittently or on a reduced leave schedule without your consent. Entitlement to leave for birth or placement of a child expires one year after the birth or placement.

FMLA leave may begin before birth or placement if needed for such events as prenatal care, or for counseling sessions and court appearances to enable the placement process to proceed. If you employ a husband and wife who are both entitled to leave for birth or placement, you may limit them to a *combined* total of 12 workweeks for such leave.

# **C. EMPLOYMENT AND BENEFITS PROTECTION**

## **1. Job Protection**

An employee is entitled to be restored to his or her job, or an "equivalent" position, upon return from FMLA leave. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, working conditions, duties, skill, authority, privileges, and status. This position must be in the same or a geographically proximate worksite with an equivalent work schedule and shift.

## 2. Benefits Protection

FMLA protects employees from the loss of any employment benefit accrued prior to the commencement of leave. While this does not entitle an employee to the accrual of any additional seniority or benefits during leave, you must maintain coverage under any group health plan *under the same conditions as those existing before the leave.*

Therefore, if the company was paying all or part of an employee's premium payments before leave, the company must continue such payments during the leave. An employee may choose not to (or may not be able to) retain group health plan coverage during FMLA leave. Nevertheless, the employee will be entitled to reinstatement into the plan on the same terms as before, without any qualifying period or physical examination, upon returning to work. This may require you to make premium payments for the employee during leave, subject to a "right of recovery." If benefits are added or changed during leave, the employee is entitled to these additions and changes.

You may recover premiums you paid for maintaining coverage if the employee fails to return to work after FMLA leave expires, so long as the failure to return is not due to the serious health condition of a family member or the employee, or other circumstances beyond their control.

**Note:** If a spouse transfers to another location greater than 75 miles from the worksite, if a layoff occurs, or if a "key employee" does not return upon being notified of your intention to deny restoration, then recovery of benefits is precluded.

Employees who return to work for at least 30 calendar days are considered to have "returned" to work. Where a serious health condition prevents them from returning, you may require a certification.

This right of recovery is limited to health care premiums only. When FMLA leave is substituted by paid leave or paid leave is provided by a disability plan or workers' compensation, you may not recover your share of premium costs.

### 3. Pay Increases and Bonuses

Employees remain entitled to any unconditional pay increases granted during leave (e.g., cost of living adjustments), and they may not be disqualified from bonuses such as perfect attendance or safety awards for taking FMLA leave. Note, however, that pay increases conditioned upon seniority, length of service, or performance need not be granted unless it is your policy to do so with respect to employees on other types of unpaid leave.

### 4. Key Employee Exception

A “key employee” is any salaried employee among the highest paid 10% of employees employed within 75 miles of the worksite. You may deny job restoration (but not FMLA leave or maintenance of health benefits) to any key employee if:

- you notify the employee when he or she provides notice of leave that they are a key employee, and of the potential consequences of this status;
- you subsequently determine that restoration would cause substantial and grievous economic injury to your operations;
- you notify the employee of your intent to deny restoration at the time this determination is made; and
- upon receiving a request to return to work, you confirm your determination and notify the employee that restoration has been denied.

The issue is not whether *absence* of the key employee will cause substantial and grievous injury. Rather, it is whether *restoration* will cause such injury. FMLA provides little guidance on the definition of “substantial and grievous economic injury,” but it does state that the test is more stringent than the Americans With Disabilities Act’s “undue hardship” test.

### 5. Fitness for Duty

When employees return from leave (other than intermittent leave) for their own serious health condition, you may enforce a uniform policy requiring them to submit a certification that they are fit to resume work. You must notify

employees of this requirement when leave is requested, and include the requirement in any employee handbook.

Note that the ADA requirement that return-to-work medical exams be job-related and consistent with business necessity still applies. In addition, FMLA specifies that you may only seek certification regarding the particular health condition that caused the need for leave.

Your health care provider may contact the employee's health care provider (with employee consent) to clarify his or her fitness for duty, but you may not delay the employee's return while such contact is being made. Although an examination by your own medical staff may take place on the first day of return to work, you are prohibited from denying return pending such an "in-house" examination.

Failure to provide fitness for duty certification may delay restoration.

## **6. Terminating Job and Benefits Protection**

All FMLA obligations end when the employment relationship would otherwise have terminated. For example, if the employee's position was eliminated in a nondiscriminatory reduction in force, the employee informs you of an intent not to return to work, or the employee fails to return after exhausting FMLA benefits, then the employment relationship terminates and FMLA obligations end.

