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Family and Medical Leave

The Family and Medical Leave Act (FMLA) allows employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. The FMLA seeks to accomplish these purposes in a manner that accommodates the legitimate interests of employers and minimizes the potential for employment discrimination on the basis of gender while promoting equal employment opportunity for men and women.

The FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons. In determining the 12-month period, employers may elect to use the calendar year, a fixed 12-month leave or fiscal year, or a 12-month period prior to or after the commencement of leave.

The law contains provisions on employer coverage; employee eligibility for the law's benefits; entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; notice and certification of the need for FMLA leave; and protection for employees who request or take FMLA leave. The law also requires employers to keep certain records.

This overview summarizes the FMLA provisions and regulations.

Employer Coverage

The FMLA applies to all public agencies, including state, local, and federal employers, and local education agencies (schools). It also applies to private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors of covered employers.

Employee Eligibility

To be eligible for FMLA benefits, an employee **must**:

- ◆ Work for a covered employer.
- ◆ Have worked for the employer for a total of 12 months.
- ◆ Have worked at least 1,250 hours over the previous 12 months.
- ◆ Work at a location where at least 50 employees are employed at the location or within 75 miles of the location.

Leave Entitlement

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- ◆ For the birth and care of the newborn child of the employee.
- ◆ For placement with the employee of a child for adoption or foster care and to care for the newly placed child.
- ◆ To care for an immediate family member (spouse, child, or parent — but not a parent “in-law”) with a serious health condition.
- ◆ To take medical leave when the employee is unable to work because of a serious health condition.

Spouses employed by the same employer may be limited to a combined total of 12 workweeks of family leave for the following reasons:

- ◆ For the birth and care of a child.
- ◆ For the placement of a child for adoption or foster care and to care for the newly placed child.
- ◆ To care for an employee’s parent that has a serious health condition.

However, if one spouse were ineligible for FMLA leave, the other spouse would be entitled to the entire 12 weeks of FMLA leave. Additionally, where the spouses both use a portion of the total 12-week FMLA leave entitlement, each spouse would be entitled to the difference between the amounts they had taken individually and the 12 weeks allotted for FMLA leave. Leave for birth and care, or placement for adoption or foster care must conclude within 12 months of the birth or placement, unless state law allows, or the employer permits, leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period.

Intermittent/Reduced Schedule Leave

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

Intermittent/reduced schedule leave **may** be taken for the following purposes:

- ◆ When medically necessary, to care for a seriously ill family member or because of the employee's serious health condition.
- ◆ To care for a newborn or newly placed adopted or foster care child only with the employer's approval.

Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA leave. Employees may not be required to take more FMLA leave than necessary to address the circumstances that cause the need for leave. Employers may account for FMLA leave in the shortest period of time that their payroll systems use, provided it is one hour or less.

Employees needing intermittent/reduced schedule leave for foreseeable medical treatment must work with their employers to schedule the leave so as not to unduly disrupt the employer's operations, subject to the approval of the employee's health care provider.

In such cases, the employer may temporarily transfer the employee to an alternative job, with equivalent pay and benefits, that accommodates recurring periods of leave better than the employee's regular job.

Substitution of Paid Leave

Employees may choose to use, or employers may require the employee to use, accrued paid leave to cover some or all of the FMLA leave taken.

Employees may choose, or employers may require, the substitution of accrued paid vacation or personal leave for any of the situations covered by the FMLA. The substitution of accrued sick or family leave is limited by the employer's policies governing the use of such leave.

The employer is responsible for determining whether an employee's use of paid leave counts as FMLA leave, based on information from the employee. In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee.

A *serious health condition* means an illness, injury, impairment, or physical or mental condition that involves either of the following:

- ◆ Any period of inpatient care connected with incapacity or treatment (for example, an overnight stay) in a hospital, hospice, or residential medical-care facility, and any period of subsequent treatment in connection with such inpatient care.
- ◆ Continuing treatment by a health care provider that includes any period of incapacity (such as the inability to work, attend school, or perform other regular daily activities) due to any of the following:
 - A health condition (including treatment for or recovery from the condition) lasting more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes either of the following:
 - Treatment two or more times by or under the supervision of a health care provider.
 - One treatment by a health care provider with a continuing regimen of treatment.
 - Pregnancy or prenatal care. A visit to the health care provider is not necessary for each absence.

- A chronic serious health condition that continues over an extended period of time, requires periodic visits to a health care provider, and may involve occasional episodes of incapacity (for example, asthma or diabetes). A visit to a health care provider is not necessary for each absence.
- A permanent or long-term condition for which treatment may not be effective (such as Alzheimer's, a severe stroke, or terminal cancer). Only supervision by a health care provider is required, rather than active treatment.
- 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 not treated (such as chemotherapy or radiation treatments for cancer).

Medical Certification

An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must allow the employee at least 15 calendar days to obtain the medical certification.

An employer may, at its own expense, require the employee to obtain a second medical certification from a health care provider. The employer may choose the health care provider for the second opinion, except that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The employer and employee must jointly approve the third health care provider. The *Certification of Health Care Provider* form (optional Form WH-380) may be used to obtain the certifications.

Health care provider means any of the following:

- ◆ Doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctors practice.
- ◆ 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 their practice, under state law.
- ◆ Nurse practitioners, nurse-midwives, and clinical social workers authorized to practice, and performing within the scope of their practice, as defined under state law.
- ◆ Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.
- ◆ Any health care provider recognized by the employer or the employer's group health plan benefits manager.

Maintenance of Health Benefits

A covered employer is required to maintain group health insurance coverage, including family coverage, for an employee on FMLA leave on the same terms as if the employee continued to work.

