

The FMLA Factsheet

A Union Reference Guide to the Family Medical Leave Act

What is the FMLA? -----

The FMLA or the Family Medical Leave Act is a federal law passed in 1993 entitling eligible employees to increased job security when dealing with their own serious health condition or a serious health condition of their child, spouse, or parent. The FMLA *requires* employers to provide eligible employees time-off from work for FMLA qualifying reasons and prohibits employers from interfering with employee rights.

The FMLA requires an employer to:

- provide time-off *totaling* 12-weeks per year due to a serious health condition of a child, spouse or parent or for their own serious health condition. For example an eligible employee working 5 days a week could get 60 FMLA days per year;
- continue group health benefits, including optical and dental benefits, over the FMLA leave period (employees would only be responsible for the co-pay on the premium they would have paid if they were still working);
- return employees taking FMLA leave to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave (provided the employee comes back to work before the 12 weeks is exhausted).

The FMLA prohibits an employer from:

- using FMLA covered absences as a basis for imposing a warning, suspension, discharge or other discipline, issuing a negative evaluation, denying advancement, making an adverse assignment, or taking other negative action against you;
- interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

"Because FMLA grants to eligible employees the absolute right to take FMLA leave for qualifying reasons under the law, employers have no discretion in this area and cannot deny the legitimate use of FMLA leave for such purposes without violating the prohibited acts section of the statute."

- Preamble to Department of Labor FMLA Regulations, page 26

Who is eligible?

Employees are eligible if they:

- work for a public employer or for an employer with 50 or more people on the payroll;
- have been employed for at least 12 months (these need not be consecutive); and
- worked at least 1,250 hours during the 12-months immediately preceding the first day of leave (this averages to about 25 hours per week over 12 months). Hours counted towards the 1250 do not include vacation, medical leave, or time off under employees compensation.
- work in a location with at least 50 other employees within a 75 mile radius.

What absences are FMLA qualifying? -----

The FMLA entitles employees time-off for both unforeseen emergencies and planned absences involving:

- (1) a serious health condition that makes you unable to perform your job;
- (2) care for your spouse, son, daughter, or parent with a serious health condition;
- (3) the birth of a son or daughter, and to care for the newborn child;
- (4) the placement of a son or daughter for adoption or foster care in your home.

What is a "Serious Health Condition?"

The FMLA regulations define qualifying serious health conditions as an illness, injury, or physical or mental condition that involves one or more of the following:

- a hospital stay of at least one night;
- incapacity for more than three consecutive calendar days (not necessarily workdays) and continuing treatment by a health care provider;
- incapacity due to a serious chronic disorder (for example asthma, chronic back condition, multiple sclerosis);
- incapacity due to pregnancy or for prenatal care;
- long term or permanent disability;
- an absence to receive multiple treatments for restorative surgery after an injury or to prevent a period of incapacity of more than three consecutive days.

What is meant by "incapacity"?

Incapacity means inability to perform *one* essential function of your job, attend school or perform other regular daily activities due to the serious health condition, treatment there of, or recovery there from.

Examples of qualifying FMLA absences

- to care for a child who is unable to attend school due to asthma;
- to care for a parent recovering from a stroke;
- for treatment of your own chronic serious back condition;
- to provide psychological comfort to your spouse during medical testing for cancer;
- incapacity due to severe morning sickness during pregnancy;
- to care for an adult son who suffers from a serious mental condition and is unable to care for himself.

What does "to care for..." mean?

The provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term *also* includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

You may be required to have your family member's health care provider certify that you are needed to provide assistance or that your presence would provide beneficial psychological comfort.

A Regulation to Remember...

"Son", "daughter," and "parent" is defined broadly

(c) Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability."

(c)(3) Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

- From FMLA regulation 825.113(c)

I missed a few days because of the flu. Is that a serious health condition?

That depends. Generally the flu is not covered unless it becomes serious enough to:

- 1) make you incapacitated (unable to perform one essential function of your job or perform regular daily activities) for more than 3 *calendar* days; and
- 2) require *continuing medical treatment* from a "healthcare provider."

