



FMLA: A Step-by-Step Compliance Overview

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Introduction



Today's Presenters

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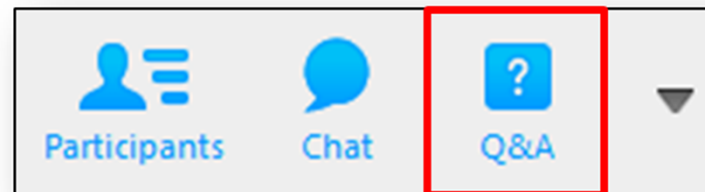
- Employment and benefits attorneys
- Expertise in health and welfare plan requirements
- Educate companies on compliance obligations
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Today's Agenda

- FMLA Overview
- Covered Employers and Eligible Employees
- Qualifying Reasons for Leave
- Notice and Recordkeeping Requirements
- Interaction with Other Types of Leave

FMLA Overview

The Family and Medical Leave Act (FMLA)



Enacted in 1993 to help balance work and family life



Amended to expand leave rights for military families



Covers only certain employers



Provides unpaid, job-protected leave to eligible employees



FMLA Requirements

- Allow eligible employees to take unpaid leave for qualifying reasons
- Provide notices to employees regarding FMLA leave
- Continue group health benefits during leave
- Restore employees to the same or equivalent job upon return from leave
- Comply with recordkeeping requirements

Enforcement and Penalties



Lawsuits:

Employees or the DOL can sue for damages or injunctive relief



DOL Audits:

The DOL enforces FMLA compliance

Knowing and following the FMLA's rules can avoid many problems for employers

Step 1: Is Your Company Subject to the FMLA?



Covered Employers

Private employers

- Employ 50 or more employees during each working day for 20 or more weeks in the current or preceding year

Public agencies

- Any size

Elementary and secondary schools

- Public schools and school boards
- Private schools
- Any size

Counting Employees

Private employers must count:

- Any employees on the payroll, even if not receiving compensation for the week
- Employees on leave if there is a reasonable expectation that they will return to work
- Employees to include:
 - Full time
 - Part-time
 - Seasonal
 - Temporary



Step 2: Follow Poster and Notice Rules

FMLA Poster

- Covered employers must display or post a general notice about the FMLA, even if no employees are currently eligible for FMLA leave
- Violations can trigger penalties of up to \$169 per offense
- DOL has a model poster that employers may use

EMPLOYEE RIGHTS UNDER THE FAMILY AND MEDICAL LEAVE ACT
THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

LEAVE ENTITLEMENTS
Eligible employees who work for a covered employer can take up to 12 weeks of unpaid, job-protected leave in a 12-month period for the following reasons:

- The birth of a child or placement of a child for adoption or foster care;
- To care for a child (must be taken within 1 year of the child's birth or placement);
- To care for the employee's spouse, child, or parent who has a qualifying serious health condition;
- For the employee's own qualifying serious health condition that makes the employee unable to perform the employee's job;
- For qualifying exigencies related to the foreign deployment of a military member who is the employee's spouse, child, or parent.

An eligible employee who is a covered servicemember's spouse, child, parent, or next of kin may also take up to 26 weeks of FMLA leave in a single 12-month period to care for the servicemember with a serious injury or illness.

An employee does not need to use leave in one block. When it is medically necessary or otherwise permitted, employees may take leave intermittently or on a reduced schedule.

Employees may choose, or an employer may require, use of accrued paid leave while taking FMLA leave. If an employee substitutes accrued paid leave for FMLA leave, the employee must comply with the employer's normal paid leave policies.

While employees are on FMLA leave, employees must continue health insurance coverage as if the employees were not on leave.

Upon return from FMLA leave, most employees must be restored to the same job or one nearly identical to it with equivalent pay, benefits, and other employment terms and conditions.

An employer may not interfere with an individual's FMLA rights or retaliate against someone for using or trying to use FMLA leave, opposing any practice made unlawful by the FMLA, or being involved in any proceeding under or related to the FMLA.

BENEFITS & PROTECTIONS

ELIGIBILITY REQUIREMENTS
An employee who works for a covered employer must meet three criteria in order to be eligible for FMLA leave. The employee must:

- Have worked for the employer for at least 12 months;
- Have at least 1,250 hours of service in the 12 months before taking leave;* and
- Work at a location where the employer has at least 50 employees within 75 miles of the employee's worksite.

*Specific "hours of service" requirements apply to part-time and new employees.

REQUESTING LEAVE
Generally, employees must give 30-day* advance notice of the need for FMLA leave. If it is not possible to give 30-day* notice, an employee must notify the employer as soon as possible and, generally, follow the employer's usual procedures.

Employees do not have to have a medical diagnosis, but must provide enough information to the employer so it can determine if the leave qualifies for FMLA protection. Sufficient information could include informing an employer that the employee is or will be unable to perform his or her job functions, that a family member cannot perform daily activities, or that hospitalization or continuing medical treatment is necessary. Employees must inform the employer if the need for leave is for a reason for which FMLA leave was previously taken or certified.

Employees can require a certification or periodic recertification supporting the need for leave. If the employer determines that the certification is incomplete, it must provide a written notice indicating what additional information is required.

