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# The Family and Medical Leave Act and Employee Benefits

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# The Federal Family and Medical Leave Act (FMLA)

(29 CFR Part 825)





# FMLA Basics

## INTRODUCTION

The Family and Medical Leave Act (FMLA) provides for unpaid, job-protected leave to eligible employees who work for qualifying employers.

- 12 workweeks per 12-month period
  - » Applies to leaves for the employee's own serious health condition, parental bonding, to care for a family member with a serious health condition and qualifying exigencies
- 26 workweeks per 12-month period
  - » Applies to military caregiver leave

**Note:** Many states have leave laws that run concurrently with FMLA, often providing protections that are greater than FMLA. The general rule in such situations is to apply the greatest protection provided by the applicable laws.



# FMLA Basics - Covered Employers

(29 CFR § 825.104)

## Private Sector Employer

- Private employers that employ 50 or more employees for each working day in 20 or more calendar workweeks in the current or previous calendar year.
  - » Employee considered employed each working day of the calendar week if the employee works any part of the week
  - » Work weeks do not have to be consecutive

## Public Employers

- Public agencies considered covered employers regardless of the number of employees
- Public agencies include:
  - » Federal, state and local governments
  - » Local educational agencies (public and private elementary and secondary schools)



# FMLA Basics - Covered Employees

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(29 CFR § 825.110)

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## Eligible Employees

Works for covered employer

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Employed by the employer for at least 12 months

- Not required to be consecutive (considers employment periods prior to a break in service of up to seven years)
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Worked for at least 1,250 hours during the 12-month period immediately preceding the

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Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

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Public agency and school employees are still required to meet the above eligibility requirements

# FMLA Basics - Qualifying Reasons For Leave

(29 CFR § 825.112)

## Circumstances for FMLA Leave

- Birth of a child and to bond with the newborn child within one year of birth
- Placement with the employee of a child for adoption or foster care and to bond with newly placed child within one year of placement
- Care for the employee's spouse, son, daughter or parent with a serious health condition
- A serious health condition that makes the employee unable to perform the functions of the employee's job
- Qualifying exigency arising out of the fact that the employee's spouse, child or parent is a covered military member on active duty or has been notified of an impending call or order to active duty
- Care for a covered service member with a serious injury or illness if the employee is the spouse, child, parent or next of kin of the service member

**Equal Application:** Right to FMLA leave applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.



# Serious Health Condition

(29 CFR § 825.113-115)

**Definition:** For purposes of FMLA, an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider (29 CFR § 825.113)

## Types of Serious Health Conditions

- **Inpatient care (29 CFR § 825.114):**
  - » An overnight stay in a hospital, hospice or residential medical care facility
  - » Any period of incapacity or subsequent treatment in connection with overnight stay
- **Incapacity and Treatment (29 CFR § 825.115):** A period of incapacity of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition that also involves: treatment of two or more times or treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment
- Any period of incapacity due **to pregnancy, or for prenatal care**
- Any period of incapacity or treatment for such incapacity due to a **chronic serious health condition**
- A period of incapacity which is **permanent or long-term** due to a condition for which treatment may not be effective but requires continuing supervision of health care provider
- Treatment for restorative surgery or a condition that would likely result in a period of incapacity of more than three consecutive days in the absence of treatment

# Military Leave

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(29 CFR § 825.122)

- Eligible employees may take FMLA leave for:
  - » Any “qualifying exigency” arising from foreign deployment of employee’s son, daughter, spouse or parent with the Armed Forces, or
  - » To care for a covered service member with a serious injury or illness if the service member is the employee’s spouse, child, parent or next of kin
- Qualifying exigency leave includes when a family member is on covered active duty or has been notified of an impending call to covered active duty
  - » Covered active duty means duty during deployment to a foreign country
- Covered service member means a current member of the Armed Forces, including a member of the National Guard or Reserves, or a covered veteran
  - » Includes both current service members and veterans who are undergoing medical treatment, recuperation or therapy for a serious injury or illness and were discharged within the previous five years





# Employee Notice

(29 CFR § 825.302-303)

- Employees must provide notice of their need for FMLA leave
- Notice is based upon the employer's customary policy for requesting leave unless unusual circumstances apply
- Notice can be oral or written



## Timing of Notice:

- **Foreseeable** – 30 days advance notice
- **Unforeseeable** – Provided as soon as possible and practical



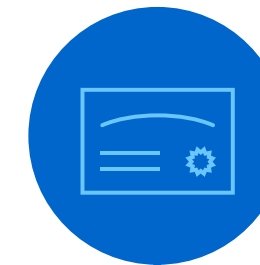


# Certification

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(29 CFR § 825.305)

- Employer may request employee certification to support need for FMLA leave
- Circumstances when certification may be required:
  - » Employee's own serious health condition
  - » Serious health condition of the employee's spouse, parent or child
  - » Military family leave
- Certification includes document or form completed by employee and health care provider if applicable
  - » Employee must provide the certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the circumstances to do so despite the employee's diligent, good faith efforts



Certification may not be required for leave to bond with a healthy newborn child or child placed for adoption or foster care.

