
THE FAMILY AND MEDICAL LEAVE ACT

Table of Contents

	<u>Page No.</u>
1. What is the FMLA?	1
2. Who is a Covered Employer Under the FMLA?	1
3. Which Employees are Eligible for FMLA Leave?	1
4. How Long is 1,250 Hours	1
5. What are the Categories of FMLA Leave?	1
6. How Much Leave is Eligible Employee Entitled to?	5
7. What are the Notice Requirements for FMLA Leave?	7
8. What are the Medical Certification Requirements for FMLA Leave?	8
9. What are the Record Keeping and Employer Notice Requirements of the FMLA?	9
10. Must an Employer Continue an Employee's Benefits During FMLA Leave?	10
11. What Reinstatement Rights Does an Employee Returning From FMLA Leave Have?	11
12. What Does the FMLA Prevent an Employer from Doing?	12
13. Employees' Possible Remedies under the FMLA	13



THE FAMILY AND MEDICAL LEAVE ACT

1. **WHAT IS THE FMLA?** The Family and Medical Leave Act ("FMLA") is a federal law requiring covered employers to provide up to 12 workweeks of unpaid leave to eligible employees within a 12-month period. Such employers must continue health insurance benefits for an employee on FMLA leave and at the end of the leave, reinstate the employee to his or her former position or an equivalent position.

2. **WHO IS A COVERED EMPLOYER UNDER THE FMLA?** An employer is covered under the **FMLA** if it has 50 or more employees on its payroll for each working day of 20 or more weeks during either the current or prior calendar year. Public employers, and public and private schools, are covered by the FMLA regardless of the number of employees that they have.

3. **WHICH EMPLOYEES ARE ELIGIBLE FOR FMLA LEAVE?** Employees are eligible for FMLA leave if they work for a covered employer and if all of the following are true:
 - A. They have been employed by the employer for at least 12 months (not necessarily consecutive) before the beginning date of the requested leave.
 - B. They have worked at least 1,250 hours in the last 12 months.
 - C. They work at a site where the employer has 50 or more employees within 75 miles.

4. **HOW LONG IS 1,250 HOURS?** An employee must have actually worked at least 1,250 hours during the preceding 12 months to qualify for leave. Time paid but not worked and time off work on FMLA leave does not count toward FMLA eligibility. A full-time employee who works 40 hours per week for each of the 52 weeks in a year works 2,080 hours in a year, so an employee needs to average only slightly more than 24 hours per week to meet the 1,250 hour test.

5. **WHAT ARE THE CATEGORIES OF FMLA LEAVE?**
 - A. **New Child Leave.** There are several categories of New Child Leave, and they are governed by some special rules. New Child Leave cannot be taken intermittently or on a reduced schedule unless the employer agrees. The leave must all be taken within 12 months after the birth or placement of the child. New Child Leave must be allowed for the following:



-
-
1. **Birth of a Child.** Leave for the birth of a child. Both fathers and mothers are eligible for this leave (need not be married).
 2. **Care for the Newborn.** A parent or a person *in loco parentis* may take time off work to care for the newborn child—regardless of the child's health. If the time off is to help care for a child who has a serious health condition, the leave is not "New Child Leave," but rather is "Serious Health Condition Leave."
 3. **Placement with the Employee of a Son or Daughter for Adoption or Foster Care.** The regulations provide that this type of leave is available not only for the actual placement or adoption, but for procedures related to the adoption or placement such as counseling, legal consultations, visits to an adoption agency and trips to pick up the child.
 - a) The adoption need not be through a licensed placement agency.
 - b) The regulations define "foster care" as 24-hour care for children in substitution for an away-from-the-child's parents or guardian. Only foster care arrangements under the color of law qualify.
- B. **Other Considerations.** If a husband and wife work for the same employer, the total New Child Leave available to both parents is 12 weeks. The leave may be taken in any combination, for example, the mother may take seven weeks and the father, five weeks. This limitation does not, however, apply to parents who are not married and work for the same employer. If two employees are not married and have a child, each parent is entitled to 12 weeks of leave. In addition, married employees are entitled to the remainder of the 12 weeks for other qualifying FMLA purposes.
- C. **Serious Health Condition Leave.**
1. **Employee.** An employee may take FMLA leave if s/he is unable to perform an essential function of his/her job due to the employee's own serious health condition.
 2. **Family Member.** An employee may take FMLA leave to care for a family member who has a serious health condition. Covered family members include:

-
-
- a) Spouse. As defined by state law in which employee lives.
 - b) Child. Leave may be taken for a child under the age of 18, or a child over 18 who is incapable of self-care because of physical or mental disability. This includes not only biological children, but step and foster children, and any child to whom the employee stands *in loco parentis*.
 - c) Parent of Employee. This includes a biological parent or an individual who stands, or stood, *in loco parentis* to an employee when the employee was a child.