"*Continuing medical treatment*" requires treatment on two or more occasions by a health care provider, or treatment on a single occasion which results in a "*regimen of supervised treatment.*"

This treatment includes:

- evaluations of your condition;
- treatment to resolve or alleviate the condition such as prescription medicine (for example an antibiotic), or special therapeutic equipment (for example oxygen). Over the counter medicines, exercise, or rest would *not* be considered covered treatment.

So if you are sick in bed with the flu for more than 3 consecutive days, and you have seen your doctor who then prescribes you an antibiotic, you should be protected by the FMLA.

Does a healthcare provider have to be a licensed physician?

No. The FMLA regulations define "health care provider" fairly broadly. The term not only includes physicians but also optometrists, osteopaths, chiropractors, podiatrists, dentists, clinical psychologists, Christian Science practitioners, nurse practitioners, nurse midwives, and clinical social employees (if authorized under state law to diagnose and treat serious health conditions without supervision), and other providers recognized by the employer or group health plan.

Also, treatment by a nurse or physician's assistant under the direct supervision of a health care provider or treatment by a physical therapist on referral by a health care provider qualifies as treatment by a health care provider.

Is time-off for "testing" for a serious health condition covered by the FMLA?

A serious health condition must be treated or supervised by a health care provider. Treatment includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

Is substance abuse a serious health condition?

Yes. Substance abuse can qualify as a "chronic serious health condition." However, FMLA leave may only be taken for treatment for substance abuse. Absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

How can I use my 12-weeks of FMLA leave time? -----

Can I use my FMLA time-off for periods shorter than a week or a day?

Yes. The law provides eligible employees with time off *totaling* 12 weeks a year. FMLA leave can be taken on a continuous basis or, if a health care provider determines it is medically necessary, in intervals of as short as a day or part of a day. Leave may not be denied because of production needs, a busy schedule, or because the employer considers you too important to take time off.

FMLA leave may be taken intermittently or as a reduced schedule under certain circumstances.

Intermittent leave. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. It can be used to protect employees from discipline for a variety of absences related to a serious health condition including:

- incapacity due to a chronic serious health condition that flares-up sporadically;
- inpatient care in a hospital (involving an overnight stay);
- incapacity due to pregnancy (such as severe morning sickness);
- treatment or testing for a serious health condition, prenatal care; or
- care for a child, parent or spouse with a serious health condition.

The FMLA protects eligible employees who may be absent for one day, come in late, leave work for a couple hours, or depart work early if such time-off is for an FMLA qualifying reason and a healthcare provider certifies that it is medically necessary.

Reduced schedule leave. A reduced schedule leave is a leave that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced schedule leave is a change in the employee's schedule for a period of time, normally from full-time to part-time, but may also include declining overtime. It can be used if a health care provider certifies that it is medically necessary for your own serious health condition or to care for a child, parent or spouse with a serious health condition.

Example: If your doctor restricts you to 20 hours a week for 24 weeks following surgery, your employer must place you on this schedule (twenty-four weeks at half time equals 12 weeks).

Can I be reassigned to a different job if I request intermittent FMLA leave?

Yes, if you use intermittent leave for planned medical treatment, such as physical therapy or chemotherapy, you can be temporarily transferred to an alternative position that better accommodates recurring absences. The transfer must be within your qualifications, must be consistent with the collective bargaining agreement, cannot create a hardship, must provide the same pay and benefits, and may not be instituted to discourage you from taking leave.

An employer may not impose a transfer on an employee who misses work because of unforeseen medical problems.

Can my supervisor force me to take the entire day off when I only need to take a couple hours for a doctor's appointment?

The FMLA regulations state (in section 825 CFR 203 (d)) that "An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave..." An employer who demands that you take off the entire day would be in violation of the FMLA. Furthermore the regulations make clear that a employee may not be made to suffer adverse consequences because FMLA leave is taken.

Keep in mind time off for an appointment during working hours must be for necessary treatment. A visit to obtain urgent care entitles you to time off. A routine physical does not.

Can I be refused FMLA time-off because I could get treatment outside of work hours?

An employer may require that you *try* to schedule time-off outside of working hours so as not to "disrupt unduly" the employer's operations. It is usually a good idea to consult with your supervisor prior to making appointments to try to arrange a mutually agreeable treatment schedule, otherwise the employer could require that you try to reschedule so as not to "disrupt unduly." This does not mean the employer can deny you the time off for appointments, only that they can require that you *attempt* to reschedule so as not to "disrupt unduly." If your health care provider can only provide you (or your covered family member) necessary treatment during the workday, time off must be given.

