FMLA Compliance Guide

Practical Advice on Managing Family and Medical Leave

Brought to you by the editors of
The HR Specialist

HR SPECIALIST

FMLA Compliance Guide

Practical Advice on Managing Family and Medical Leave

Brought to you by the editors of
The HR Specialist

About the Authors

Matthew S. Effland, formerly of the Labor and Employment firm of Ogletree Deakins Nash Smoak & Stewart, P.C., regularly provides training and counseling on employment issues to management in both the private and public sector. He is licensed in both California and Indiana.

Special thanks to co-author Matthew J. Kelley, an associate at Ogletree Deakins P.C., Indianapolis, for his contributions to this special report. Mr. Kelley concentrates his practice in employment and labor law.

Anniken Davenport is a noted employment law attorney and the editor of the HR Specialist state employment law newsletter series. She has authored several books, including *Bullet-Proof Your Employee Handbook* and *Employer's Practical Legal Guide,* published by HR Specialist. Anniken has served as a professor at Penn State University, where she taught business law and HR management, and she directed the Legal Studies Program at Wilson College. Her legal career includes representing government units in discrimination and other employment law cases and representing school districts in labor negotiations.

Author:	Matthew S. Effland, Esq.
Co-author:	Matthew J. Kelley, Esq.
Contributors:	Anniken Davenport, Esq. Morey Stettner
Editor:	Kathy A. Shipp
Editorial Director:	Patrick DiDomenico
Associate Publisher:	Adam Goldstein
Publisher:	Phillip A. Ash

ISBN: 1-880024-26-8

For further information on the FMLA regulations, go to **www.theHRSpecialist.com.**

Contents

Executive Summary

The FMLA has changed. Is your organization in compliance?

Since 1993, employers have struggled to comply with the Family and Medical Leave Act's complex web of regulations. In 2008, Congress and the U.S. Department of Labor gave the law a big makeover, so employers and HR professionals need to ensure they are up to date on the changes and have adjusted their policies accordingly. In 2009, Congress expanded military and caregiver leave to include all service members.

You can't afford to make a mistake when administering FMLA leave. If a worker files an FMLA lawsuit against your organization, the stakes are high. You may end up paying back wages and benefits, the employee's attorney fees and court costs—or double the amount if a court deems your violation was willful. Even worse, in some cases courts can hold supervisors *personally* liable when employees are not granted the unpaid leave they are entitled to under the law.

Use this special report to review the FMLA's intricacies, familiarize yourself with the revised regulations and double-check your policies and employee handbook to ensure compliance with the law.

FMLA Regulations

The FMLA provides qualified employees up to 12 weeks of unpaid, job-protected leave each year. The leave must be triggered by the birth, adoption or foster care of a child; caring for a child, spouse or parent who has a "serious health condition"; or the employee's own "serious health condition." The law does not cover an employee's in-laws, grandparents, aunts, uncles, siblings, cousins, children beyond age 18 (unless a mental or physical disability makes the child incapable of self-care) or an unmarried domestic partner.

For "family" leave (i.e., tied to the birth or adoption of a child), an employee must take the leave as a block of time unless the employer agrees otherwise. For "medical" leave, the employee can take time off either as a block or on an intermittent basis.

In addition, the FMLA now also provides that eligible employees may take up to 12 weeks of military family leave for certain "exigencies": qualifying events related to a family member's active-duty military service or call to active duty. The new caregiver provisions also provide employees with up to 26 weeks of

unpaid job-protected leave to care for certain injured or sick family members in the military.

Covered employers

The law applies to all companies "engaged in commerce" that have 50 or more employees working within a 75-mile radius of the "work site." The FMLA covers about 65 million employees and 300,000 U.S. businesses, according to the Bureau of Labor Statistics.

Eligible employees

To be eligible for FMLA leave, employees must work for a covered employer for at least 12 months (but not necessarily 12 continuous months) and clock at least 1,250 hours during the 12 months leading up to FMLA leave.

Continuation of benefits

While an employee is on leave, the employer must maintain the person's group health insurance, along with life insurance and disability benefits. However, an employee on leave does not get a free health insurance ride. If the employee paid part of the health insurance cost while working, he or she would continue to do so while on FMLA leave.

If the employee does not pay the premiums, the employer may cancel coverage, but only after a 30-day grace period and only if a cancellation notice was sent at least 15 days before coverage would stop. If coverage is canceled, the employer must reinstate all benefits when the employee returns from leave.

Notification deadlines

Eligible employees who want to take FMLA leave must give either 30 days' advance notice, or as much notice as is reasonably possible, when the need is foreseeable. When leave is not foreseeable, the employer may require workers to

FMLA Changes

In 2008, Congress extended FMLA leave benefits to military families, and the DOL issued revised regulations that change several aspects of the FMLA, effective Jan. 16, 2009. In 2009, Congress extended FMLA benefits to all active-duty military families and addressed issues for flight crews on commercial airlines. *(See summary of changes, Chapter 1.)* In addition, be aware that states and other jurisdictions continue to pass their own family or medical leave laws. In jurisdictions that have both federal and state laws, you must abide by the regulation that provides the most generous benefit to the employee.

follow the organization's usual and customary call-in procedures for reporting an absence or late arrival, absent unusual circumstances.

To give proper notice, employees must explain that they need leave, but they do *not* need to mention the FMLA itself. The burden is on you to draw a preliminary conclusion about whether the leave falls under the FMLA.

Employers are required to take certain steps to inform their employees about their FMLA rights:

- Post FMLA information in the workplace.
- State the law's basic provisions in your employee handbook or distribute otherwise.
- Comply with all notice requirements once leave is sought.

Providing a speedy response to an employee's leave request is crucial. Employers have five days to provide the Notice of Eligibility and Rights & Responsibilities when leave is initially sought, and another five days to provide the Designation Notice once leave is approved.

Your organization must have a written policy that specifies how you handle eligibility questions.

For example, you may want to require medical certification for every FMLA absence, or you may want absences over a certain number of days to be verified. It is up to you, as long as you are consistent and apply the law uniformly to every employee taking FMLA leave.

To get their leave certified, workers must give their health care provider an FMLA certification form. The provider must complete the form and certify that the worker has a serious health condition or needs to care for an eligible relative with a serious health condition. In the case of childbirth or adoption leave, the employee can provide proof of birth, adoption or the arrival of a foster child to verify eligibility for time off.

If you doubt that the employee suffers from a serious health condition, you can ask for a second opinion from another health care provider. If the second certification does not show a serious health condition, the employee can request a third, tie-breaking opinion. (Employers must pay for the second and third opinions.) The certification should specify exactly when the employee needs the leave, as well as the duration and frequency of leave.

'Serious health condition'

The FMLA defines a serious health condition as an "illness, injury, impairment or any physical or mental condition that requires inpatient medical care, or continuing treatment by a health care provider."

There are several specific conditions or circumstances that will qualify as a serious health condition, as well as the more general absence of more than three full consecutive calendar days from work, coupled with two or more visits to a health care provider (or one visit plus a regimen of continuing treatment—for example, prescription drugs).

Reinstating a worker

An eligible employee who takes FMLA leave is entitled to reinstatement to the same or equivalent position with equivalent benefits, pay and other terms and conditions of employment. The new position must involve the same or "substantially similar duties and responsibilities" and must entail "substantially equivalent skill, effort, responsibility and authority." While an exception exists for reinstating certain highly compensated "key" employees, applying that exception is tricky and should be done only with assistance of counsel. *(See page 27.)*

Once back at work, the returning employee is entitled to any cost-of-living increases granted other employees during his or her absence, as well as any other unconditional pay increase. Employers do not have to give a raise based on seniority, length of service or work performed. However, be sure not to tamper with a returning employee's benefits. The employee is entitled to everything everyone else receives: group life, health and disability insurance, as well as sick leave, annual leave and educational benefits. Pensions are particularly inviolate.

Under no circumstances should you count time off under the FMLA against the employee for disciplinary purposes. For example, you can't penalize someone under the company's attendance policy for taking FMLA leave, even if he or she was absent for the full 12 weeks. Attendance *bonuses,* however, need not be awarded to employees who miss work so long as you treat all types of leave uniformly for attendance bonus purposes.

Compliance Headaches

Complying with the FMLA is not, and has never been, easy. Employers fare best when they understand their FMLA obligations and adopt clear leave policies for their organizations.

A 2014 survey reported in an article by the Society for Human Resource Management revealed that 70% of employers were concerned their employees were abusing FMLA leave. Surveys consistently show that complying with the FMLA poses several challenges, including:

- Determining what constitutes a "serious health condition."
- Difficulty tracking and administering intermittent leave.
- Morale issues with workers forced to pick up the slack when others take FMLA leave.
- Doubts about the legitimacy of leave requests and the medical certifications provided by health care professionals.
- Measuring the overall costs of administering leave requests.

The Department of Labor's revised regulations are designed to help employers administer such complexities in the law. While SHRM said it "applauds the department for taking this step," many business groups had urged the DOL to go further in its revisions.

FMLA Forms: Online Resources

Employers can download the FMLA poster and the following forms at the DOL's Wage and Hour Division web site:

- WH-380-E: Certification of Health Care Provider for Employee's Serious Health Condition
- WH-380-F: Certification of Health Care Provider for Family Member's Serious Health Condition
- WH-381: Notice of Eligibility and Rights & Responsibilities
- WH-382: Designation Notice
- WH-384: Certification of Qualifying Exigency for Military Family Leave
- WH-385: Certification for Serious Injury or Illness of Covered Service Member—for Military Family Leave

To access the forms, go to **www.dol.gov/whd/fmla/**.

FMLA regulations, for example, contain no sweeping redefinitions of "serious health condition." Nor do they set ironclad rules on how employees should give notice of their need for intermittent leave.

Like all other federal employment laws, the FMLA contains an anti-retaliation provision. In 2015, a federal court ruled that even if an employee isn't deprived of leave, courts can still rule the employer retaliated. (*Gordon v. U.S. Capitol Police*, 778 F.3d 158, 24 WH Cases 2d 354 D.C. Cir. 2015)

10 Compliance Tips

1. Draft a written FMLA policy.
If you have not already done so, you should prepare a comprehensive policy on FMLA leave and make it available to your employees. By committing your policy to paper and distributing it companywide, you and your employees can better understand how the law works and what is expected of both parties. You will also be satisfying the law's requirement that you must notify employees of their FMLA rights and obligations.