This type of leave is only available for an employee who is needed to provide care. An individual is needed to provide care when any of the following exist:

- (1) The family member is unable to care for his own basic needs. Basic needs include medical, hygiene, nutritional needs or the individual's safety;
- (2) The family member is unable to transport himself to the doctor for needed care, or to other necessary places;
- (3) The employee is needed to provide "psychological comfort" to the family member;
- (4) The employee is needed to substitute for others giving such care; or
- (5) The employee is needed to make arrangements for care of the covered family member.

D. Definition of "Serious Health Condition."

- 1. A serious health condition is defined as an illness, injury, impairment or physical or mental condition that involves any of the following:
 - a) Inpatient Care. Any absence or tardiness caused by a condition involving inpatient care (for example, an overnight stay) in a hospital, hospice or residential care facility, and also including any follow-up treatment or recovery period.

-
-
- b) Absence Plus Treatment. Any absence or tardiness caused by a condition requiring absence from work, school or other daily activities of more than three consecutive calendar days, that involves “continuing treatment” by or under the supervision of a health care provider. This includes any subsequent incapacity or treatment relating to the same condition.
 - c) Chronic Conditions. Any absence or tardiness caused by a chronic or long-term health condition that requires periodic treatments, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity. Examples may include migraine headaches, depression, ulcers, asthma, and epilepsy.
 - d) Permanent/Long-Term Conditions. Any absence or tardiness caused by a permanent or long-term condition for which treatment may not be effective, if the victim is under the continuing supervision of a health care provider. Examples may include Alzheimer’s disease, a severe stroke, or terminal cancer.
 - e) Multiple Treatments (Non-Chronic Conditions). Any absence or tardiness caused by multiple treatments and/or recovery from treatment involving restorative surgery or a condition that might cause an incapacity of more than three days if not treated. Examples include chemotherapy for cancer, physical therapy for arthritis, dialysis for kidney disease.
 - f) Pregnancy. Any absence or tardiness caused by pregnancy or prenatal care, including morning sickness.

E. **Definition of Treatment.** A covered employee or family member is considered to be under the "continuing treatment" of a health care provider for any of the following:

1. The individual is treated two or more times for the condition by a health care provider or under the health care provider's supervision;
2. The individual is treated two or more times for a given condition by a "provider of health care services" under the orders of a health care provider;
3. The individual is treated by a health care provider at least once which results in a “regime of continuing treatment” under the supervision of the health care provider.

4. Over-the-counter medications, bed rest, drinking fluids, exercise and other similar activities that can be initiated without a visit to a health-care provider are not considered a regimen of continuing treatment under the FMLA.

F. **Definition of Health Care Provider.** The statute specifically notes that a doctor of medicine or osteopathy and any other person determined by the DOL “to be capable of providing health care services” is a health care provider. These include:

Physicians, podiatrists, dentists, clinical psychologists, optometrists, nurse practitioners, nurse midwives, Christian Science practitioners, chiropractors (in some circumstances), and any other health care provider recognized by the employer’s health plan.

G. **Conditions Not Covered.** Short-term conditions for which treatment and recovery are very brief are not covered. Routine physicals, eye examinations, and dental treatments are not covered. Likewise, cosmetic treatments (such as most treatments for orthodontia or acne) that are not medically necessary are not covered, unless hospitalization is required.

H. **Substance Abuse.** Substance abuse can constitute a serious health condition, but an employer need not tolerate substance abusers except to allow them to take FMLA leave for treatment. An employee’s absences because of substance abuse are not protected.