A regulation to remember...

FMLA time-off can be taken in increments of 1 hour

There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less [for AAUP-AFT employees it is 1 hour]. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave...

- From FMLA regulation 825.203(d)

Employee Notification and Medical Certification Procedures -----

How do I initiate FMLA protections?

FMLA protections are triggered once you provide sufficient and timely notice to management that you are unable to work because of your own serious health condition, or your spouse's, child's or parent's serious health condition or for some other qualifying reason such as an adoption or a foster care placement. You do not have to mention the FMLA by name, although it is a good idea to do so. This notification can be verbal, given to anyone in management.

It is the employer's legal responsibility to designate paid or unpaid time-off as FMLA. They are expected to investigate and ask questions to determine if your leave or absence qualifies for FMLA protection. If your employer asks, you must provide further details about your condition or that of your family member. Keep in mind the FMLA does not require that you tell your employer the exact diagnosis (although you may have to submit this information to an insurance provider to be eligible for insurance benefits).

Note: Although only verbal notice is required, at some point you may have to prove that you gave sufficient notice. It is recommended that you follow up a verbal request with a written request. It is a good idea to always keep copies of paperwork submitted to management in case disputes arise later on.

What is "sufficient notice"?

To obtain the FMLA protection you do not have to request the FMLA by name, but you do have to clearly indicate that a serious health condition is involved or that your leave is for an FMLA qualifying reason such as the birth of a child.

Example of sufficient notice: "I need time off for back surgery."

"My son broke his arm and I'm taking him to the hospital."

Example of insufficient notice: "I need time off for personal reasons."

"My son can't go to school and I'm staying home with him."

Do I have to tell my supervisor the exact diagnosis?

The FMLA does not require that you tell your employer the exact diagnosis of your medical condition or that of your family member. If you want to keep this private, offer a general description of the condition. For example, instead of telling your employer that you have cancer, you might say: "I have a serious medical problem which requires time off for medical treatment. I am under the care of a specialist and can provide verification." FMLA certification forms may not ask for a diagnosis.

Keep in mind that when receiving paid leave the employer may require more stringent certification requirements. So for instance a medical diagnosis may be required for receiving long-term disability benefits. Medical records held by the company must be kept confidentially and only shared with those who have a need to know. Your immediate supervisor would not have the right to know your precise diagnosis.

When must I give notice to the employer?

The regulations outline different notification procedures for planned (foreseeable) and unplanned (unforeseeable) absences. In either case, you must give your employer adequate and timely notice when FMLA is needed. Otherwise leave can be disallowed or delayed and an absence counted towards discipline.

Foreseeable absences - 30 days or "as soon as practicable."

The employer can require a 30-day advanced notice for planned leaves, but if that is not possible, notice must be given as soon as practicable. Ordinarily this means within one or two business days of when you learn of your need for leave.

Example: Your doctor tells you today that your son must have surgery next week. You should inform your employer of your need for leave within the next two business days.

Unforeseeable absence - "As soon as practicable" / within one or two business days

Since advanced notice is impossible for unplanned absences, you are required to give notice "as soon as practicable" - i.e., within one or two working days after you become aware of the seriousness of the condition. Notice may be given in person, in writing, by telephone, or fax machine. In the event of a brief absence (e.g., a day), FMLA notice may be submitted when you return to work.

Who must I notify?

The FMLA regulations state that you must notify the "employer," a term it defines broadly and includes "any person who acts directly or indirectly in the interest of an employer." On the other hand, the regulations do not prohibit the employer from establishing internal procedures, such as notifying a particular supervisor.

Do I still have to follow the company rules on absenteeism and leaves?