Court decisions and company experience continually affect your company's FMLA policies and procedures. You should revisit your FMLA policy and revise it on a regular basis. Once you have a draft, give it to your attorney for review to ensure it complies with the court decisions in your location.

2. Post the DOL's notice.
The "Notice of FMLA Rights" poster should appear in a prominent place in your workplace. You can also post the FMLA notice online or anyplace where

employees have access. If you fail to post the notice, you are subject to fines. More importantly, you could undermine your legal standing if you chose to terminate an employee who has used up his or her FMLA leave or you were otherwise defending yourself in court. You want to show that you acted in good faith in educating employees about the law. Posting the notice is an easy step in that direction. If you have a significant number of employees who speak a language other than English, you should post the notice in their native language. The DOL provides the notice in several languages.

3. Respond promptly to employees' requests for FMLA leave.
Once you learn that an employee's absence may qualify for FMLA leave, every day counts. The sooner within the five-day period you notify the employee in writing that his or her absence is FMLA protected, the sooner you begin the 12-week countdown until the person exhausts the leave.

4. Include workers' compensation absences as FMLA leave.
In most cases, workers' compensation absences also qualify as FMLA leave. That means you should promptly designate time missed for workers' comp injuries to activate the 12 weeks of allowable FMLA leave. Otherwise, you would enable employees to take 12 weeks on top of any time taken for a workers' comp injury.

5. Explain your organization's internal rules on using FMLA leave.
Besides letting employees know that their leave qualifies under the FMLA, you must send written notification of the rights and obligations of both employer and employee. These include:

- The employee's obligation to arrange for medical certification to substantiate the reason for the leave.
- Your requirement that an employee use all accrued paid leave before taking unpaid leave.
- Your right to substitute paid leave for unpaid leave.
- Your rule that employees on FMLA leave pay a portion of their health insurance benefits and that employees are liable for paying the premiums if they do not return from leave.
- Your rule that employees provide a medical certificate that they are fit for duty after the leave.
- The employee's status as a "key employee," if applicable.
- The employee's right to return to the same or an equivalent job.

Integrating all these elements in your letter is critical because it demonstrates that you are complying with the FMLA's notice requirements.

6. Establish a measuring system for tracking annual FMLA leave.
There are four measuring-year methods you could use:

- Calendar year

- A year beginning on the date of the employee's first use of FMLA leave
- A "leave year," such as your fiscal year
- Rolling period starting on the date of the first FMLA leave

Be careful in selecting your tracking system. You do not want to give employees a chance to elect the most advantageous measuring method when they take their leave. Plus, if you fail to designate a measuring-year method, employees must be given the most generous leave option available to them at the time they take leave.

7. Verify serious medical conditions.
Require that all employees submit medical certification to document a serious health condition within 15 days of their request for FMLA leave. If you disagree with the certification, consider obtaining a second or third opinion *(for details, see page 24).*

8. Deduct intermittent leave from an employee's 12-week entitlement.
Tracking intermittent leave can prove a headache for employers. Unless you charge every instance of intermittent leave against an employee's 12-week entitlement, however, you may find yourself giving away more leave than the law requires.

9. Be consistent with attendance bonuses and other types of leave.
If you award bonuses for attendance, you no longer have to pay them to an employee who takes FMLA leave. The regulations allow employers to deny perfect-attendance awards to employees who take FMLA leave as long as they treat employees taking non-FMLA leave the same way.

10. Treat the ADA separately from the FMLA.
An employee returning from FMLA leave may also qualify to receive reasonable accommodations based on the Americans with Disabilities Act. You may have to modify an employee's schedule or work environment or even permit additional time off beyond the 12 weeks of FMLA leave, as required under the ADA.

1. The 'New' FMLA Regulations

10 key changes you need to know: Adjust your policies accordingly

In late 2008, the DOL took a big step toward clarifying some of the confusing aspects of the FMLA. It issued its final rules updating the FMLA, effective Jan. 16, 2009. These rules are intended to help employers better administer the complex law. Understanding what has changed is the first step toward avoiding lawsuits.

Here's a summary of the 10 biggest changes in the "new" FMLA, compared to the old regulations:

1. '12-Month' Eligibility Requirement

Old: Under the old regulations, an employee needed one year of service to be eligible for FMLA leave. That one year of service did not need to be continuous, but there was no real guidance regarding extended breaks in service.

New: Under the new regulations, a **seven-year break** in service (unless the result of either National Guard/Reserve military service or a written agreement, such as a collective bargaining agreement) requires an employee to meet once again the "12 months of employment" requirement.

2. Timing of Doctor Visits

Old: Previously, there was no time requirement placed on employees for the necessary two visits or one visit plus continuing a regimen of treatment to qualify as a "serious health condition."

For chronic conditions, the regulations required "regular" visits, but left "regular" undefined.

New: The new regulations set specific guidelines for employees to follow. The first visit to a doctor must be within seven days of the first day of leave, and both visits must occur within 30 days of the absence. For chronic conditions, the employee must visit a doctor at least twice each year.

3. Work-Related Bonuses

Old: Formerly, "attendance bonuses" could be prorated, but not denied, due to FMLA absences.

New: Now, goal-oriented bonuses, including those based on hours worked, *can* be denied if an employee's failure to achieve the goal is due to FMLA leave. Employers must treat all types of leave the same (i.e., they cannot single out FMLA leave).

4. Notice Requirements

Old: Employers were required to have both a poster and a written policy outlining FMLA requirements.

New: Under the new policy, notice is combined into a single poster or an electronically distributed document to current employees and made available to new employees upon their hire.

5. Employer Obligations

Old: Previously, the employer had **two** business days in which to (a) notify the worker of eligibility, (b) give him or her the certification forms and (c) determine coverage.

New: Now, an employer must notify the employee of eligibility within **five** business days after leave is requested, and the notice must state specific reasons for ineligibility. The eligibility notice may be oral or written, but make sure you give the employee his or her "Rights & Responsibilities" form at the same time. Within five days you must inform the employee whether or not the leave is covered and whether the employee is required to use paid leave time as a substitute. If possible, you should state in the designation form how much of the employee's allotted 12 weeks will be used during the period of FMLA-covered leave.

6. Employee Obligations

Old: Under the old regulations, the employee could notify the employer of the need for unforeseeable leave as soon as practicable, usually within two business days after the leave began.

New: Now, an employee must provide notice as soon as practicable, but within the time required by the employer's usual notice requirements, unless there are unusual circumstances. Under 29 CFR 825.301(a), the employer

can require compliance with its normal call-in procedures (absent unusual circumstances).

7. Medical Certification

Old: If the medical certification was incomplete or incomprehensible, the employer could either (a) give it back to the employee and allow a "reasonable" amount of time for proper completion or (b) obtain written permission for the company's doctor to call the employee's doctor.

New: Now, an employer must give the employee **seven days** to fix any incomplete/incomprehensible certification forms. If, after seven days, the form is still insufficient, the employer may call the employee's doctor directly to seek clarification, provided the employee's direct supervisor does not make the call. You must follow HIPAA rules, but if the employee refuses to allow you to contact the doctor, you may deny the request for leave.

8. Settlement of FMLA Claims

Old: Courts struggled with the question of whether FMLA claims could be released as a part of a settlement and/or severance package without court or DOL approval.

New: The new regulations clarify that retroactive waiver of FMLA claims is allowed without prior approval by the DOL or a court; however, a prospective waiver of FMLA rights is still prohibited.

9. Active-Duty Leave: Military Families

New: Employers must grant up to 12 weeks of unpaid leave to immediate family members of reservists, members of the National Guard, and certain retired but recalled military service personnel. **Note:** Following the 2009 changes, Congress expanded the definition of 'covered service member' to include regular armed forces members. To be eligible for active-duty leave, the employee must show the existence of one or more "qualifying exigencies" related to military service. *(For details, see Chapter 4.)*

10. Caregiver Leave: Military Families

New: Employers must offer up to 26 weeks of unpaid FMLA leave within a single 12-month period to eligible employees caring for family members with a serious injury or illness incurred in the line of duty. The 26-workweek entitlement is a special provision that extends FMLA job-protected leave beyond the normal 12 weeks of FMLA leave. An eligible

employee is defined as the spouse, son, daughter, parent or "next of kin" of a covered service member. The expanded definition of 'covered service member' also applies to caregiver leave.

Tip: Make sure you notify your employees of these new military leave laws. If you have military families on staff, be prepared to offer them FMLA caregiver and active-duty leave.

2. Determining Coverage and Eligibility

Which employers are covered, and which employees are eligible for leave?

Ignorance can be expensive. For example, you do not want to discover after years of litigation that you shouldn't have been in court in the first place. That's the lesson one employer learned after having to spend lots of time and money defending itself against an employee's FMLA lawsuit in the following case:

The plaintiff had worked for her company for almost a year when she asked for time off. Her supervisor told her she could "take a week off and take care of" her problems. The company's employee handbook seemed to indicate she was eligible for FMLA leave. It turned out, however, that she was nine days' short of being eligible for leave, despite her supervisor's assurances and the policy stated in the handbook. Then the company fired her for missing work. She lost her case at the trial court and then appealed, costing her employer another round of attorneys' fees and lost time.

Both the trial court and the appeals court ruled that the worker was not eligible for time off even if her supervisor had promised it and the handbook said so. (*Renart v. Chartwells*, 122 F. App'x 559, 3rd Cir., 2004)

This trial and appeal shouldn't have happened. The company should have trained all its managers on the rules, and this supervisor should have known that the employee was nine days' short of eligibility.

In today's technological world, managers have no excuse for not tracking eligibility for FMLA and other leave benefits. Nor should the employee handbook contain inaccuracies or misleading statements. Had the employee known upfront she was not eligible, she probably wouldn't have taken time off or, if she did, would have realized she might lose her job. It was the false information that probably triggered the lawsuit.

Nowadays, an employer can't afford any blind spots in looking at the laws that cover its organization. Ignorance of the law is not only a poor legal defense but also a prime example of mismanagement. The FMLA is just one of many employment laws that have evolved into a complex web of rules and regulations.

This chapter is designed to provide guidelines on how to comply with the FMLA's eligibility and coverage issues.

Are You a Covered Employer?