6. HOW MUCH LEAVE IS ELIGIBLE EMPLOYEE ENTITLED TO?

A. **How Is The 12-Month Period Computed For Purposes of FMLA Leave?** Employers are permitted to select a uniform method of computing the 12-month period. Alternatives include a fixed 12-month period (*e.g.*, a calendar year or an employment year) or a rolling 12-month period (which looks back from when the employee takes leave or which looks forward from the first date the employee takes leave).

B. **What Is A "Workweek" For Purposes of The FMLA?** An eligible employee working for a covered employer is entitled to 12 "workweeks" of unpaid FMLA leave. A workweek is defined as the employee's normal full workweek. For example, if an employee normally works full-time, five days/40 hours, that employee will be charged for a full week of leave for each five days he misses. If the employee takes one day of FMLA leave, he will be charged with one-fifth of a week.

Overtime hours missed are only counted if they are "usual and normal." If the overtime is usual and normal, then the employee will actually be entitled to more leave than an employee who works 40 hours in a week if the employee takes intermittent leave.

C. Intermittent Leaves And Reduced-Schedule Leaves.

1. **Intermittent Leave.** Intermittent leave is leave taken in less than a full workweek— an hour or a day at a time, for example.
2. **Reduced Schedule Leave.** Reduced schedule leave means part-time or modified work schedules. An employee who is unable to work overtime because of a serious health condition is considered to be on reduced schedule leave.
3. **Employee Scheduling.** When possible, an employee must try to schedule his/her leave to avoid disrupting the employer's operations.

D. Basic Rules Regarding Intermittent or Reduced Schedule Leave.

1. **New Child Leave.** New child leave may be taken as intermittent leave or reduced schedule leave only with the employer's agreement.
2. **Serious Health Condition Leave.** Serious health condition leave (for the employee's own condition or to care for a covered family member) may be taken as intermittent or reduced-schedule leave if there is a medical need for leave and the medical need can best be accommodated by intermittent or reduced-schedule leave.
3. **Managing intermittent or reduced schedule leave.**
 - (a) For intermittent leave or reduced schedule leave for planned medical treatment, the employer may transfer the employee to an available alternative position that better accommodates the recurring periods of leave. The alternative position must have equivalent pay and benefits. When leave is no longer required, the employee must be returned to his/her position or an equivalent position.
 - (b) Where an exempt (salaried) employee takes intermittent or reduced schedule leave, the employer may make deductions from the employee's salary for any hours of leave.

7. **WHAT ARE THE NOTICE REQUIREMENTS FOR FMLA LEAVE?**

A. **The Requirement for Advance Notice.** When possible, an employee is required to give advance notice of the need for leave. However, the employee need not specifically ask for "FMLA leave." The employee is only required to notify the employer of a need for leave and the reason for the leave. It is then up to the employer to ascertain that the leave in fact qualifies under the FMLA.

B. **Requirements.**

1. If the need for the leave is foreseeable, the employee must give 30 days' advance notice or give notice "as soon as practicable." The regulations state that "as soon as practicable" means within one or two business days of the time that the employee knows of the need for the leave.
2. If the employer has not designated a leave as FMLA and the employee wants it so designated, the employee must so notify the employer within two business days of returning to work that the leave was for FMLA purposes. If the employee does not do so, he cannot later assert FMLA protections. Unfortunately, employers still retain the responsibility for determining if a leave is FMLA qualifying and the employee need only give the reason for the leave to be entitled to the FMLA's protections.
3. The employee need only give verbal notice of the need for the leave and the employer can require written follow-up only if the employer requires written notice for other types of leaves.
4. The employee is required to give notice himself unless he is unable, in which case the employee's representative may give such notice.

C. **Failure to Give Adequate Notice.**

1. If the employee fails to give 30 days' notice for new child leave or a foreseeable serious health condition leave, and does not have a reasonable excuse for the delay, the employer may delay the leave for a period of 30 days from the date notice is received. But, the employer must be able to demonstrate that the need for the leave was foreseeable and that the employee had actual notice of the notice requirements.
2. Where the employer has less stringent policies for requesting other types of leave, these policies also apply to FMLA leave.



D. **Notice of Intent to Return to Work.**

1. The employer may require the employee to report periodically on the employee's status and intent to return to work as long as the same requirements are placed on employees on other types of leave.
2. Only if the employee gives unequivocal notice of the intent not to return to work do the employer's obligations under the FMLA end.

