

# FAMILY MEDICAL LEAVE ACT

## WHAT IS THE FMLA?

### BACKGROUND

The Family and Medical Leave Act (“FMLA”) was enacted by Congress in 1993 to address problems arising from “inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods.” The Act was designed to provide balance between “entitling employees to take reasonable leave for medical reasons” and “accommodating the legitimate interest of employers.”

## WHAT LEAVE ENTITLEMENT IS PROVIDED UNDER THE ACT?

The Act allows eligible employees the right to take up to 12 work weeks of leave during a 12 month period of any of the following reasons:

1. Because of the birth of a son or daughter of the employee and in order to care for the son or daughter.
2. Because of the placement of a son or daughter with the employee for adoption or foster care. (Leave for birth or placement for adoption or foster care must conclude within 12 months of the birth or placement).
3. In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter or parent has a serious health condition.
4. Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

## WHICH EMPLOYERS ARE COVERED UNDER THE ACT?

- Public agencies, including state, local and federal employers, local education agencies (schools) and
- Private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year and who are engaged in commerce or in any industry or activity affecting commerce—including joint employers and successors of covered employers.

## **WHICH EMPLOYEES ARE COVERED UNDER THE ACT?**

To be eligible for FMLA benefits, an employee must:

1. work for a covered employer,
2. have worked for the employer for a total of at least 12 months;
3. have worked at least 1,250 hours over the previous 12 months; and
4. worked at a location where at least 50 employees are employed by the employer within 75 miles.

Full-time teachers of elementary and secondary school systems, institutes of higher education, or other educational establishments meet the 1,250-hour test (under Fair Labor Standards Act exemptions) and are eligible for FMLA leave.

## **DOES FMLA LEAVE HAVE TO BE TAKEN ALL AT ONCE OR CAN IT BE TAKEN IN PARTS?**

Under some circumstances, employees must take FMLA leave intermittently—which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.
- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

## **CAN THE EMPLOYEE USE ACCRUED PAID LEAVE DURING A FMLA LEAVE?**

Also, subject to certain conditions, employees or employers may choose to use accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave. The employer is responsible for designating if an employee's use of paid leave counts as FMLA leave, based on information from the employee. In no case can use of paid leave be credited as FMLA leave after the leave has ended.

## **WHAT CONSTITUTES A “SERIOUS HEALTH CONDITION” UNDER THE ACT?**

“Serious health condition” means an illness, injury, impairment, or physical or mental condition that involves:

- Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility;
- Any period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
- Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days, and for prenatal care.
- Examples of this definition include, but are not limited to: heart attacks or heart conditions requiring surgery, back conditions requiring surgery or extensive therapy, severe arthritis, severe nervous disorders, pregnancy, pregnancy, severe morning sickness, miscarriages, a parent or spouse suffering from Alzheimer’s disease or clinical depression.

## **WHAT CONSTITUTES A “HEALTH CARE PROVIDER” UNDER THE ACT?**

“Health care provider” means:

- Doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices; or
- Podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist) authorized to practice, and performing within the scope of the practice, under state law; or,
- Nurse practitioners and nurse-midwives authorized to practice, and performing within the scope of their practice, as defined under state law.

FMLA leave applies equally to the sexes. Fathers have the same right to leave for care of a newborn as mothers do.

If an employee requires treatment for substance abuse, the leave is covered under FMLA.

**UNDER WHAT CIRCUMSTANCES MAY AN EMPLOYER DESIGNATE LEAVE, PAID OR UNPAID, A FMLA LEAVE AND, AS A RESULT, COUNT IT AGAINST THE EMPLOYEE'S TOTAL FMLA LEAVE ENTITLEMENT?**

- The employer, in all cases, must designate leave as FMLA leave and notify the employee of the designation.
- An employee requesting FMLA leave must give notification and reasoning so the employer may determine if the leave is acceptable under FMLA rules. If the employee fails to provide the reason, the leave may be denied.
- The employer may notify the employee either orally or in writing regarding whether leave has been designated FMLA LEAVE. Oral notification must be confirmed in writing.
- In most cases, the employer may not designate FMLA LEAVE retroactively. (However, there are exceptions. For example, an employee who is on a two-week paid vacation breaks his leg at the start of the second week. The employer may designate FMLA leave from the time the accident occurred through the extension of the leave. In other words, the second week of vacation would also count as FMLA leave).
- In two situations the employer may designate leave as FMLA leave after the employee returns to work.