The FMLA applies to all companies "engaged in commerce" with 50 or more employees working within a 75-mile radius of the "work site" during at least 20 weeks of the current or prior year. The regulations specifically bar employers from moving workers from site to site to evade the 50-employee limit.

If another corporation owns your company, how would you determine the total number of employees for compliance purposes? The companies would be considered separate entities unless you meet the "integrated employer" test. Per Section 825.104c (2) of the FMLA regulations, four criteria are used to determine if two or more companies are an integrated employer: "common management, interrelation between operations, centralized control of labor relations and degree of common ownership/financial control."

If you meet those tests, the employees of all the companies would be counted in determining whether you are covered by the law. If you are uncertain of your status, call the DOL's Wage and Hour Division at (866) 487-9243.

In 2003, the U.S. Supreme Court ruled that state government employees can sue states for FMLA violations under certain circumstances. State employees may take FMLA leave to care for an immediate family member, (*Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721), but didn't address whether state employees could take leave for self-care until 2012 when it decided they could not. (*Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327)

Federal and state government employees are covered regardless of the size of their agencies. The only exceptions are the personal staffs of elected officials.

Some states and municipalities have their own family or medical leave laws. Employees are entitled to the benefits provided by the more generous law. For example, some jurisdictions require a portion of all medical leave to be paid. In such situations, an employer should run unpaid FMLA leave at the same time the employee is receiving paid state-mandated leave.

Which Employees Are Eligible?

Eligible employees must work for a covered employer for at least 12 months (but not necessarily 12 continuous months) and clock at least 1,250 hours during the 12 months leading up to FMLA leave. However, if there's a break in service of seven years or more, the employee must once again fulfill the 12-month requirement before becoming eligible for leave. Paid time off, such as vacation or sick time, does not count in determining an employee's eligibility.

FMLA leave is generally unpaid, but employers have some flexibility. You may require employees to use any accrued annual or sick leave first before using unpaid leave. At the beginning of the leave, it's advisable to clarify how paid and unpaid time is to be used. Additionally, employers should develop leave policies and apply them uniformly to avoid any appearance of favoritism.

PART-TIMERS AND TEMPS

Part-time employees who take a solid block of time off are treated much the same way as full-timers. If a part-time employee requires 12 weeks off, he or she is entitled to the leave.

But for part-timers who require intermittent leave or wish to work a reduced schedule, calculations are treated differently. FMLA regulations require employers to compare the reduced schedule with the employee's normal hours. For instance, if the employee normally worked 30 hours per week, the person is entitled to as much as 360 hours (30 hours × 12 weeks) of FMLA leave.

An employee's normal week is determined by his or her usual schedule at the time leave begins. You may not reduce an employee's schedule in an attempt to reduce leave. However, any permanent or long-term changes made to the employee's schedule for legitimate, non-FMLA reasons prior to taking leave become the basis for determining the employee's normal week.

Example: Susan has been working 30 hours a week and is FMLA-eligible. Due to an increase in business, she's promoted to permanent, full-time status. A week later, Susan's injured in a car accident and requires FMLA leave. She's entitled to take 12 weeks of full-time FMLA leave.

For an employee whose schedule varies a great deal, however, employers may average the hours worked over the 12 weeks immediately prior to the start of the leave.

For small businesses that frequently hire temporary or part-time workers, the head-count issue takes on added importance because it affects whether the company must abide by the FMLA. The law applies to employers that employ 50 or more employees for each working day during each of 20 or more calendar workweeks (not necessarily consecutive ones) in the current or preceding year. The law specifies that any employee on paid or unpaid leave (including FMLA leave) is counted as long as the employer reasonably expects the individual will eventually return to work. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

An employee who does not begin to work until after the first day of a calendar week, or who quits before the last working day of a calendar week, is not considered employed on each working day of that week. Also, any employee who works outside the United States or its territories is not counted in determining employer coverage.

The FMLA regulations specifically address "joint employment," which is defined as two or more businesses exercising some control over the work or working conditions of an employee. Temps fall under the joint-employment definition because their leasing agency exerts some control over their placement at a client's workplace.

Under the FMLA, only the *primary* employer in the joint-employment relationship is responsible for giving required notices to employees, providing FMLA

leave and maintaining health insurance benefits. Temporary employment agencies generally serve as the primary employer for the workers they place at their clients' work sites. The primary employer:

- Exercises authority to hire and fire.
- Assigns the employee to a job.
- Prepares payroll.
- Provides employment benefits.

For purposes of determining whether an employer is covered by the FMLA, workers who are jointly employed by two employers must be counted by both employers, even if the workers do not appear on both companies' payrolls. For example, if you have 40 permanent employees and you hire 15 temps a week from a temp agency, you must count those 15 temps toward the 50-employee threshold even if they are only on the temp agency's payroll.

Determining the FMLA Year

When does the year begin for FMLA purposes? The regulations allow employers four ways to determine the start of the FMLA year.

Obviously, an employer can use the calendar year. Alternatively, you can use any fixed 12-month period (i.e., a fiscal year or employee anniversary date) for FMLA purposes. Or you may use the date of an employee's first use of FMLA as the start of that employee's FMLA year. These scenarios all present the risk of abuse, however: Under any of these scenarios, an employee could take as much as 24 consecutive weeks of FMLA leave—the last 12 weeks of one year and the first 12 weeks of the next.

The most common approach is to use a "rolling" 12-month period going backward from the date an employee first takes FMLA leave. This rolling approach eliminates the possibility of someone taking a 24-week FMLA leave.

The key is to decide on which method to use and follow it consistently. If you haven't chosen a method, an employee is entitled to use whichever method is most beneficial to him or her. You may then choose a method to use in future cases, but you must give employees 60 days' notice before implementing it.

Making things even more complicated, the new Military Caregiver Leave entitles an employee to up to 26 weeks of leave per service member, per injury, in a single 12-month period, beginning on the date the leave begins. This effectively creates a second "leave year" for employers to track, and it operates outside the standard leave year. *(See Chapter 4.)*

The Paper Chase: Tracking Leave Time and Eligibility

Among the main complaints of employers trying to comply with the FMLA is the administrative chore of tracking employees' attendance and identifying whether

an absence qualifies under the FMLA. The law requires covered employers to document and preserve records pertaining to their FMLA-related obligations.

The DOL has the right to audit employers no more than once during any 12-month period to inspect personnel records and ensure compliance. But it can request records more frequently in cases where the department has "reasonable cause" to believe an FMLA violation occurred or the investigation is in response to a complaint.

Although the law does not mandate any specific form of record-keeping, employers must maintain some kind of accurate documentation for no less than *three years*. Here's what the documentation should include:

- **Basic payroll and employee information**, including name, address and occupation, rate or basis of pay and terms of compensation, daily and weekly hours worked per pay period, additions to or deductions from wages and total amount paid.
- **Dates that eligible employees** take their FMLA leave. Records must indicate the leave is FMLA related, and the time off may not include other leave required under state law or an employer plan that's not also covered by the FMLA.
- **Hours of leave**. If FMLA leave occurs in increments of less than one full day, the employer must record the hours of the leave.
- **Copies of employee notices** of leave given to the employer, along with copies of all written notices the employer has given to the employee as required under the FMLA.
- **Any records that describe employee benefits** or employer policies regarding paid and unpaid leave.
- **Any records that indicate premium payments** of employee benefits.
- **Any records of disputes** between the employer and an eligible employee regarding classification of time off as FMLA leave.

3. Critical Questions on Employee Coverage

The burden of proof is on you to determine if a leave request qualifies

The FMLA employs many terms. Proper understanding of the applicable language is paramount to complying with the law. These terms provide the structure—and in many cases cause the confusion—surrounding the FMLA.

Defining 'Serious Health Condition'

FMLA regulations define a "serious health condition" as an "illness, injury, impairment or any physical or mental condition that requires inpatient medical care or continuing treatment by a health care provider."

Examples include emphysema, appendicitis, severe respiratory conditions (such as chronic asthma), heart attacks, heart conditions requiring bypass or valve operations, back conditions requiring surgery or extensive therapy, most cancers, strokes, spinal injuries, severe arthritis, pneumonia, severe nervous disorders, any serious injury caused by an accident on or off the job, emotional distress following a miscarriage and migraine headaches.

The law states that a serious health condition must result from one or more of the following:

1. A health condition lasting more than three consecutive, full calendar days, requiring continuing treatment.

▶"Treatment" means an in-person visit to a health care provider for examination, evaluation or specific treatment. (It does not include phone calls, letters, e-mails or text messages.)

▶To qualify as a "visit" under the regulations, an employee's first appointment with a health care provider must occur *within seven days* of the start of the incapacity.

2. Any period of incapacity due to pregnancy or prenatal care.

3. Any period of incapacity due to a chronic, serious health condition that continues over an extended period and requires visits to a health care provider (although not necessarily for each episode associated with that condition).

▶The "chronic condition" definition requires at least one visit to a health care provider *every six months* for treatment of the condition. The

regulations make it clear that for continuing treatment involving two or more doctor visits, the two visits must occur *within 30 days* of the start of the incapacity.

4. A permanent or long-term condition for which treatment may not be effective, requiring supervision by a health care professional (*examples:* terminal cancer, Alzheimer's disease, stroke).

5. 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 days if left untreated, such as radiation treatment and chemotherapy.

Courts have ruled that the following illnesses are not serious enough to warrant FMLA protection: flu-like symptoms, even if they result in an unconscious state; a single asthma attack during which there was no evidence that the victim could not care for himself or herself; rectal bleeding, even if the condition could have turned into something more serious; an ear infection; muscle strain even if the employee required follow-up treatment, and food poisoning that doesn't require inpatient or continued medical treatment.

Does substance abuse qualify?

Substance abuse may qualify as a serious health condition if it meets certain criteria. For example, substance abusers may take FMLA leave but only for substance abuse treatment administered by a health care provider. Employers may not retaliate against anyone for legitimately using FMLA leave. However, you're not required to tolerate illegal drug use in the workplace, and you should have a policy on illegal drug use and administer it fairly.

Can several illnesses add up to one serious health condition?

In certain situations, several illnesses taken together may constitute a serious health condition—even though none of the illnesses alone would be considered serious under the FMLA.