8. **WHAT ARE THE MEDICAL CERTIFICATION REQUIREMENTS FOR FMLA LEAVE?** In evaluating a request for FMLA leave, an employer may require employees to provide certification of a serious health condition completed by a health care provider. The employer must provide written notice of the certification requirement to the employee at the time the employee notifies the employer of the need for a leave.

A. **What Information May an Employer Request?** The medical certification may only request the following information for serious health condition leaves:

1. The date that the serious health condition began and expected duration;
2. Identification of the serious health condition;
3. Whether inpatient hospitalization is required;
4. A statement of medical necessity and expected duration if intermittent or reduced-schedule leave is involved;
5. For employee serious health condition leaves, the employer may require a statement that the employee cannot do any work or perform his/her essential job functions; and
6. For family member serious health condition leaves, the employer may require a statement that the patient requires assistance for basic medical, hygiene, nutritional needs, safety and transportation or that the employee's presence would be beneficial (including psychological support). The employee must also include a statement of what kind of care s/he will provide.

B. **May an Employer Contact an Employee's Health Care Provider?** The employer may not directly contact the employee's health care provider. The employer's health care provider may contact the employee's health care provider "for purposes of clarification and authenticity only" and only if the employee

agrees to the contact. Employers should consider obtaining this consent at the outset as part of the certification process.

- C. **May an Employer Request a Second Opinion?** If the employer has reason to doubt the validity of a medical certification, the employer may require the employee to obtain a second opinion from a health care provider not regularly utilized by the employer. If that opinion differs from the first, a third opinion may be sought from a health care provider jointly approved by the employer and employee. This third opinion is binding.
- D. **How Frequently May an Employer Request Certification?** An employer can require recertification at reasonable intervals not more frequent than every 30 days or the period identified by the employee's health care provider, if longer.

If the employee seeks an extension of leave, if circumstances change significantly, or if the employer has new information casting doubt on the validity of the certification, the employer may require recertification immediately.

- E. **Fitness for Duty Reports.** An employer may require an employee who takes leave for his/her own serious health condition to provide a fitness-for-duty report from his/her health care provider before returning the employee to work after an FMLA leave.

9. **WHAT ARE THE FMLA'S RECORD KEEPING AND EMPLOYER NOTICE REQUIREMENTS?**

- A. **Record Keeping.** Employers must make, keep, and preserve records regarding compliance with the FMLA in accordance with the Fair Labor Standards Act. Employers will not be required to submit records to the government more than once a year, unless there is reason to believe an employer is violating the law. The employer must keep records of the following:
1. Basic payroll and identifying employee data;
 2. Dates of FMLA leave separately for each employee (records must designate FMLA leave as such);
 3. Hours of FMLA leave, if taken in increments of less than one full day;
 4. Copies of notices, statements, and medical certificates received from and given to the employee;



-
-
5. Documents reflecting employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves;
 6. Premium payments for employee benefits; and
 7. Records of any disputes with employees regarding the designation of leave as FMLA leave.

10. **MUST AN EMPLOYER CONTINUE AN EMPLOYEE'S BENEFITS DURING FMLA LEAVE?**

A. **Health Benefits**

Although an FMLA leave is unpaid, an employer is required to continue to provide health insurance benefits (for example, medical, dental, prescription drug, vision, etc.) in the same manner as is provided to the individual while actively at work.

B. **Termination of Health Benefits.** The employer may terminate an employee's health benefits when:

1. The employee unequivocally informs the employer of his/her intent not to return from leave;
2. The employee fails to return from leave;
3. The employee exhausts leave entitlement; or
4. The employee does not pay his/her share of the premium.

C. **Non-Health Benefits**

Non-health benefits (for example life insurance, disability insurance, etc.) need not be continued during FMLA leave, unless the employer has a policy of continuing them for employees on other types of leave. As a practical matter, however, an employer may wish to continue these benefits during an employee's FMLA leave because the employer must reinstate coverage for eligible employees immediately upon return from leave, without any re-qualification requirements.

Benefits accrued at the time FMLA leave begins must be available to the employee upon return from leave. Benefits and seniority need not continue to accrue during FMLA leave, however. FMLA leave may not disrupt continuous service for purposes of vesting and eligibility to participate in retirement plans.