They are: 1) if the employer was unaware of the reason for the absence, or 2) the employer knew the reason, but was unsure if the leave qualified as FMLA leave.

**WHAT OTHER NOTICES TO EMPLOYEES ARE REQUIRED OF EMPLOYERS UNDER FMLA?**

- FMLA-covered employers with eligible employees must provide written guidelines pertaining to FMLA leave. If the employer already has a handbook or something similar available to the employees regarding employee benefits, they need only add a section regarding the FMLA leave rules.
- If the employer does not have a guideline or book of benefits, the employer must make FMLA rules available to the employees. Employers may use copies of the FMLA fact sheet for this purpose.

- The employer must also provide the employee with a list of written expectations and obligations and the consequences of failing to meet these obligations.

## **HOW DOES THE ACT ADDRESS MEDICAL CERTIFICATION/RECERTIFICATION?**



The regulations provide that an employer may require medical certification from a health care provider for leave based on the employee's own serious health condition or the serious health condition of a spouse, child or parent. Medical certification by a health care provider must include four basic pieces of information:

1. The diagnosis of the medical condition,
2. The date the condition began and the health care provider's judgment as the probable duration of the condition,
3. The prescribed treatment protocol (e.g., the frequency and duration of treatment); and,
4. Whether in-patient hospitalization is required.
5. If the leave is for the employee's own serious health condition, then they must provide a statement that employee is unable to perform the essential functions of their job.
- 5a. If an employee takes leave on an intermittent or reduced leave schedule, medical certification must include: 1) a statement from a health care provider that the leave is medically necessary and 2) the expected duration and schedule of the requested leave.

The employer must allow the employee at least 15 calendar days following the request of certification for the response. **The employee must pay for the cost of the initial medical certification.**

### **Recertification**

As a condition of the restoration of employment, an employer is also permitted to require all employees who take leave for their own serious health conditions to obtain

certification from a health care provider that they are able to return to work. The uniform policy must be based on the nature of the illness or duration of the absence. Certification of the employee's fitness to return to work may only deal with the illness that caused the need for leave.

If the employer does not require a "fitness-for-duty" certification, the employee should still notify the employer in writing of his or her intent to return to work.

## **IS THE EMPLOYER REQUIRED TO MAINTAIN HEALTH CARE COVERAGE DURING THE FAMILY MEDICAL LEAVE?**

### **MAINTENANCE OF HEALTH BENEFITS**

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.

In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

## **ARE THERE SPECIFIC LEAVE RULES FOR CERTAIN EDUCATIONAL EMPLOYEES?**

### **INSTRUCTIONAL EMPLOYEES AND THE FMLA**

#### **OVERVIEW**

29 U.S.C. § 2618 of the Statute deals with rules applicable to employees of local educational agencies.

1. These rules apply to primary and secondary schools (not colleges and universities, pre-schools or other types of educational institutions).
2. These special rules are only applicable to "instructional employees," i.e., those employees whose principal function is to teach and instruct students. (The rules therefore exclude teacher aides and counselors).

## **LIMITATIONS ON TAKING LEAVE NEAR THE END OF AN ACADEMIC TERM**

1. If an instructional employee begins leave more than five weeks before the end of a term, and if the leave will ultimately last at least three weeks and the

employee would otherwise return to work during the three weeks before the end of the term, the employer may require the employee to continue taking leave until the end of the term.

2. If an instructional employee takes leave, for a reason other than the employee's serious health condition, which commences during the five weeks before the end of the term, and if the leave will last more than two weeks and the employee would otherwise return to work during the last two weeks of the term, the employer may require the employee to continue taking leave until the end of the term.