Case in point: In *Fries v. TRI Marketing,* No. 11-1052 (D. Minn. 2012), an employee suffered from two distinct, but related conditions: genital herpes and interstitial cystitis. The two conditions flared up within days of each other resulting in a continuous period of incapacity. The employer argued that neither condition produced the required three-day period of incapacity. The court concluded that conditions that are "temporally linked and affect the same organ system" can constitute a serious health condition for FMLA purposes.

Advice: Err on the side of accepting an employee's claim of a serious health condition, but make sure you obtain medical documentation for each presumed illness. The expanding list of conditions that can trigger FMLA leave puts an even weightier burden on you to determine compliance. And remember: No matter how many separate conditions an employee has, the person's FMLA leave is still limited to 12 weeks.

NOTICE REQUIREMENTS

Like many federal regulations, the FMLA is complicated and ambiguous at points. As a result, FMLA-related misunderstandings between employer and employee are not uncommon. That's particularly true when both parties try to communicate what types of leave count under the law.

Eligible employees who want to take FMLA leave must give you 30-day advance notice when the need is foreseeable, such as when pregnant workers anticipate time off for childbirth. When it's not foreseeable, they need to inform you through your organization's usual and customary call-in procedures for reporting an absence, unless there are unusual circumstances. In the absence of an employer policy, employees must give notice "as soon as practicable."

To give proper notice, employees must alert you to their need to take time off. They do *not* need to mention the FMLA per se as long as they provide enough information so that you can gather the facts and decide whether their leave qualifies under the FMLA. The employee must provide sufficient information to enable the employer to determine whether the leave is FMLA-qualifying; calling in sick without providing more information is *not* sufficient.

Caution: In some cases, courts have held conditions that prevent verbal notification, such as severe depression, nevertheless provide "notice" to employers if the employee's change in behavior is suitably severe and noticeable. In short, as long as you are alerted about the need for the leave, the burden is on you to draw a preliminary conclusion about whether it falls under the FMLA. Some employers, however, choose to waive the FMLA notice obligations for their employees.

If an employee misleads you about the nature of an illness, thus failing to notify you of a serious health condition, he or she is not protected under the FMLA. In one case, an employee's spouse, in an attempt to protect the employee, did not disclose that he had been hospitalized in a psychiatric facility. Instead, she told the employer only that he was having tests conducted. The court ruled that the employer was not on notice of a potential FMLA situation. (*Gay v. Gilman Paper Co.*, 125 F.3d 1432, 11th Cir., 1997)

Requests for FMLA leave do not have to be in writing. Therefore, it's crucial to train supervisors to treat each mention of time off needed as an FMLA request. Supervisors should document every request and determine FMLA eligibility. The employer should then advise the employee of his or her eligibility and responsibilities for medical certification, as well as the employer's and the employee's responsibility for health care premiums.

In any case, your legal obligation to extend FMLA-protected leave can be triggered only if the employee properly notifies you. Once you receive that notice, you're expected to monitor the situation and determine whether it qualifies under the law. You're also required to take certain steps to inform workers about their FMLA rights. You must provide:

- **General notice about the FMLA:** You must post or distribute the notice in such a way as to be available to employees and job applicants.

Notifying Employee of FMLA Leave

You should always send the employee a letter within five days of a request for leave (when foreseeable) or the actual leave (when unforeseeable) outlining your organization's specific requirements on taking leave. Make sure your letter addresses these issues:

1. The employee's FMLA status (qualified or unqualified).
2. If qualified, notice that you are provisionally approving the leave pending medical certification (if not submitted with the request).
3. The employee's need to provide medical certification to prove the leave qualifies under the FMLA.
4. Your policy on substituting paid leave for unpaid leave.
5. The company's policy on paying health care premiums during FMLA leave.
6. The employee's potential liability for paying health insurance premiums should he or she not return from FMLA leave.
7. The employee's right to return to the same position or an equivalent one following the leave.
8. The employee's status as a "key employee," if applicable.

- **Eligibility notice:** You must provide this notice, whether oral or written, within *five* business days of a request for leave, and you must inform employees of their eligibility for leave (or the reason they are not eligible).
- **Rights and responsibilities notice:** This form details the rights (i.e., types of leave, job protection) and responsibilities (certifications, return-to-work requirements) of employees seeking FMLA leave, and must be given in conjunction with the eligibility notice.
- **Designation notice:** After receiving sufficient information to determine whether to grant leave, the employer has *five* days to provide the employee a form designating the requested leave as FMLA-covered (this form must also state whether a return-to-work certification is required).

  The DOL provides these notice forms at **www.dol.gov/whd/fmla/index.htm**.

The Difference Between 'Medical' and 'Family' Leave

Employees eligible for FMLA leave can take up to 12 weeks of unpaid, job-protected leave each year. To qualify, the leave must be triggered by:

- The birth, adoption or foster care of a child (family leave) *or*

- Caring for a child, spouse or parent who has a "serious health condition" or the employee's own "serious health condition" (medical leave).

The 12 weeks of leave permitted under the FMLA need not be consecutive and, in certain circumstances, can be taken in blocks of time or intermittently. Intermittent leave is defined as taking off a few hours, a single day or a week as determined by a worker's needs; a reduced schedule means regularly working half-days or perhaps a three-day week.

Medical leave: An employee is allowed to take intermittent or reduced-schedule leave when medically necessary to care for a seriously ill immediate family member or to accommodate the employee's own serious illness. Employees who take intermittent leave for planned medical treatment have a statutory obligation to make a "reasonable effort" to schedule such treatment as not to unduly disrupt the employer's operations. Employees do not need employer approval to schedule intermittent or reduced-schedule leave for "medical" leave.

Thus an employee can use FMLA time to take certain days off, spread over many months, for chemotherapy or some other ongoing medical treatment that qualifies under the law. Individuals who would rather work a four-day week can potentially abuse this benefit by spacing the days off at one per week for 60 weeks before exhausting their allotted leave time of 12 weeks (or 480 total hours). Because the 12-week limit for FMLA leave begins again every year, a worker might restart benefits from scratch by using them up intermittently. This is just one of many areas that require employer vigilance.

Family leave: Leave to care for a newborn or an adopted or foster child placed with the employee is treated differently. Generally, family leave must be taken in blocks of time. The leave must end within 12 months after the birth or placement of a child, and the employer's approval is required when an employee wants to use intermittent or reduced-schedule leave to care for the child.

When employees take intermittent leave, the law permits employers to account for their FMLA leave in the shortest period of time used by their payroll systems for hourly workers. For FLSA-exempt workers, leave is calculated in half-day increments.

FMLA and Same-Sex Partners

The U.S. Supreme Court legalized same-sex marriage in the landmark *Obergefell v. Hodges* (No. 14-556, 2015) decision. In *U.S. v. Windsor* (No. 12-307, 2014), the Court ruled section 3 of the Defense of Marriage Act that defined marriage as being between one man and one woman for all federal laws and programs to be unconstitutional. Taken together, the rulings mean same-sex spouses have all the same rights that opposite-sex spouses have under the FMLA, including the right to care for one another should one have a serious health condition and to care for each other's children should the employee be *in loco parentis*, which the FMLA regulations define as having "day-to-day responsibilities to care for and financially support a child." 29 C.F.R. § 825.122(b), (c)(3) (The DOL does not require that an individual necessarily prove both.)

FMLA regulations tell employers to interpret the term 'family' broadly. The fact that a child has a biological parent in the home, or has both a mother and a father, does not mean the child can't also be treated as the child of an employee without a legal or biological relationship for FMLA purposes.

An employee who cares for a domestic partner's child—or whose partner gives birth or adopts a child—is now eligible to take FMLA leave to care for the child.

The new rule applies regardless of sexual orientation or conventional family ties. That means it also covers FMLA leave for extended family members: for example, an uncle who is caring for his sick niece while the child's single parent is called into military duty is eligible.

Medical Certification

The only way an employer may verify or challenge the use of FMLA leave is through the certification process. Employees are not required to provide certification unless the employer requests it.

When an employee requests FMLA leave, you may require medical certification of the need for leave from the employee's health care provider. You have five days to request certification after the employee notifies you of the need for leave (or the date the employee begins leave if it is unforeseeable). Also, you can request a new certification (as distinct from recertification) on an annual basis, provided it is in conjunction with a request for leave. Similarly, an employer may now seek a recertification every six months, irrespective of the stated duration of the condition.

Who Is a 'Health Care Provider'?

The status of a health care provider is not limited to physicians, according to the DOL's rules. A provider is defined as a doctor of medicine or osteopathy authorized to practice medicine or surgery in a specific state or states, or any other person whom the Secretary of Labor deems capable of providing health care services.

Here's a partial list of those considered providers:

- Physicians
- Dentists
- Podiatrists
- Clinical psychologists
- Optometrists
- Chiropractors
- Nurses
- Clinical social workers
- Christian Science practitioners
- Health care providers recognized by the employer or the benefits manager of the employer's group health plan

Employers may use their own certification form or the DOL's Form WH-380-E or WH-380-F, downloadable at **www.dol.gov/whd/fmla/index.htm**.

If you're not satisfied with an employee's certification, you may contact the employee's health care provider directly to *clarify* or *authenticate* a certification form so long as you first give the employee seven days to clear up any deficiencies on the form.

Caution: An employee's "direct supervisor" is prohibited from contacting the health care provider. FMLA rules give this right only to a "health care provider, an HR professional, a leave administrator (including third-party administrators) or a management official." Also, employers can't ask doctors for information beyond what is required by the certification form.

If you disagree with the health care provider's certification that a serious health condition exists, you can request a second opinion from another health care provider at your company's expense. If the second opinion differs from the first, the employee may request a third opinion, also at the company's expense. The decision of the third, neutral health care provider is final.

Note: Health care providers who are employed by the employer or contract with the company on a regular basis may not be used to secure second or third opinions.

During the time it takes to arrange for examinations to obtain second or third opinions, you should provisionally grant the employee FMLA leave. If the medical certification does not support the need for leave, you must designate the time off as paid or unpaid leave in accordance with your organization's existing policies.

For pregnancy or long-term conditions, employers may request medical certification every 30 days. If the minimum period of incapacity listed on the original certification is more than 30 days, you may seek recertification every six months, irrespective of the stated duration of the condition.

Employers may require recertification if:

- The employee requests an extension of leave.
- The employee's (or family member's) health condition has changed.
- The employer receives new information that casts doubt on the current medical certification.