11. **WHAT REINSTATEMENT RIGHTS DOES AN EMPLOYEE RETURNING FROM FMLA LEAVE HAVE?**

- A. Generally, the employer must reinstate the returning employee to the same, or an equivalent, position.
- B. **Definition of Equivalent Position.** An equivalent position must have nearly identical pay, benefits, and working conditions as the position the employee had before his or her leave of absence.
- C. **Seniority.** An employee must be given the same seniority rights as he or she had when the leave commenced. An employee may, but is not entitled to, accrue additional benefits or seniority during unpaid FMLA leave.
- D. **Exceptions.**
1. Key Employees. An employer cannot deny a key employee an FMLA leave, but can deny his/her reinstatement if necessary to prevent "substantial and grievous" economic harm, if the employer notifies the key employee in writing that it will deny reinstatement. A key employee is defined to be any employee who is paid among the top 10 percent of employees located within a 75-mile radius.
 2. Substantial Changes During Employee's Leave. If the terms of employment change substantially during the employee's FMLA leave, those changes apply to the employee when s/he returns to work.
- E. **Confidentiality.** Records and documents relating to medical certifications, recertification or medical histories of employees and their families must be maintained in separate files and treated as confidential medical records.
- F. **Postings.** Employers must also conspicuously post a notice containing information about the FMLA's provisions and how to file charges for violations. The Department of Labor provides notices that may be used by employers.
- G. **Handbooks.** All handbooks and manuals must be changed to include information about the FMLA.
- H. **Notice for Employee Taking Leave.** The employer must provide notice to an employee who is taking FMLA leave of the following, in writing, the first time in each six-month period that the employee takes FMLA leave:
1. The employer's expectations regarding that leave;

-
-
2. That the leave will count against FMLA eligible leave (failure to do this will mean the employee retains full FMLA protection, but the leave will not count against the 12-week entitlement);
 3. Any medical certification requirements;
 4. The employee's right to substitute paid leave and any requirement to do so;
 5. Any required health benefit premium payments;
 6. Any requirements for certification of fitness to return to duty;
 7. The employee's rights if the employee is a key employee;
 8. The employee's right to restoration to an equivalent position; and
 9. The employee's potential liability for health premiums paid by the employer if the employee chooses not to return to work.
 10. An employer must inform the employee verbally or in writing that leave is being counted as FMLA leave, within two business days after the employee's request for leave, or as soon as the employer learns that the leave is FMLA qualifying.
 11. If the "two-day" notice is verbal, the employer must follow up with written notice by the next following payday (or the second payday if the next payday is less than a week away).
 12. It is the employer's obligation to determine that a given absence should be classified as FMLA leave, and to so notify the employee.
 13. If the employer fails to give the required notices, it may not take action against employees for their failure to comply with leave requirements imposed on employees.

12. **WHAT DOES THE FMLA PREVENT AN EMPLOYER FROM DOING?**

- A. **Discriminating Based on FMLA Leave.** An employer may not discriminate or retaliate against an employee for exercising rights under the FMLA.

-
-
- B. **Interfering With FMLA Rights.** An employee may sue an employer for refusing to allow an FMLA leave or for refusing to provide health care benefits while the employee is on FMLA leave.

13. **POSSIBLE REMEDIES UNDER THE FMLA.**

- A. **Monetary Damages.** An employee may recover lost wages, employee benefits, or other damages caused by a violation of the FMLA. An employee may not recover damages for emotional distress under the FMLA. Employees may receive interest on any monetary damages. The employer may be liable for double damages if it did not act in good faith and reasonably believed that it was not violating the FMLA. It is the employer's burden to prove that double damages should not be awarded.
- B. **Equitable Remedies.** Reinstatement and promotion are possible remedies.
- C. **Legal Costs.** A successful plaintiff will recover the costs of litigation, including attorneys' fees.
- D. **Statute of Limitations.** Any lawsuit must be filed within two years after the employer's last violation. An additional year is provided if the violation was willful.
- E. **Department of Labor.** An individual can file a complaint with the Department of Labor, which will investigate. The DOL may also file a suit. If the DOL files suit, the individual can no longer file a claim on his/her own. An individual can also go directly to court and sue under the FMLA, bypassing the DOL.