



FMLA – Common Scenarios and Posting Obligations

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Does the FMLA Apply to My Business?

- **The Family and Medical Leave Act (FMLA) was enacted in 1993**
 - Protects workers from losing jobs when time off is needed for health-related issues
 - Amended in 2008 and 2010 – National Defense Authorization Act
 - Additional regulations in 2009 and 2013 to clarify military caregiver provisions
 - March 27, 2015 new regulations that defined spouse to recognize same sex marriages
- **FMLA applies to employers with 50+ employees companywide**
- **FMLA also applies to public agencies, including state, local and federal employers, and local education agencies – regardless of the number of employees**

What Kinds of Absences Qualify for FMLA Leave?

- **Covered employers must grant an eligible employee up to 12 workweeks of unpaid leave during a 12-month period for one or more of the following reasons:**
 - the birth and care of the employee's newborn child
 - the placement of a child with the employee for adoption or foster care
 - the care of an immediate family member with a serious health condition or the employee's own serious health condition
- **FMLA also provides leave for eligible employees who have covered family members in the military, reserves, or who are covered military veterans:**
 - Qualifying exigency family leave or "active-duty leave"
 - Military caregiver family leave

Who Is Eligible for FMLA Leave?

To be eligible for FMLA protection, an employee must meet three requirements:

1. Have been employed by your company for at least 12 months (not necessarily consecutive months)
2. Have been employed by your company for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave
3. Work at a location where 50 or more employees are employed by your company within 75 miles of that worksite

What Benefits Does the FMLA Provide?

- **FMLA leave is job-protected time off**
 - During FMLA-qualifying absences, employees may not be terminated or penalized for violating attendance policy.
- **FMLA does not require employers to pay wages during leave; however, employers must maintain any pre-existing group health insurance coverage**
- **Upon returning from leave, the employee is entitled to be restored to his/her original position, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment, including substantially similar duties and responsibilities**
- **Employees may choose, or (in some jurisdictions) employers may require, the substitution of accrued paid vacation or personal leave for any of the situations covered by the FMLA**

Know Your State and Local Laws

- **States are permitted to enact their own laws and regulations to provide even greater protection for their workers than are provided under federal law**
- **State and local laws may differ from the federal FMLA as follows:**
 - Apply to smaller employers
 - Have less stringent requirements for employee eligibility
 - Provide longer leave periods
 - Expand the definition of serious health condition
 - Apply to individuals other than immediate family members as defined by the FMLA
 - Require paid leave instead of unpaid leave
 - Provide leave for circumstances beyond the scope of the FMLA (such as parental leave for school activities, leave for organ donations, etc.)
- **If a state and federal law differ or conflict, you must follow the provisions that are the most generous to the employee**

Other Laws to Consider

- **State family and medical leave laws often overlap with the FMLA, as do state workers' compensation laws and the federal Americans with Disabilities Act (ADA)**
- **State workers' compensation statutes, which provide benefits to employees who are injured on the job, might apply simultaneously to an employee whose work injury is also a serious health condition under the FMLA**
- **Similarly, an employee might be protected both by the ADA and the FMLA if the employee's condition meets the definition of a "disability" under the ADA**
 - The ADA requires employers to provide a reasonable accommodation unless it poses an undue hardship.
 - This might include extending a leave of absence beyond 12 weeks.

What Is a Serious Health Condition?

- **"Serious health condition" includes any injury, illness, impairment, or physical or mental condition that involves either *inpatient care*, or *continuing treatment* by a healthcare provider**
- **Continuing treatment includes:**
 - Incapacity for more than three days and subsequent treatment by a healthcare provider that involves: (1) treatment two or more times, within 30 days of the first day of incapacity; or (2) treatment at least once, resulting in a regimen of ongoing supervised treatment by a healthcare provider
 - Incapacity relating to pregnancy or prenatal care
 - Permanent or long-term incapacity, for which treatment might not be effective
 - Chronic serious health conditions, such as asthma, diabetes or epilepsy
 - Conditions requiring multiple treatments for restorative surgery after an injury, or for a condition that would likely result in incapacity of more than 3 days if left untreated

Examples of Serious Health Conditions

- **Conditions that typically qualify are:** 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 types of cancer, 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 chronic migraine headaches.
- **Conditions that generally do NOT qualify include:** colds and flu, earaches and ear infection, upset stomachs and minor ulcers, headaches (other than migraines), routine dental or orthodontia problems, periodontal disease, routine physical, eye or dental exams, conditions requiring only over-the-counter medications that can be managed without a visit to a healthcare provider, cosmetic treatments unless inpatient hospital care is required or unless complications develop, and food poisoning that doesn't require inpatient or continued medical treatment.