Health Benefits Continue

Group health insurance must remain in place while an employee is on FMLA leave. Employees may choose to forgo health coverage during their leave (perhaps to avoid paying their share of the premiums). If they do that, however, you must reinstate them on the same terms without any qualifying period. The Affordable Care Act prohibits exclusions for pre-existing conditions.

But an employee on leave does not get a free health insurance ride. If the person paid part of the health insurance cost while working, he or she would continue to do so while on FMLA leave.

What happens if an employee on leave does not pay the premiums? If payments are 30 days late, you may terminate coverage. According to FMLA

regulations, you must first notify an employee in writing that you did not receive payment for the premium, and you must wait 15 days after notifying the employee before you canceling coverage. However, at the end of the leave, you still have to restore his or her coverage and benefits to their former status without a waiting period or medical exam.

That's why many employers wind up paying a worker's share of the premiums while he or she is on unpaid leave. If an employer paid the premiums for a worker who never returns, it can demand repayment, provided the person did not have a valid reason for not returning.

Many employers have employees sign a promissory note stating that the employee understands that he or she must repay the employer if the employee fails to make premium payments while on leave.

When an employee doesn't return to work after exhausting FMLA leave, the employer is released from having to maintain the person's health insurance benefits. If at any time during the leave, the employee indicates that he or she will not return to work, the employer can terminate coverage and provide the employee with the option of continuing coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). When an employee exhausts FMLA leave, the employer must decide whether to offer the employee unpaid leave as an accommodation under the Americans With Disabilities Act or to terminate the employee. Termination would be a COBRA-triggering event.

If your company changes its coverage or adopts a new plan that offers new services, such as dental care, the new plan must be made available as well to an employee on FMLA leave.

When a Worker Returns . . .

Employees returning from FMLA leave are entitled to be restored to the same position or an equivalent one with regard to pay, benefits and other terms of employment. The employer must reinstate an employee *immediately* upon return even if the return is earlier than expected. (*Hoge v. Honda*, 384 F.3d 238, 6th Cir., 2004) FMLA regulations define the same or equivalent position as one with "substantially similar duties and responsibilities" entailing "substantially equivalent skill, effort, responsibility and authority."

You have the right to ask returning employees to undergo a "fitness for duty" examination to determine if they are capable of performing the job's essential functions. (Employers may require that the certification specifically address the employee's ability to perform the job's essential functions.)

If an employee can't perform the essential functions, you may place him or her on light duty if such a position is currently open. However, employers are not obligated to create light-duty positions. Furthermore, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work after taking intermittent leave.

Employees who are not currently capable of performing the job's essential functions, but are likely to with further convalescence, are considered disabled

under the ADA. Employers may not terminate such employees simply because they have exhausted their FMLA leave.

Also, returning employees are entitled to any cost-of-living increase or any unconditional raise given to similarly situated employees during their absence. Other raises, such as those given for seniority or length of service, must be paid in accordance with your policy for giving them to employees on non-FMLA unpaid leave.

Returning employees are entitled to shift differential and overtime equivalent to what they were receiving before taking leave, assuming all similarly situated employees are still receiving the differential and overtime. Also, employers must pay any commissions earned or accrued by employees during their FMLA leave. (*Estes v. Meridian One Corp.*, 77 F. Supp. 2d. 722, E.D. Va., 1999)

Bottom line: You cannot penalize employees for taking FMLA leave.

Don't tamper with benefits

Make sure not to tamper with a returning employee's benefits. The person is entitled to everything everyone else receives. This may include group life, health and disability insurance, as well as sick leave, annual leave and educational benefits. Pensions are particularly inviolate.

Although you don't have to grant the person additional benefits and seniority during the leave, you must count leave time as work time for pensions or any other retirement program. If a vesting date falls during leave time, you must treat the date as if the employee had been working. The returning worker is entitled to the same opportunity for bonuses, profit sharing and nondiscretionary payments as other workers.

FMLA leave cannot be considered as an absence for disciplinary reasons, but it can be considered to disqualify employees from a perfect-attendance award or other bonus predicated on specific goals, such as hours worked or products sold.

An exception to reinstatement: key employees

The FMLA allows you to designate a class of highly paid, salaried "key" employees to whom you can deny reinstatement after taking family and medical leave. But such action is allowed only if reinstating them at the end of their leave would cause your business "substantial and grievous economic injury." There's no precise test to determine such an injury, so until case law on this subject develops, no clear guidelines exist. Keep in mind, too, that you cannot deny FMLA leave to key employees, only reinstatement.

To qualify as a key employee, the individual's salary, including base pay and bonuses, must be in the top 10% at your organization. Stock options, benefits and perks are not included in the salary calculation. You do not have to determine whether someone is in the top 10% until he or she requests the leave.

You must notify an employee of his or her status as a key employee in the letter granting FMLA leave. If you don't think the person can be reinstated, the letter must state this as well. Also, you must reveal all possible consequences of

taking leave in regard to re-employment and health insurance coverage as soon as you are aware of them. Any determination as to whether reinstating the key employee would cause "substantial and grievous economic injury" must be made in good faith and fully documented.

Retaliation Is Illegal

Employers may not retaliate against employees who exercise their rights under the FMLA, nor can they discriminate or retaliate against anyone who assists an employee in exercising such rights.

You should examine all your policies to ensure they do not penalize employees who use FMLA leave. The U.S. Supreme Court has ruled that policies appearing to be fair but that actually have a disparate impact on a protected group are illegal. (*Smith v. City of Jackson*, 544 U.S. 228, 2005)

4. Military Family Leave

Prepare to grant eligible employees 'caregiver' and 'active-duty' leave

The National Defense Authorization Act of 2008 imposed two new obligations on employers covered by the FMLA. Both arise out of the military service of employees' close family members.

The first new entitlement, designated as "active-duty leave" (ADL), applies to leave in connection with a family member who is on or called up for active duty. An employee may take ADL for any of several "qualifying exigencies," as defined in the federal regulations *(see below)*.

The second new entitlement, designated as "caregiver leave," permits an employee to take up to 26 weeks in a single year to care for a close family member in the military who has been injured in the line of active duty.

Active-Duty Leave

Covered employees may now use their 12 weeks of unpaid FMLA leave for a "qualifying exigency." To qualify for ADL, an employee must be an immediate family member of a reservist or member of the National Guard called to active duty in the U.S. armed forces (in the U.S. or abroad) or a member of the Regular Armed Forces called to serve in a foreign country.

The law applies to "qualifying" events "arising out of the fact that the spouse, son, daughter or parent of an employee is on active duty (or has been notified of an impending call or order to active duty)." DOL regulations identify eight circumstances that meet the definition of "qualifying" events:

1. Short-notice deployment.
Where the notification of a call or order to active duty is seven days or less, an employee can take leave. Eligibility for this type of leave begins when the service member receives notice of impending deployment or receipt of orders.

2. Military events and related activities.
This leave may be taken to attend official military events, family assistance programs or briefings, including family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations or the American Red Cross as long as the event is related to the service member's active duty or call to covered active-duty status.

3. Child care and school activities.
An eligible employee can take leave for a variety of childcare and school-related reasons for a child, legal ward or stepchild of a covered military member. These activities include arranging for alternative childcare for a military member's child; providing childcare for a military member's child on an urgent, immediate-need basis (but not on a routine, regular or everyday basis); enrolling in or transferring to a new school or daycare facility; and attending meetings with school or a daycare facility staff. To be covered, the activities must be related to the military member's deployment.

4. Financial and legal arrangements.
Leave is available to an eligible employee to make or update financial or legal arrangements addressing the absence of a covered military member including updating wills, powers of attorney and making banking arrangements. Also, employees may take leave to represent the military member before governmental agencies when attempting to obtain, arrange or appeal military service benefits while the military member is on covered active duty or call to covered active-duty status, and for a period of 90 days following the termination of the military member's covered active-duty status.

5. Nonmedical counseling.
This leave is to attend non-healthcare-related counseling for the employee or child, legal ward or stepchild of the military member.

6. Rest and recuperation.
An eligible employee may take up to fifteen days at a time to spend time with a covered military member who is on short-term rest leave.

7. Post-deployment activities.
For a period of 90 days after a covered military member's active duty terminates, an eligible employee may take leave to attend ceremonies, reintegration briefings or other programs, as well as deal with a service member's posthumous return.

8. Parental care.
Should one of the military member's parents become incapable of self-care while the military member is deployed, the spouse, son, daughter or parent of the military member may take leave to secure care for the ailing parent. The employee may provide the urgent, short-term care directly, arrange for care, have the parent admitted to or moved to an appropriate facility, or attend meetings related to the ailing parent's care.

9. Additional activities.
This category covers leave for other events where the employer and employee agree on the time and duration of the leave.

Caregiver Leave

Employers must offer up to 26 weeks of unpaid FMLA leave in a single 12-month period to eligible employees caring for family members with a serious injury or illness incurred in the line of duty. The 26-workweek entitlement is a special provision that extends FMLA job-protected leave beyond the normal 12 weeks of FMLA leave. An eligible employee is defined as the spouse, son, daughter, parent or "next of kin" of a covered service member.

The regulations define "next of kin" as the service member's nearest blood relative (other than the covered service member's spouse, parent, son or daughter) in the following order of priority: blood relatives who have been granted legal custody of the service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of FMLA military-caregiver leave.

An eligible employee may take no more than 26 workweeks of military caregiver leave in any "single 12-month period." The 26-workweek entitlement is to be applied as a per-service-member, per-injury entitlement.

That means an eligible employee may take 26 workweeks of leave to care for one covered service member in a "single 12-month period" and then take another 26 workweeks of leave in a different "single 12-month period" to care for another covered service member, or to care for the same covered service member with a subsequent serious injury or illness. The regulations also provide that the "single 12-month period" begins on the first day the eligible employee takes military-caregiver leave and ends 12 months after that date.

For example, an employee who is eligible for FMLA leave on Jan. 1, 2009, using a calendar-year leave entitlement calculation, could take 12 weeks of leave for a serious health condition starting on Jan. 1, 2009. Upon his return on April 1, 2009, his wife is wounded in Iraq and requires extensive rehabilitation and care. From April 1, 2009, to April 1, 2010, that employee is eligible for up to 26 weeks of caregiver leave.