Once an employer becomes aware that an employee's need for leave is for a reason that may qualify under the FMLA, the employer must notify the employee if he or she is eligible for FMLA leave and, if eligible, must also provide a notice of rights and responsibilities under the FMLA. If the employee is not eligible, the employer must provide a reason for ineligibility.

Employees must notify their employers if leave will be designated as FMLA leave, and if so, how much leave will be designated as FMLA leave.

EMPLOYER RESPONSIBILITIES

ENFORCEMENT
Employees may file a complaint with the U.S. Department of Labor, Wage and Hour Division, or may bring a private lawsuit against an employer.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

For additional information or to file a complaint:
1-866-4-USWAGE
(1-866-487-9243) TTY: 1-877-889-5627
www.dol.gov/whd
U.S. Department of Labor | Wage and Hour Division



Employer's General Notice

Covered employers with any FMLA-eligible employees must provide employees with a general notice about the FMLA

- The general notice must be provided in the employee handbook or other written materials about leave and benefits
- If no handbook or written leave materials exist, employer must distribute general notice to each new employee upon hire
- Can use the language from DOL's model poster or another format, as long as it includes all the information contained in DOL's model poster

Step 3: Is the Employee Eligible for FMLA Leave?

Employee's Leave Notice

Employees must notify their employers when they need FMLA leave

General Rules

- Must comply with employer's **usual and customary procedures** for requesting leave
- Employee does not have to specifically mention FMLA in leave request

Timing

- If leave is foreseeable, must provide at least 30 days' advance notice of leave (if practicable)
- Otherwise must provide notice as soon as possible and practicable

Eligible Employees

Employees must meet these requirements to be eligible:

Months of
service

- Worked for the employer for at least a total of 12 months (need not be consecutive)

Hours of
service

- Worked at least 1,250 hours during the 12-month period immediately before the leave

Location

- Work at a location where employer has at least 50 employees within a 75-mile radius

Required Notices

After determining whether employee is eligible for FMLA leave, the employer must provide required notices

Notices

- Eligibility Notice
- Rights and Responsibilities Notice
- DOL model notice combines these two notice requirements into one notice

Rules

- Must be provided within five business days of FMLA leave request (unless there are extenuating circumstances)
- If employee is not eligible, must provide at least one reason

Step 4: Is the Leave for a Qualifying Reason?



Qualifying Reasons for Leave – 12 weeks

- Birth and care of employee's newborn child
- Placement of a child with employee for adoption or foster care
- Care of an immediate family member (spouse, child or parent) with a serious health condition
- The employee's own serious health condition
- Qualifying exigency related to active duty (or call to active duty) of a family member (spouse, child or parent) in the Armed Forces

Maximum leave: 12 weeks in a 12-month period



Qualifying Reasons for Leave – 26 weeks

- To care for a covered service member with a serious injury or illness who is the employee's spouse, child, parent or next of kin

Maximum leave: 26 weeks in a 12-month period

Birth or Adoption of a Child

- Time limit: leave must take place within 12 months of the birth or placement
- Spouses employed by same employer are limited to a combined total of 12 workweeks of leave



Serious Health Condition



An illness, injury, impairment or physical or mental condition that involves **inpatient care** or **continuing treatment** by a health care provider

The common cold, flu, headaches other than migraines and routine dental problems ordinarily are not serious health conditions for FMLA



Family Members

Spouse

- Husband or wife as defined or recognized under state law, including a common law marriage or same-sex marriage
- Does not include domestic partners or civil union partners

Parent

- Biological, adoptive, step or foster father or mother or any other individual who stood “in loco parentis” (in place of a parent)
- Does not include “parents-in-law”

Son or Daughter

- Biological, adopted or foster child, stepchild or legal ward
- Child of a person standing “in loco parentis”
- Must be under 18 unless disabled

Step 5: Grant or Deny the Leave (and Provide Notice)



Employer's Designation Notice

The employer is responsible for designating leave as FMLA leave and providing a Designation Notice

Determination of Qualifying Leave

- Must be based on information received from employee
- Can ask for documentation of family relationship and certification
- State what information is missing, if any

Designation Notice

- Informs the employee that the leave will be designated as FMLA leave
- Sets out the requirements for while the employee is on leave
- Provide within five business days



Certification

Employer may require certification:

- For leave due to serious health condition of the employee or family members
- For military family leave

Certification

- A document or form completed by the employee and a health care provider (if applicable)
- Must normally provide within 15 days

If the employee does not provide the certification, the employer may deny the request for FMLA leave



Intermittent or Reduced Schedule Leave

Employers must permit intermittent or reduced leave:



For employee's own serious health condition



To care for family member with a serious health condition



To care for covered service member with a serious injury/illness



For a qualifying exigency



Restrictions

Birth or Placement of Child

- Intermittent or reduced schedule leave can be taken **only if the employer agrees**

Scheduling for Planned Medical Treatment

- Employee must make a **reasonable effort** to schedule treatment in a way that does not **unduly disrupt** employer's operations