(When such an event takes place, the school district must continue to maintain health insurance coverage during period of leave and cannot count the extra leave as part of the 12 weeks of FMLA leave entitlement).

3. If the employee takes leave for a reason other than the employee's own serious health condition, which begins during the last three weeks of the term, and if the leave will last more than five working days, the employer may require the employee to take leave until the end of the term.

#### **INTERMITTENT LEAVE AND THE INSTRUCTIONAL EMPLOYEE**

1. If an instructional employee requests intermittent or reduced leave for planned medical treatment for more than 20% of the total number of working days in the period during which the leave would be used, the employer may require the employee to elect either to:
  - (i) Take leave for a "particular duration" of time which is not greater than the duration of the planned treatment, or
  - (ii) Be transferred to an alternative position.
2. If an instructional employee requesting intermittent leave or leave on reduced leave schedule fails to provide proper notice as required under Section 825.302 of the regulations, (30 days advanced notice when leave is foreseeable, within one or two business days of when employer learns of the need for leave when leave is unforeseeable), the employer may deny the taking of leave until 30 days after notice, or may require the employee to take leave for either a "particular duration" or accept an alternative position.
3. If an "instructional employee" requests intermittent leave that is less than 20 percent of the work days during the period of leave, he or she is entitled to take the intermittent leave. Of course, the employee should discuss the leave with the employer and try to accommodate the employer's work needs, if possible.

### Summary Provisions of FMLA

- FMLA provides up to 12 weeks of unpaid leave during any 12-month period for childbirth, adoption or foster child placement, or for the serious health condition of a spouse, parent, child or eligible employee.
- The employer must continue the employee's health benefits during the period of leave under the same conditions that exist for active employees.
- Upon the expiration of the leave, the employee is entitled to be restored to the same position held before the leave was taken or to an equivalent position with the same pay, benefits and working conditions.
- Special leave rules apply for teachers and other instructional employees in elementary and secondary schools. **These special rules do not apply to colleges and universities, trade schools, pre-schools, or other types of educational institutions.**

#### REMEMBER!!!!

Through collective bargaining, an employer also may provide leave benefits in excess of those benefits provided by the statute.



## ADDITIONAL FMLA QUESTIONS AND ANSWERS

**Q: What if an employer provides more generous benefits than required by the FMLA? Which benefits apply?**

**A:**

**Q: Are our members entitled to the same position upon returning from a FMLA leave?**

**A:**

**Q: A member is on an unpaid child care leave under the FMLA. Is the employer required to continue health insurance coverage?**

**A:**

**Q: A member is requesting a two-week paid sick leave under the FMLA. Can the employer request medical certification under the Act?**

**A:**

**Q: Two of your members are married and work for your school district. Both spouses want to take unpaid child care leave under the FMLA. How many weeks of unpaid leave is each spouse entitled to under the Act?**

**A:**

**Q: Jane Eldercare has been approved for a twelve (12) week FMLA unpaid leave for the care of her "seriously ill" mother. Upon return, she is informed, by the district, she has been demoted to a lesser salaried position. Does Jane have any recourse under the FMLA?**

**A:**

**Q:** A member has taken a twelve (12) week FMLA leave for the care of their “seriously ill” spouse. The leave started in September, 2004. The member’s spouse becomes “seriously ill” again in January, 2005. Is the member entitled to another twelve (12) week FMLA leave?

**A:**

**Q:** Mary, a Social Studies teacher, started a FMLA leave on June 1<sup>st</sup> for her own “serious illness.” She will be medically able to return to work the week before school ends in June. Can the district require the member to continue the leave until the end of the semester?

**A:**

**Q:** John works in the Pinesfield School District. John has been approved for a twelve (12) week leave under the FMLA. The leave starts one week before the Christmas break. Does the break count toward the FMLA leave?

If a holiday falls during the leave, is the day counted toward the 12 weeks?

**A:**