There are several ramifications for the employer. First, an employee can potentially spend 38 weeks per year on protected leave. Second, employers must now keep track of two separate leave periods. This is complicated enough, but imagine if your employee has a brother in the military who designates him as his next of kin, meaning that if the brother were injured, the employee could also request caregiver leave for him as well. Because military caregiver leave is awarded on a per-service member/per-injury basis, the employee would end up with three separate leave years:

1. The standard FMLA leave year that all employees have
2. The "single 12-month period" for his wife that runs (in the example above) from April to April
3. A second, separate "single 12-month period" for the brother that may very well overlap with the leave period for the wife.

The only consolation is that no employee can ever take more than 26 weeks of leave in a single 12-month period.

Online resources: To access the military leave certification forms, go to **www.dol.gov/whd/forms/index.htm**.

- WH-384: Certification of Qualifying Exigency for Military Family Leave.
- WH-385: Certification for Serious Injury or Illness of Covered Service Member —for Military Family Leave.

5. Frequently Asked Questions

If an employee comes to you and asks for more specifics about the FMLA, will you be ready with answers? Here are some of the most common questions you can expect to field from employees.

Q. How can I determine if I have worked the required 1,250 hours in a 12-month period to qualify for FMLA leave?

A. Your record of hours worked is used to determine whether you have worked 1,250 hours in the 12 months prior to commencement of FMLA leave.

As a rule, the following guidelines may help you estimate if you are close to qualifying:

- Just over 24 hours worked in each of the 52 weeks of the year *or*
- Just over 104 hours worked in each of the 12 months of the year *or*
- Just over 40 hours worked per week for more than 31 weeks (over seven months) of the year.

Q. What if my spouse works for the same employer?

A. If spouses work for the same employer, they may be limited to a combined total of 12 weeks of FMLA leave in a 12-month period for the birth of a child, placement of an adopted or foster child, or the care of a parent with a serious medical condition. For example, if each spouse takes six weeks of leave to be home with a new baby, neither may take more time off to extend their maternity/paternity leave. However, if either one developed a serious health condition or their child became seriously ill, each would have six weeks of FMLA leave remaining to meet their time-off needs. A similar restriction applies to military caregiver leave. If both spouses work for the same employer, they are limited to a total of 26-weeks of caregiver leave during any 12-month period.

Q. Does the law guarantee paid time off?

A. No. The FMLA requires only unpaid leave. But if you have accrued paid leave (such as vacation or sick leave), the law allows you to elect to use some or all of it during the FMLA leave period. Your employer can also require you to use your accrued paid leave to count toward FMLA leave.

Q. What if my employer already provides paid leave for the purposes covered by the FMLA?

A. The FMLA is intended to encourage generous family and medical leave policies, so the law does not interfere with more generous existing policies or laws.

Q. Does leave resulting from a workers' compensation claim count against my FMLA leave?

A. Yes. Leave due to a workplace injury counts as FMLA leave, provided it meets the other necessary requirements (i.e., more than three full calendar days of incapacity, treatment by a health care provider, etc.).

Q. Can my employer count leave taken due to pregnancy complications against the 12 weeks of FMLA leave for the birth and care of my child?

A. Yes. An eligible employee is entitled to a total of 12 weeks of FMLA leave in a 12-month period. If the employee has to use some of that leave for another reason, including a difficult pregnancy, it may be counted as part of the 12-week FMLA leave entitlement. However, when the pregnancy-related difficulties occur early in the pregnancy, a worker may possibly be entitled to additional time off.

For example, assume that a pregnant employee has difficulty early on and must take 12 weeks' leave starting in June. She returns Sept. 1 and works until she has the baby in January of the following year. If she has worked more than 1,250 hours in the calendar year and her employer uses the calendar method for calculating FMLA eligibility, she would be entitled to another 12 weeks' unpaid leave to care for the newborn child. If, however, the employer uses the "rolling" method of calculating FMLA leave eligibility, she would not be entitled to additional time off under the FMLA. *(See measuring-year methods, page 16.)*

Q. What about incapacity that results from pregnancy? Does it qualify as FMLA leave?

A. Yes. Incapacity that results from pregnancy is considered a serious health condition and may be counted in the 12 weeks of FMLA leave.

Q. Do I have to submit medical records to my employer to prove I have a serious health condition?

A. No. You do not have to provide medical records. But your employer has the right to request from you medical certification confirming that a serious health condition exists. That way, your employer can determine whether you qualify for FMLA leave.

Your employer may request that you get a second opinion from another health care provider (at the employer's expense). If the second health care provider won't certify that your condition meets the criteria as a serious health condition, you may be asked to provide a third, tie-breaking certification, again paid for by your employer. If the third health care provider also does not believe that your condition qualifies, you're not entitled to leave.

Q. Can my employer require me to return to work before my certified FMLA leave is over?

A. Generally, no. However, if your need for leave extends beyond the amount originally certified, your employer may require you to be recertified. If you fail to provide recertification, your employer can deny the additional leave or count any additional time off as non-FMLA leave.

Q. Are there any restrictions on how I spend my time while on FMLA leave?

A. Employers with internal policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. Otherwise, the employer may not restrict your activities. The protections of FMLA do not cover situations where the reason for leave no longer exists, where employees do not provide required notices or certifications, or where employees misrepresent the reason for leave.

Also, if your activities on leave appear to contradict your stated reason for leave (e.g., golfing when supposedly out on leave for back surgery), that can result in a finding of benefits fraud on your part, which is not FMLA protected.

Q. Can my employer ask about my leave during my absence?

A. Yes. Your employer may ask you questions to confirm whether the leave qualifies under the FMLA and may require periodic reports on your status and intention to return to work. If your employer wants another opinion, you may be required to obtain additional medical certification at the employer's expense. Your employer may contact your doctor (but your direct supervisor may not) to clarify information in the medical certification or to confirm it if, after seven days, you have not resubmitted the certification. Such inquiries may not seek additional information regarding your health condition or that of a family member.

Q. Will I lose my job because I take FMLA leave?

A. It is illegal for any employer to interfere with, restrain or deny the exercise of any right provided under the law. Employers can't consider the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary action.

Also, employers can't count FMLA leave under "no fault" attendance policies. DOL regulations state that absences for FMLA-qualifying events can't be counted as occurrences under a no-fault attendance policy. That means if employees are subject to a collective bargaining agreement that includes a "no-fault" attendance policy, where they are assessed points for violations of the company's policy, they can't be terminated if they acquire too many points as a result of FMLA leave.

Under limited circumstances, an employer may deny reinstatement to work to certain highly paid, salaried employees if doing so at the end of the leave would cause the business "substantial and grievous economic injury." But even these "key" employees still have full rights to take FMLA leave.

Q. Are there other situations when my employer can deny me FMLA leave or reinstatement to my job?

A. Employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or otherwise terminated if they continued to work during the FMLA leave period. In other words, if a general layoff occurs while you are on leave, you may lose your job along with everyone else.

If you give firm notice that you do not intend to return to work, you lose your entitlement to FMLA leave. You would also lose your entitlement and the right to reinstatement if you were unable to return to work after exhausting your 12 weeks of FMLA leave within the designated 12-month period.

In certain circumstances, an employer may deny reinstatement if the worker fails to provide a requested medical certification of his or her fitness to return to work, or the employer may delay reinstatement until the employee submits the certification.

However, employees may have additional rights under the ADA if the serious health condition is also considered a disability. The employer may be required to make reasonable accommodations to allow the employee to return to work or to take some additional time off beyond the 12 weeks of unpaid FMLA leave. That time might, for example, include leave to attend physical or mental therapy sessions or an altered schedule of breaks and start times to accommodate medication needs. The return to work may also trigger the need for physical accommodations, such as a wheelchair-accessible workplace.

Q. Can I be fired for complaining about an FMLA violation?

A. No, your employer cannot take any adverse employment action on that basis. It's against the law to fire or otherwise discriminate against an employee for opposing a practice made unlawful under the FMLA.

Q. Do I still get bonuses during and after I return from FMLA leave?

A. The FMLA requires that employees be restored to the same or an equivalent position. If you were eligible for a bonus before taking FMLA leave, you would be eligible for the bonus upon returning to work. However, your employer can count your FMLA-qualifying absence against you for perfect-attendance or hours-worked bonuses.

Finally, there are limits to what benefits you can earn after you return. The FMLA does not require that employees on FMLA leave be allowed to accrue benefits or seniority. For example, you might not meet a sales quota to qualify for a bonus if you are on FMLA leave. Your employer isn't required to make any special accommodation for you as a result of your absence.

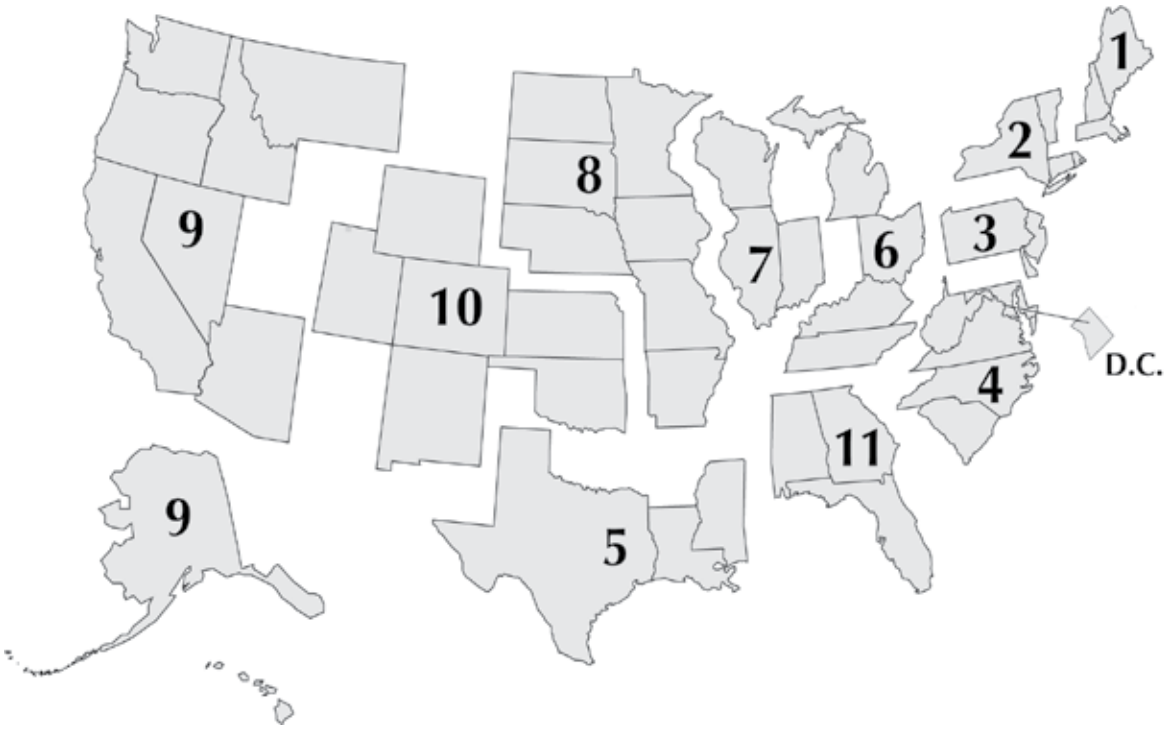
6. Related Court Rulings

Which decisions affect your company?