Transfer to Alternative Position

- In some cases, the employee may be **temporarily transferred** to an alternative position to accommodate recurring periods of leave

Step 6: Maintain Group Health Benefits



Group Health Benefits

Employers must maintain group health benefits during leave on the same terms as if employee had continued to work

Rules

- If employee drops coverage during leave, must be reinstated when employee returns
- Coverage may be terminated if employee informs employer that he or she will not be returning
- Entitlement to other employee benefits during FMLA leave (for example, holiday pay) depends on employer's leave policies

Paying for Health Plan Coverage

- During FMLA leave, employee must continue to pay his or her share of premiums
- Employer should set rules for making premium payments
- If a premium payment is more than 30 days late, may drop the employee's coverage unless employer has a policy of allowing a longer grace period





Step 7: Provide Job Restoration Rights



Job Restoration

- An employee returning from leave must be restored to:
 - The employee's original job; or
 - An equivalent job with equivalent pay, benefits and other terms and conditions of employment
- An employee is entitled to any:
 - Unconditional pay increases that occurred during FMLA leave, such as cost of living increases
 - Any pay increases conditioned upon seniority, length of service or work performed if employees taking the same type of leave for non-FMLA reasons receive the increases
- Taking FMLA leave cannot result in the loss of any employment benefit that employee earned or was entitled to before taking leave



Job Restoration

Exceptions

- Employees on FMLA leave are not protected from actions that would have affected them if they were not on FMLA leave
- May deny restoration to “key employees” to prevent substantial and grievous economic injury
- In some cases, may delay restoration to employee who does not provide fitness-for-duty certification

Step 8: Maintain Records Properly



Employer Recordkeeping

- Covered employers must keep and maintain records regarding FMLA obligations, such as:
 - Dates of FMLA leave
 - Hours of leave, if taken in increments of less than a day
 - Employee notices
 - Premium payments for employee benefits
 - Records of disputes regarding leave designation
- Must be kept for a minimum of **three years**

Step 9: Think About Interaction with Other Rules



Substitution of Paid Leave

- An employee may elect, or an employer may require, substitution of accrued paid leave (such as sick or vacation leave) to cover some or all of FMLA leave
- If substituted, paid leave and FMLA leave run concurrently
- When paid leave is used for FMLA-covered reason, leave is still protected
- An employee's ability to substitute paid leave is determined under employer's normal leave policy

Workers' Compensation

Workers' compensation absence for employee's own serious health condition may also be designated as FMLA leave

Rules

- If designated as FMLA leave, leave counts against employee's FMLA leave entitlement
- Because this leave is paid, cannot require other accrued paid leave (for example, sick leave) to be substituted
- Employee and employer may agree (if state law permits) to have accrued paid leave supplement plan's benefits

Americans with Disabilities Act (ADA)

- Applies to employers with 15 or more employees
- Must provide reasonable accommodations to disabled employees
- Leave may be a reasonable accommodation
 - Employees not eligible for FMLA
 - Additional leave following FMLA
- Indefinite leave is not a reasonable accommodation





State Leave Laws – General Rules

Employers must comply with FMLA and state laws that provide different or more expansive rights

- State laws may provide longer leave periods, greater benefits or leave for other reasons
- If an employee's absence qualifies for leave under FMLA and state law, the leave counts against the employee's entitlement under both laws.
- If leave qualifies under state law but not the FMLA, it does not count against the employee's FMLA entitlement (and vice versa)



New York Leave Laws

Paid family leave
*(all employers, effective
Jan. 1, 2018)*

**Military spouse
leave**
(20 or more employees)

**Bone marrow
donation leave**
(20 or more employees)

**Blood donation
leave**
(20 or more employees)

**Adoptive parents
leave**
*(all employers, equal
treatment)*

Pregnancy leave
*(4 or more employees,
equal treatment)*



New York Paid Family Leave

General Rules

Applies to all private-sector New York employers

Eligible for up to 8 weeks of paid leave in 2018 (12 weeks for 2021)

Paid at a percentage of employee's average wages

Funded through employee payroll deductions

Reasons for Leave

Bond with newly born, adopted or foster child

Care for family member with serious health condition

Qualifying exigency leave for military families

Interaction with FMLA

Runs concurrently with FMLA leave (if employee is FMLA-eligible and reason is covered by FMLA)

Must designate as FMLA leave and provide required notices

New Jersey Leave Laws

- **Family and medical leave**
 - Applies to employers with 50 or more employees
 - Up to 12 weeks in 24-month period
 - May provide additional rights (for example, covers civil union partners)
- **Domestic violence/sexual assault leave**
 - 25 or more employees
 - Up to 20 days in 12-month period





New Employer Tax Credit

Overview

- Effective for **2018 and 2019** tax years, employers that provide paid leave for FMLA-covered reasons may qualify for a tax credit
- IRS is expected to issue guidance on the details

Key Points

- Equal to a **percentage of wages** paid during leave
- Applicable percentage amount depends on rate of payment on leave
- To be eligible, employer must provide at least **two weeks** of paid leave at a payment rate that is at least **50 percent** of normal wages

Limitations

- Paid time off used for FMLA reasons does not count
- Leave required under state law does not count