You may also deny benefits to an employee who fraudulently obtains FMLA leave, or who violates a uniformly-applied policy prohibiting outside employment. Similarly, if the employee is unable to perform an essential function of the position, then the employee has no right to restoration under FMLA. Note, however, that you may still have accommodation obligations under the ADA. You may also have COBRA obligations when you terminate health coverage. These laws may have broad implications for employees returning from FMLA leave, and a thorough discussion of them is beyond the scope of this booklet.

# NOTICE, POSTING AND RECORD KEEPING

## A. POSTING REQUIREMENTS

Covered employers must post notice of FMLA rights in a conspicuous and prominent fashion (regardless of whether they have any eligible employees) in a language that employees can understand, utilizing the Department of Labor's FMLA poster. Employers who willfully violate this requirement are subject to civil penalties of up to \$100 per violation, and forfeit their right to take adverse action against any employee who fails to provide requisite notice of the need for FMLA leave.

## B. OTHER NOTICE REQUIREMENTS

Covered employers must also include a description of FMLA benefits in any written policies, such as manuals or handbooks, and provide notice of rights and obligations *each time* an employee requests FMLA leave. If you fail to comply with these provisions you cannot avail yourself of any protections afforded to employers under the Act, and cannot deny FMLA leave to any employee who fails to give the requisite advance notice.

## C. RECORDKEEPING REQUIREMENTS

FMLA also imposes strict record keeping and confidentiality requirements. For example, employers must maintain records specified by FMLA regulations for no less than three years, including:

- basic payroll and identifying employee data;
- dates FMLA leave is taken by FMLA-eligible employees;
- copies of employee notices of leave furnished under FMLA; and,
- records of any dispute regarding designation of leave.

Records relating to medical certifications, recertifications or medical histories of employees or family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files from the usual personnel files.

## PROHIBITED ACTS AND ENFORCEMENT

It is unlawful to interfere with the exercise of any right provided under FMLA, or to discharge or discriminate against an individual for filing a charge or giving information relating to possible FMLA violations. Prohibited acts also include deliberate attempts to avoid “covered employer” status or employee eligibility.

Civil actions may be brought by aggrieved individuals in state or federal court, or through enforcement by the Secretary of Labor. Available remedies may include:

- payment of wages, salary, employment benefits, and other compensation;
- interest;
- liquidated damages equal to the sum of (1) and (2) above;
- equitable relief such as employment, reinstatement, and promotion; and,
- reasonable attorney and expert witness fees and other costs.

The court may, in its discretion, deny recovery of liquidated damages if it finds that the violation was in good faith *and* that the employer had reasonable grounds for believing that its acts were not a violation of the law. The statute of limitations is two years, or three years in the case of “willful” violations. Employees may *not* waive their FMLA rights, and employers may not induce such a waiver.

## EFFECT ON OTHER LAWS AND AGREEMENTS

FMLA does not affect federal or state laws prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability. Similarly, FMLA does not supersede any state laws, collective bargaining agreements, or employment benefit plans which provide greater family or medical leave rights, and you must still comply with COBRA upon termination of FMLA health maintenance benefits. Employers remain free to adopt or retain more generous leave provisions than those mandated by FMLA.

## THE PRACTICAL RESPONSE

FMLA was designed to promote the development of the family and to address the serious potential for gender discrimination in the workplace. Certainly these are goals everyone supports. As the brief summary provided in this booklet demonstrates, however, the law's provisions are exceedingly complex, and even an innocent failure to comply could have serious ramifications.

Making matters even more difficult for employers is the need to coordinate the effect of FMLA's provisions with coverage provided by the Americans With Disabilities Act, workers' compensation statutes, and laws regulating other types of leave such as jury, military duty or personal leave.

We urge that you review *all* your leave policies, written and unwritten, to be sure they are valid, then develop control procedures to ensure compliance. These include notice and recordkeeping procedures and benefits maintenance. The timing and substance of your COBRA notifications should also be looked at, and revised if necessary.

Finally, various policy considerations should be thought through, such as whether to substitute paid leave for FMLA leave, and how best to communicate your policies and procedures.

**C**areful attention to those details will not only give you the assurance that you are in compliance, but provide the opportunity for increased productivity and employee morale, as well as safeguard the important rights this law was designed to protect.

*For further information about this topic, contact any office of the Firm.*

## **OTHER BOOKLETS IN THIS SERIES:**

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Americans With Disabilities Act  
(Public Accommodations)

COBRA

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