This chapter describes several FMLA cases decided by district and appellate courts and gives you a general sense of how the courts are interpreting the law's provisions. Keep in mind that only those decisions rendered by judges in your jurisdiction, as well as by the U.S. Supreme Court, are binding on your organization. *(See map below.)*

Nevertheless, courts often look to other jurisdictions for guidance when addressing issues for the first time. As a result, rulings from other jurisdictions can be instructive when making your own policy decisions.

Circuits of the U.S. Court of Appeals



EARNING FMLA ELIGIBILITY

Plaintiffs often seek to join two smaller employers that provide services to each other, such as a company and an outside firm handling administrative tasks, to satisfy the FMLA's 50-employee threshold. Alone, these companies are not big enough to trigger the FMLA, but if a "joint-employer" relationship exists, the combined companies may reach the magic number of 50 and the FMLA will apply.

The 7th Circuit looked at the "joint employer" issue under the FMLA and found that the law did not define "joint employer," so it took that responsibility upon itself and held: "In determining whether a joint employer exists under the FMLA, courts should consider the amount of control each alleged employer exerts over the working conditions and day-to-day operations of the employee." (*Moldenhour v. Tazewell-Pekin Consol. Community Center,* 536 F.3d 640, 7th Cir., 2008)

In *Tazewell,* the court found that no "joint employer" relationship existed. The employer contracted for services from the city of Pekin, Ill., but there was no evidence that either Pekin or Tazewell County controlled the employer's operations or made hiring, firing, compensation or other decisions affecting working conditions.

Importantly, the court emphasized that the FMLA's small-business exemption recognizes that smaller organizations will not be able to operate if they are unable to outsource administrative services.

A nurse who first worked for a temp agency and was then hired permanently can add the time spent with the temp agency to his time as a permanent employee to meet the minimum 12-month employment requirement for FMLA leave.

A few months into his permanent employment, the nurse turned out to be a difficult employee and received a negative performance appraisal. He reacted emotionally and said he needed time off because he was under stress. His doctor certified that he had a serious health condition; however, the employer fired him because it did not think he was eligible for FMLA leave since he had worked permanently for only nine months.

The court disagreed, since the nurse had worked more than 12 months when his temp assignment was added into the calculation. (*Mackey v. Unity Health System,* 2004 WL 1056066, W.D. N.Y., 2004)

A part-time worker hired as an independent contractor to run errands for a credit union is in fact an employee under the FMLA and entitled to unpaid leave, a federal trial court ruled. It just so happened that the messenger was the 50th "employee," triggering FMLA benefits for everyone else working at the credit union. As a result, he and all the others became eligible for 12 weeks of unpaid FMLA leave. (*Holliday v. Vacation Federal Credit Union,* 2004 WL 903902, N.D. Ohio, 2004)

An employee was approaching her one-year anniversary when she learned her pregnancy was high-risk. She provided her employer with the medical restrictions her doctor had placed on her. The employer terminated her the day before her one-year anniversary.

She sued and the court concluded that when calculated properly, she was eligible for FMLA when terminated. Further, the employer's actions were so obviously

designed to interfere with her FMLA rights and retaliate against her for using them that it awarded her back pay, pre-judgment interest and liquidated damages. An appeals court ruled a jury, not the judge should determine damages, but the FMLA violation stood. (*Wages v. Stuart Management Corp.,* 798 F.3d 675, 99 Empl. Prac. Dec. P 45, 165 Lab. Cas. P 36, 8th Cir. 2015)

Obtaining a Second Opinion

The FMLA explicitly allows an employer to obtain a second medical opinion when it disagrees or questions the medical certification of an employee's serious health condition. The FMLA requires the employer to pay for the second opinion (and third, if necessary), and employees must agree to undergo the examination needed to issue that second opinion.

Following an altercation between an assistant principal and student, an employee requested and was granted leave. However, the school district required him to attend three sessions with a therapist and one disciplinary conference while he was on leave. He sued, arguing these required meetings interfered with his FMLA rights.

The court found the three therapy sessions were necessary for the employer to develop the second opinion and therefore did not violate the FMLA. The disciplinary meeting was part of the employer's standard procedure in similar cases and the employee was therefore obligated to participate as part of his employment. *(Adams v. Anne Arundel County Public Schools,* 789 F.3d 422, 4th Cir. 2015)

Certification

If you believe the medical certification an employee provided was insufficient, give the employee a chance to provide more detailed information before taking any disciplinary action.

An employer fired an employee for absenteeism after she submitted an insufficient medical certification to cover her absences. She was later diagnosed with diabetes and high blood pressure, which she attributed as the causes for her absences when she sued the employer. The Circuit Court hearing her appeal ruled the employer failed to give her a chance to "cure" the certification as required by FMLA regs. (*Hansler v. Lehigh Valley Hosp. Network,* 798 F.3d 149 3rd Cir. 2015)

Returning to the Same or Equivalent Position

An employee who was not performing well e-mailed his employer suggesting he might perform better in another position and listed several possibilities. Two days later he went on FMLA leave and upon return was placed in a position that paid $55,000 less than his previous job. He sued, arguing the company failed to return him to the same or equivalent position as the FMLA requires. The employer countered that it simply granted his request for a transfer prior to the start of his leave. The trial court and appeals court both sided with the employer. (*Allen v. Wal-Mart Stores, Inc.,* 602 F. Appx 617 6th Cir. 2015)

Honesty is usually the best policy, even if it hurts an employee's feelings. An employee had been struggling since her promotion to a new, more demanding position. The employer had decided to move her to a new position it thought better suited her abilities. But before it informed her of the change, she announced she was pregnant. The company waited until she returned from maternity leave to inform her of her new position. She argued the company failed to restore her to the same or equivalent position and sued under the FMLA. The case will go before a jury. (*Brown v. Diversified Distribution Systems, LLC,* 801 F.3d 901, 25 Wage & Hour Cas. 2d (BNA) 396, 8th Cir. 2015)

An employer asserted at trial that it would suffer "substantial and grievous economic harm" if it reinstated an employee it argued was a key employee. When the employer could produce no evidence of this "harm," the jury sided with the employee. The appeals court refused to overrule the jury. (*Lane v. Grant County,* 610 Fed. Appx. 698, 25 Wage & Hour Cas. 2d 29 ,9th Cir. 2015)

Notice Requirements

A police officer suffered chest pains at work and left to go to the hospital. He provided his employer with a doctor's note saying his workday should be reduced to eight hours, but he never specifically requested FMLA leave. One co-worker harassed him by wearing a t-shirt that read, "I refuse. I have a note from my mom." He ultimately resigned, but then filed an FMLA suit. The court of appeals hearing the case reasoned that leaving work and providing a doctor's note was sufficient FMLA notice for the employer. The employer's lack of action and toleration of the harassment could have rendered his resignation a constructive discharge. The court remanded the case for a jury to decide these issues. (*Festerman v. Cty. of Wayne,* 611 F. Appx 310, 311, 6th Cir. 2015)

A federal appeals court ruled that a man who was not told by his employer that the FMLA guarantees only 12 weeks of unpaid leave could sue for interference with the exercise of his FMLA rights.

The mechanic had taken more than 12 weeks off when he tried to return. He was told he no longer had a job because he had not returned at the beginning of the thirteenth week. He then cried foul, telling the court that if he had known he had only a total of 12 weeks of leave, he would have returned to work earlier on a part-time basis.

The court concluded that by not telling the mechanic directly how much time he had available under the law and how he could use that time, the company might have interfered with his rights. (*Conoshenti v. Public Service Electric and Gas,* 364 F.3d 135, 3rd Cir., 2004)

A manager took eight weeks off to deal with heart disease and was told upon his return that he had to work 52 hours per week even though his doctor advised him to work no more than 40 hours. Then he fell on the ice and had to use the rest of his leave entitlement.

He sued, alleging that he should have been allowed to use his remaining eligibility to reduce his workweek from 52 hours to 40 hours. The court agreed that by not telling

the worker about intermittent leave, the employer had interfered with the manager's FMLA rights. (*Whitney v. Wal-Mart Stores,* 2004 WL 1084612, D.Me., 2004)

A firefighter who was often late because he was depressed over his pending divorce was not eligible for FMLA intermittent leave because he never told his supervisors before he took the time off (that is, before he arrived late). Employers are entitled to notice when it is practical and do not have to take excuses after the fact. (*Henson v. Bell Helicopter Textron Inc.,* 2004 WL 238063, N.D. Texas, 2004)

Calling in to a security office meets FMLA notice requirements, triggering the company's responsibility to determine if the worker is eligible for FMLA leave.

Because the standard procedure at one company was for workers who would be absent to call the security office and report their absence, notice to the gate was notice to the company. (*Cavin v. Honda of America,* 346 F.3d 713, 6th Cir., 2003)

An employee suffered from heart attack symptoms and asked for FMLA leave. The employer provided a form with a box checked indicating the employee was eligible for leave. He had read in the employee manual that employees who worked 1,250 hours within the previous calendar year and had been on the job for a year were eligible for FMLA leave. The employer, however, did not employ 50 employees in a 75-mile radius and denied the leave request.