As mentioned above, the FMLA does not forbid employers from establishing certain attendance rules such as calling in before start time, filling out FMLA paperwork, reporting periodically on the status of your condition - provided these rules are enforced in a reasonable manner. A transgression, however, cannot serve as a basis for denying you FMLA protection if you provide timely and sufficient notice. In other words, you may be subject to discipline for not following the call-in procedure, but if you gave sufficient and timely verbal notice, you cannot be denied FMLA coverage. *Keep in mind that the employer may require that you comply with more stringent established requirements for obtaining sick or disability pay to cover your absence provided these requirements are reasonable and uniformly applied.*

Medical Certification

A employee seeking unpaid FMLA leave can be required to provide medical certification, signed by a health care provider, verifying that the he or she or a covered family member suffers from a serious health condition and needs a period of time off, intermittent leave, or a reduced work schedule. The following rules apply:

- Your employer's initial certification request must be in writing. A posted rule or policy is not sufficient. The request must inform you of any penalties for noncompliance.
- The employer's request for medical certification must be made within two business days after you give notice of a need for FMLA leave or commence an unforeseen one. After two days, a request can be made only if your employer has a legitimate basis to question the reasons for your leave or its duration.
- In the event of intermittent leave, your provider does not have to submit an exact schedule of leave if this is not known, just an estimate of the probably duration and intervals of absence.
- You must be given at least 15 calendar days to submit the certification. Additional time must be allowed if your doctor fails to fill out the form despite your diligent efforts. If the certification is incomplete in any way, you must be given a reasonable amount of time to correct the deficiency.
- If your certification is complete, your supervisor or manager may not request additional records or information from your health care provider. With your permission, however, your employer can assign a physician or other provider to contact the provider to authenticate or clarify the certification.
- The certification is confidential and must be kept separate from your personnel file.
- If you do not submit a medical certification or if the certification fails to indicate that you are unable to work because of a serious health condition, your employer can disapprove your leave or revoke a previous acceptance. If absences have occurred, they may be counted against you.

Tip: You take a risk if you give your health care provider a certification form and ask him or her to mail it to your employer. The provider may not answer all the questions or may fail to submit it on time. It is safer to pick up the completed form, make sure it certifies you condition and take it in yourself or send it by certified mail.

Must I see a healthcare provider every time I use the FMLA for a serious health condition?

Although you or family member must be under the continuing supervision of a health care provider and if requested by your employer must submit medical certification of a serious health condition, certain absences do not require a doctor's visit or medical treatment to be FMLA protected. You need only provide timely notice to your supervisor that an absence from work was for FMLA covered reasons. Absences that do not require a doctor visit include incapacity due to pregnancy, chronic serious health conditions, and permanent or long-term conditions for which treatment may not be effective.

For example;

- an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level;
- a pregnant employee is unable to report to work because of severe morning sickness;
- an employee needs to leave work early to care for a child with autism or a parent with Alzheimer's.

How often can the employer require me to recertify my FMLA leave?

For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider the FMLA regulations state that an employer may request recertification "no more often than every 30 days and only in connection with an absence by the employee." But the regulations also state that if the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed, unless:

- 1) the employee requests an extension of leave;
- 2) circumstances described by the previous certification have changed significantly;
- 3) the employer receives information that casts doubt upon the continuing validity of the certification.

It is therefore recommended that healthcare providers not use open-ended statements such as "on-going" or "permanent" when describing the duration of an intermittent leave, but instead specify a minimum duration of up twelve months and perhaps add "will reevaluate after this time."

An FMLA violation occurs if your employer:

- refuses to allow you time off for FMLA purposes;
- fails to restore you to your former position or to an equivalent position after an FMLA leave;
- uses coercion, threats, or intimidation to discourage you from taking FMLA leave;
- discharges, disciplines, or demotes you because of an FMLA absence;
- gives you a poor evaluation or denies you a promotion because of FMLA absences;
- punishes you for complaining about FMLA violations, telling others about the FMLA, or taking legal action to enforce the FMLA;
- denies you any rights provided by the FMLA.

What do I do if my supervisor violates my rights under the FMLA?

Keep copies of all documentation submitted to and received from management regarding your situation. It is also a good idea to keep notes on what happened, when it happened, who was involved and what was said. Contact your union for further assistance.

For More Information

For more information or to access the FMLA regulations go to the U.S. Department of Labor's website:

<http://www.dol.gov/esa/whd/fmla/>

Sources: US Department of Labor, FMLA Regulations; The FMLA Handbook, A Union Guide to the Family and Medical leave Act, 2nd Edition (2006), Robert Schwartz.