Key Definitions – Family Members

- **An eligible employee may take leave to care for a family member with a serious health condition**
- **Family member is defined as:**
 - **Spouse:** All married couples are covered, regardless of their sex, where they were married, or where they live.
 - **Parent:** Includes the employee's biological parent or any individual (including a grandparent or other relative) who stands or stood *in loco parentis* to the employee as a minor. Does not include "parents-in-law."
 - **Son or daughter:** Includes the employee's biological child, adopted child, foster child, stepchild, legal ward, or a child to whom the employee stands *in loco parentis*. The child must be under age 18, or age 18 or older and "incapable of self-care" because of a mental or physical disability.

Intermittent Leave

- **Employees may take FMLA leave intermittently – which means taking leave in short blocks of time, or by reducing their normal weekly or daily work schedules**
- **For example, intermittent leave may be used for:**
 - Medical appointments (e.g., prenatal or related to a serious health condition)
 - Continual treatments (e.g., chemotherapy, physical therapy or dialysis)
 - Periods of severe morning sickness due to pregnancy
- **You may ask your employee to schedule time off so as not to disrupt business operations, subject to approval by the employee's healthcare provider**
- **Intermittent leave is not required for the birth and care of a newborn or the placement of a child for adoption or in foster care**

Employee Notice Requirements

- The FMLA requires employees to give notice of their need to take FMLA leave, but they do not have to mention “FMLA” specifically
- It’s up to the employer to recognize the possibility that an employee’s request for leave may be protected by the FMLA and to ask for more information, if necessary, to determine whether the law applies
- The regulations state that a written leave request is not necessary for an employee to assert FMLA rights or qualify for FMLA leave
- Employees must give notice at least 30 days in advance if their need for FMLA leave is foreseeable (for example, for non-emergency surgery)
- If unforeseeable, employees must give as much notice as practicable

Employer Notice Requirements

Covered employers must give employees a series of notices about their rights and obligations under the FMLA:

- 1) A general notice informing employees and applicants of their rights under the FMLA, which must be posted and distributed to employees.
- 2) An eligibility notice informing employees of their initial eligibility status, which must be provided within 5 days of the employee's request for leave.
- 3) A rights and responsibilities notice providing a variety of information about FMLA leave, including whether the employer will require a medical certification, which must be provided within 5 days of the employee's request for leave.
- 4) A designation notice designating the time off as FMLA leave or notifying the employee that time off will not be designated as FMLA leave, which must be provided within 5 days of employer's receipt of sufficient information (e.g., completed medical certification) to determine if FMLA covers the time off.

Medical Certifications

- **If an employee requests FMLA leave for his or her own serious health condition or for a family member's serious health condition, you have the right to request a medical certification.**
- **You must give the employee the blank medical certification form within 5 days of employee's leave request.**
- **Must allow employee at least *15 calendar days* to return the completed medical certification.**
- **Employer may contact employee's healthcare provider to clarify or authenticate the form.**
 - Must first give employee 7 days to resolve the problem.
 - Contact may NOT be made by the employee's direct supervisor.
 - Inquiry is limited to the form itself ... not to challenge or explore the diagnosis or treatment.

Recertification and Follow-Up

- **You have the right to request:**
 - Second or third medical opinions (at the company's expense)
 - Periodic reports during FMLA leave regarding the employee's status and intent to return to work
- **You may require “recertification” (a newly completed medical certification) if:**
 - The employee requests an extension of leave
 - The serious health condition has changed or there is a new serious health condition triggering request for time off
 - You receive information that casts doubt on the current medical certification

Workplace Scenario #1: Janet

Scenario: Janet in Accounting has just informed you that she is pregnant with her first child. You discover that she knew she was pregnant during her job interview but didn't disclose it. She wants to know if she will get paid during maternity leave and whether you will hold her job for her for 12 weeks while she is out.

Learning Points:

- Assuming Janet does not meet FMLA eligibility requirements (less than 12 months of employment), you still need to consider state and local laws that might apply.
- Also, the Pregnancy Discrimination Act requires you to treat her request for leave like any other leave of absence for any other reason under company policy, including pay and benefits, eligibility, length of permitted time off, status during time off, reinstatement, the need for medical documentation, return-to-work releases, etc.
- You must apply the most generous provisions if laws and policies conflict.
- Employees are not required to disclose pregnancy or future leave requirements during an interview.