The employee sued and, citing the number of employees, moved to have the case dismissed. The court, however, noted the statements on the certification form and the employee manual as promises the employee relied on when seeking treatment. So even though the employer is not covered by the FMLA, the employee can bring his case before a jury. (*Tilley v. Kalamazoo County Road Com'n,* 777 F.3d 303, 125 Fair Empl.Prac.Cas. (BNA) 1696, 6th Cir. 2015)

Defining 'Serious Health Condition'

The employee, an alcoholic, worked for Interstate Brands Corp. (IBC). IBC's attendance policy consisted of a points system, and once an employee accrued 32 points, he was subject to termination. Leave taken under the FMLA did not accrue points.

The employee sought FMLA leave for a period covering July 29 to Aug. 11. His physician submitted a certification covering those days. Another physician submitted a disability form for the employee so that he could be paid for his missed work. There was a slight discrepancy in the dates covered by the leave between the forms. IBC terminated the employee under its attendance policy because he was absent from work July 31 through Aug. 3 with no entitlement to FMLA leave and the three absences put him over 32 points under the attendance policy.

The employee sued but lost. The federal court found that DOL regulations provide that a serious health condition for substance abuse applies only to those days on which the employee is receiving treatment. (*Darst v. Interstate Brands Corp.*, 512 F.3d 903, 7th Cir., 2008)

An employee who worked 40 hours per week for her main employer and another 20 hours a week at another company doing the same type of work could not argue

that she had a serious health condition that prevented her from working for her main employer but not for her second employer.

The worker claimed she suffered from stress and needed FMLA leave. The court dismissed her case, calling her "serious health condition" a "selective disability." (*Lonicky v. Sutter Health Central*, 124 Cal. App. 1139, Cal. Ct. App., 2004)

An employee who tells her supervisor she is "having a mental breakdown" has notified her employer of her need for FMLA leave and that she may have a serious health condition. That statement and others indicating she could not "come back" were enough to count as a request for FMLA leave.

The company violated the FMLA when it fired her instead of offering her the opportunity to show she suffered from a serious health condition. (*Ruiz v. Ostbye & Anderson*, 2004 WL 2237051, D. Minn., 2004)

An employee who is too stressed out to come to work but can do everything else required of him at home and elsewhere may still be eligible for FMLA leave. Being stressed out and depressed while at work is a serious health condition if a health care provider is willing to certify that it is and if it means the worker cannot do his current job while so afflicted. (*Conrad v. Eaton Corp.*, 303 F.Supp.2d 987, N.D. Iowa, 2004)

A worker who took time off to see his dying mother was not covered by the FMLA because he never told his supervisor that he needed to help his mother make medical decisions and then help his father with funeral arrangements. If he had, he might have been entitled to leave, since the FMLA covers time off to care for a parent facing a serious health condition. (*Fiota v. Manhattan Woods Golf Enter.*, 304 F.Supp.2d 541, S.D. N.Y., 2004)

A father who wanted to take summers off to supervise his teenage son while he was not in school is not entitled to unpaid FMLA leave at the end of every school year. A court concluded that the son's attention deficit disorder did not amount to a serious health condition that required personal supervision all summer. (*Perry v. Jaguar of Troy*, 353 F.3d 510, 6th Cir., 2004)

An employer's sole means of challenging a worker's eligibility for FMLA leave due to a serious health condition is through the medical certification process. An employee who submits a certification showing she has a serious health condition is eligible for FMLA leave (assuming she meets time-on-the-job and hours-worked standards and her company is a covered employer).

An employer that wants to challenge whether the worker has a serious health condition must ask for another certification and follow the procedures in the regulations. The request must be timely, or the employer cannot challenge the original certification. (*Smith v. Univ. of Chicago Hosp.*, 2003 WL 22757754, N.D. Ill., 2003)

A worker who was eligible for intermittent leave to relieve flare-ups of rheumatoid arthritis was fired when her supervisor caught her shopping for a baby shower gift after she left work early. A federal court concluded that the firing violated the FMLA.

Workers who are eligible for intermittent leave do not have to rush home and lock the door; other activities consistent with their medical limitations cannot be restricted.

In this case, the worker could not use her computer mouse due to pain but could pick up a stuffed animal at a store. (*Jennings v. Mid-American Energy Co.*, 282 F.Supp.2d 954, S.D. Iowa, 2003)

DAMAGES

A worker who stopped coming to work and never told his employer why won a lawsuit against his former employer and saw his award doubled because the court thought his employer had acted in bad faith. The worker's relatives had told his employer that he seemed to be suffering from health problems.

When the company fired him, he provided evidence that he did have a serious health condition. The appeals court upheld the jury's award of more than $140,000 plus attorneys' fees. (*Byrne v. Avon Products*, 328 F.3d 379, 7th Cir., 2003)

A worker with an extensive history of psychiatric problems won double damages after his FMLA leave was used against him when he asked for a transfer. The worker had taken extensive time off for post-traumatic stress disorder, severe anxiety, paranoia and bipolar personality problems.

When the employer realized its mistake, it paid the worker in full for his lost wages. Still, the court considering his case allowed double damages because of the violation. (*Jordan v. United States Post Office*, 379 F.3d 1196, 10th Cir., 2004)

Employers that call workers away on FMLA leave and ask them to come back to work may face an interference lawsuit. When a supervisor called a salesperson out on FMLA leave and asked for information about an account, the salesperson refused to provide any information. Instead, he told his supervisor that his doctor had advised him not to do any work. The supervisor then threatened to come to his house to pick up "company property" and fire him in front of his family.

The salesperson sued and won more than $200,000 as compensation. (*Arban v. West Publishing*, 345 F.3d 390, 6th Cir., 2003)

SUPERVISOR LIABILITY

When a school teacher hurt her foot, she took FMLA leave for several weeks. The HR director and the school district decided to fire her because they needed a teacher "in the classroom on a consistent basis." The teacher sued the district, plus the HR director personally.

The 3rd Circuit allowed the personal lawsuit to go forward. *Reason:* The FMLA allows an employee to sue his or her employer, and the law defines "employer" as "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." The court said that means any manager or supervisor who recommends or approves FMLA decisions. (*Hewett v. Willingboro Board of Education, et al.*, No. 05-2035, 3rd Cir., 2006)

Supervisors can be personally liable for violations of the FMLA, as a supervisor of two older workers learned the hard way. When the workers, ages 61 and 55, asked for intermittent leave due to their increasing health problems, the supervisor said

no. Then the supervisor suspended the workers when they took the time off anyway. Angry, they sued him personally, asking that payment come out of his personal assets rather than the employer's. (*Davis, et al. v. City of Chicago, et al.*, 2004 WL 728215, N.D. Ill., 2004)

Other Legal Issues

There's no protection for an employee who is fired for an appropriate cause but also happens to be on leave. In one case, the employee was given FMLA leave for a nervous breakdown. During her leave, an audit revealed substantial confusion and disarray in the accounts the employee was responsible for. The 1st Circuit dismissed the plaintiff's summary judgment charge. (*Fantini v. Salem State College,* No. 07-2026, 1st Cir., 2009)

If an employer honestly believes an employee is fraudulently using FMLA leave, the employee can be fired. In this case, the employee worked the third shift at the company's car manufacturing plant and suffered from migraine headaches, a condition that periodically required her to take medical leave from her job. As the employee's use of intermittent leave became more frequent, the company grew suspicious that she was misusing her FMLA leave.

Believing that the employee was working for her husband's lawn mowing company during periods of leave, the company hired a private investigator. She was caught misusing her FMLA leave and terminated. The court found the employer's suspicion honest and legitimate. (*Vail v. Raybestos Prods. Co.,* 533 F.3d 904, 7th Cir., 2008)

An employer can't force a worker to give up FMLA rights in exchange for higher pay or better benefits. (*Faris v. Williams,* 332 F.3d 316, 5th Cir., 2003)

Time off for an FMLA purpose cannot be counted as an unexcused absence under a company's no-fault attendance policy. In this case, a worker took vacation rather than FMLA leave to care for his ill spouse. The employer knew he was substituting the paid vacation because he could not afford to take unpaid leave. Therefore, the employer should not have counted the time against the attendance policy. (*Taylor v. Invacare,* 64 F. Appx 516, 6th Cir., 2003)

Rights under the FMLA survive death, so a spouse may sue for violations on behalf of a deceased husband or wife. (*Collins v. OSF Healthcare Systems,* 262 F.Supp.2d 959, C.D. Ill., 2003)

A radiologist had been warned about repeated absenteeism. After a final warning, he performed a CT scan that yielded poor images. A week later he began FMLA leave. When he returned, his supervisor terminated him for the bad CT scan and attendance issues. He sued, claiming the employer interfered with his FMLA rights and retaliated against him for taking leave. The court noted that the employer allowed him to take his full leave when it dismissed the interference claim and ruled the employer had a legitimate reason to terminate him when it dismissed the retaliation claim. (*Beese v. Meridian Health Sys., Inc.,* No. 14-3627, 2015 WL 6659657 3d Cir. Nov. 2, 2015)

Sometimes an employee's health deteriorates to the point that she can no longer perform her job's essential functions. A teacher developed renal failure and it began to interfere with her ability to teach. The school district placed her on administrative leave and twice had her take a fitness-for-duty examination. She failed both times. Seeing no possible accommodation, it terminated her. She sued, but her inability to perform the job's essential functions sunk both her FMLA and ADA claims. (*Belasco v. Warrensville Heights City School District,* 25 WH Cases 2d (BNA) 1404, 6th Cir. 2015)

An outside salesman believed the $70,000 "draw" his company paid was his base salary. His company saw it as an advance against commissions. When he took FMLA leave, the company stopped the "draw" and informed him he owed the company $20,000. He quit rather than incur additional debt. He argued the company constructively discharged him and therefore prevented him from exercising his FMLA rights. The company countered that he quit and therefore was not discharged. The Appeals Court ruled a jury should decide. (*Hurtt v. International Services, Inc.,* 25 WH Cases2d 559, 6th Cir. 2015)

A teacher suffered from diabetes and cared for a son with sickle cell anemia. When the school district fired him, it relied on his poor attendance record. He sued, arguing absences due to his and his son's illnesses were protected. The federal court refused to dismiss the case sending it to a jury instead. (*Preddie v. Bartholomew Consolidated School Corp.,* 799 F.3d 806, 127 FEP 1617, 7th Cir. 2015)

ISBN 1-880024-26-8

BFMLA1604