Where appropriate, arrangements should be made for employees taking unpaid FMLA leave to pay their share of health insurance premiums. For example, if the group health plan involves co-payments by the

employer and the employee, an employee on unpaid FMLA leave must make arrangements to pay the employee's normal portion of the insurance premiums to maintain insurance coverage, as must the employer. Such payments may be made under any arrangement voluntarily agreed to by the employer and employee.

An employer's obligation to maintain health benefits stops if and when an employee informs the employer of an intent not to return to work at the end of the leave period or if the employee fails to return to work when the FMLA leave entitlement is exhausted. The employer's obligation also stops if the employee's premium payment is more than 30 days late and the employer has given the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received.

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

Other Benefits

Other benefits, including cash payments chosen by the employee instead of group health insurance coverage, need not be maintained during periods of unpaid FMLA leave.

Certain types of earned benefits, such as seniority or paid leave, need not continue to accrue during periods of unpaid FMLA leave if such benefits do not accrue for employees on other types of unpaid leave. For other benefits, such as elected life insurance coverage, the employer and the employee may make arrangements to continue benefits during periods of unpaid FMLA leave. An employer may elect to continue such benefits to ensure that the employee will be eligible to be restored to the same benefits upon returning to work. At the conclusion of the leave, the employer may recover only the employee's share of premiums it paid to maintain other nonhealth benefits during unpaid FMLA leave.

Job Restoration

Upon return from FMLA leave, an employee **must** be restored to the employee's original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave. An employee's use of FMLA leave cannot be counted against the employee under a no-fault attendance policy.

Key Employee Exception

Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly-paid key employees after using FMLA leave during which health coverage was maintained.

In order to do so, the employer **must**:

- ◆ Notify the employee of the employee's status as a key employee in response to the employee's notice of intent to take FMLA leave.

Employers must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave.

- ◆ Notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision.
- ◆ Accept the key employee's request to return to work from FMLA leave after giving notice.
A key employee is entitled to request reinstatement at the end of the leave period although the employee did not return to work in response to the employer's initial notice of potential denial of restoration.
- ◆ Make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee requested restoration.

A **key employee** is a salaried eligible employee who is among the highest paid 10 percent of employees within 75 miles of the worksite.

Notice

Employee Notice

Eligible employees seeking to use FMLA leave **may** be required to provide the following:

- ◆ Thirty-day advance notice of the need to take FMLA leave when the need is foreseeable.
- ◆ Notice, as soon as practicable, when the need to take FMLA leave is not foreseeable (*as soon as practicable* generally means at least verbal notice to the employer within one or two business days of learning of the need to take FMLA leave).
- ◆ Sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons (the employee need not mention the FMLA when requesting leave to meet this requirement, but may ask for time off from work for what may be an FMLA qualifying reason).
- ◆ Where the employer was not made aware that an employee was absent for FMLA reasons and the employee wants the leave counted as FMLA leave, timely notice (generally within two business days of returning to work) that leave was taken for an FMLA-qualifying reason.

Employer Notices

Covered employers must take the following steps to provide information to employees about the FMLA:

- ◆ Post a notice approved by the Secretary of Labor explaining rights and responsibilities under the FMLA.
- ◆ Include information about employee rights and obligations under the FMLA in employee handbooks or other written material, including collective-bargaining agreements.
- ◆ If handbooks or other written material does not exist, provide general written guidance about employee rights and obligations under the FMLA whenever an employee requests leave.
- ◆ Provide a written notice designating the leave as FMLA leave and detailing specific expectations and obligations of an employee who is exercising FMLA entitlements. The employer may use the *Employer Response to Employee Request for Family or Medical Leave* form (optional Form WH-381) to meet this requirement. This employer notice should be provided to the employee within one or two business days after receiving the employee's notice of need for leave and include the following:

- That the leave will be counted against the employee's annual FMLA leave entitlement.
- Any requirements for the employee to furnish medical certification and the consequences of failing to do so.
- The employee's right to elect to use accrued paid leave for unpaid FMLA leave, whether the employer will require the use of paid leave, and the conditions related to using paid leave.
- Any requirement for the employee to make co-premium payments for maintaining group health insurance and the arrangement for making such payments.
- Any requirement to present a fitness-for-duty certification before being restored.
- Rights to job restoration upon return from leave.
- Employee's potential liability for reimbursement of health insurance premiums paid by the employer during the leave if the employee fails to return to work after taking FMLA leave.
- Whether the employee qualifies as a key employee and the circumstances under which the employee may not be restored to his or her job following leave.

USERRA

The Uniformed Services Employment and Re-Employment Right Act (USERRA) requires that returning veterans receive all benefits of employment that they would have obtained if they had been continuously employed. One such benefit is eligibility for leave under the FMLA.

A member of the National Guard or Reserve who is absent from employment for an extended period of time due to military service and who requests FMLA leave shortly after returning to civilian employment may not have actually worked for the employer for a total of 12 months or may not have performed 1,250 hours of actual work with the employer in the 12 months prior to the start of the FMLA leave.

Under USERRA, the returning service member would be entitled to FMLA leave if the hours that the member would have worked for the civilian employer during the period of military service would have met the FMLA eligibility threshold. Therefore, in determining whether a veteran meets the FMLA eligibility requirement, the months employed and the hours that were actually worked for the civilian employer should be combined with the months and hours that would have been worked during the 12 months prior to the start of the leave requested but for the military service.

Unlawful Acts

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by the FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to the FMLA.

Enforcement

The Wage and Hour Division investigates complaints. If violations cannot be satisfactorily resolved, the U.S. Department of Labor may bring action in court to compel compliance. Individuals may also bring a private civil action against an employer for violations.