Workplace Scenario #2: Frank

Scenario: Frank, your warehouse coordinator, has been with the company for 8 years. Frank mentions over lunch with a few managers that he is tired from all the driving he's been doing taking his son back and forth to physical therapy appointments after his car accident. His supervisor was part of the discussion, but it was his last week with the company so he wasn't concerned with Frank's attendance. He knew Frank was missing a lot of work, but he trusted that Frank would get his work done so he didn't address it. A few weeks later, Frank's new supervisor, who just transferred in from another store, writes Frank up for excessive absences and demotes him to a part-time schedule with hourly pay.

Learning Points:

- Frank gave sufficient information to put the company on notice that his absences may fall under the FMLA.
- Managers and supervisors need to be trained to recognize potential FMLA-qualifying absences.
- Include reporting procedures in your company policies.
- Frank's demotion and reduction in pay based on his absences could give rise to an FMLA cause of action.

Workplace Scenario #3: Lisa

Scenario: Your office manager, Lisa, has chronic back pain and starts missing a lot of work due to flare-ups. She's an "eligible employee" under the FMLA, so you provide her with the proper FMLA notices and a blank medical certification so you can determine if the time off qualifies for FMLA leave and how to designate the absences. She returns the medical certification on time. When reviewing the form, you see that under "Frequency" the doctor wrote "unknown," and under "Duration" the doctor wrote "indefinite." Should you designate her ongoing absences as FMLA-qualifying?

Learning Points:

- You have the right to seek clarification of the "frequency" and "duration" of Lisa's condition.
- You should give Lisa at least 7 days to resolve on her own, then you may contact her healthcare provider for more information, with Lisa's authorization.
- Contact should never be made directly by the employee's direct supervisor.
- You have the right to seek clarification or authentication of the form – sticking with questions on the form itself.

Workplace Scenario #4: Bob

Scenario: Bob, a sales associate, who is on FMLA leave for hip surgery. You have approved his leave and he will be out for 6 weeks. While he is on leave, you discover in a routine audit that Bob was entering false sales to boost his commissions, essentially having items shipped to friends and returned once he was paid his commissions. You discover that he was doing this for several months prior to his surgery, and that he received hundreds of dollars in unearned commissions under the scam. Can you fire him even though he is on job-protected FMLA leave?

Learning Points:

- You have the right to discipline or terminate an employee for a legitimate business reason unrelated to his/her FMLA leave or health condition.
- It is critical to conduct a proper investigation, thorough fact-finding, and to document your findings, to protect your company in a potential FMLA lawsuit.
- Consult with an attorney to evaluate options and reduce your risk if you are considering terminating someone while they are on leave or upon their return.

How Is the FMLA Enforced?

- **Employees who believe their FMLA rights were violated have two options:**
 - 1) File a complaint with the federal Department of Labor (DOL)
 - 2) File a lawsuit in civil court
- **If an employer is found to have violated the FMLA, the employee may be awarded one or more of the following:**
 - Back pay (lost wages, benefits, etc.)
 - Cost of providing care (e.g., home health care for an ill family member)
 - Interest, calculated at the prevailing rate
 - Liquidated damages (double damages) unless the court finds “good faith”
 - Equitable relief such as reinstatement, promotion, or other job actions
 - Reasonable attorney fees and court costs
- **There are additional consequences for failure to post mandatory FMLA posting**

Postings and Risks of Non-Compliance

- **Government posting fines can add up (FMLA is one of six mandatory federal postings)**
 - Combined federal fines recently increased to \$30,000+ per violation
 - State and local fines typically range from \$100-\$1,000 each
- **Employee lawsuits are the real danger: Failure to post extends the “statute of limitations”**
 - Forces employers to unnecessarily defend old claims that should have been dismissed as time-barred
 - Expands potential damages for back pay or lost wages by extending recovery period and the number of affected plaintiffs
 - Inflates damage awards

Postings and Risks of Non-Compliance (continued)

- **Evidence of good faith or bad faith**
 - Under various employment laws, courts can impose additional punitive or liquidated damages for *bad faith*, or reduce/excuse liability for violations where there is a showing of *good faith*.
 - FMLA plaintiffs are entitled to double damages unless there's a showing of "good faith."
 - Posting compliance is a factor courts take into consideration when applying the good faith defense under the FMLA and other employment laws.

Postings and Risks of Non-Compliance (continued)

- **Failure to post amounts to FMLA interference if it causes harm:**
 - Title 29 C.F.R. Section 825.300 states that “failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee’s FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.”

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