# Model Forms, Fact Sheets and Notices

## FMLA Forms

1. WH-1420	FMLA Poster
2. WH-380E	Certification of Heath Care Provider – Employee
3. WH-380F	Certification of Heath Care Provider – Family member
4. WH-381	Notice of Eligibility, Rights & Responsibilities
5. WH-382	Designation Notice
6. WH-384	Certification of Qualifying Exigency
7. WH-385	Certification of Serious Injury/Illness – Military
8. WH-385V	Certification of Serious Injury/Illness – Veteran

**FIND FMLA FORMS →**

<https://www.dol.gov/agencies/whd/fmla/forms>

# FMLA Basics – Duration of Leave

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- Based on defined 12-month period or “leave year”
- Methods for determining 12-month leave year:
  - » Calendar year
  - » Any fixed period of 12 months
  - » Rolling forward – 12-month period measured forward from first date of leave
  - » Rolling backward – 12-month period measured backward from date employee uses FMLA leave
- Intermittent or reduced scheduled leave permitted under certain circumstances

## Length of Leave:

- Up to 12 weeks for qualifying leave
- Qualifying exigency leave
  - » Up to 15 days to spend time with an active service member on rest and recuperation leave
- Up to 26-weeks for military caregiver leave





# School Instructional Employees

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**(29 CFR § 825.600-604)**

Special rules apply for instructional employees of elementary and secondary schools (public and private) for purposes of intermittent or reduced scheduled leave

- ➔ Includes teachers, athletic coaches, driving instructors and special education assistants
- ➔ Special rules do not apply to teaching assistants and aides, or other auxiliary workers, whose primary duties are not instructional

# School Instructional Employees

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- If intermittent leave or reduced schedule is needed and the employee will be on leave for more than 20% of the total number of working days over the leave period, employer may require employee to choose between:
  - » Leave for a period of a duration no greater than the duration of the planned treatment, or
  - » Transfer temporarily to an available alternative position with equivalent pay and benefits  
**(29 CFR § 825.601)**
- Employees on leave at the end of the school year must be provided any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year. Leave periods during summer vacations do not count against the employee's FMLA entitlement **(29 CFR § 825.601)**
- In certain cases, for leaves commencing at the end of the academic term the employer may require the employee to remain out on leave through the end of the term
  - » Such periods are not counted against FMLA entitlement **(29 CFR § 825.603)**
- Restoration must be to an equivalent position **(29 CFR § 825.604)**



# Airline Flight Crew Employees

(29 CFR § 825.800-802)



## Special rules apply to airline flight crew members for calculating leave and determining leave eligibility

- Hours of service criteria – Employee must have worked or been paid during the previous 12 months for:
  - » Not less than 60% of applicable monthly guarantee, and
  - » Not less than 504 hours
- Duration of FMLA-qualified leave during 12-month period
  - » 156 days for military caregiver leave
  - » 72 days for other leave



# Employee Protections

- It is unlawful for an employer to discharge or discriminate against any employee for opposing any practice, or because of involvement in any proceeding, related to FMLA
- Employers may not discriminate against or interfere with employees who attempt to exercise their rights to take FMLA leave
  - » However, an employer is not prohibited from taking action against an employee for violating company policy when the employee is on FMLA leave

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# FMLA Impact on Benefits







# Group Health Plans

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## Maintenance of health coverage during leave

- “Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees.”
- An employer must maintain the same coverage and contributions as if the employee on FMLA leave were actively at work (applies to employee and dependent coverage)



# Group Health Plans

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- ➔ **If an employee goes on unpaid FMLA leave, a covered employer may:**
  - Allow an employee going on unpaid FMLA leave to either revoke or continue health coverage during the FMLA leave, or
  - Require that the employee continue coverage but allow the employee to discontinue his/her/their contributions (the employer may recoup the employee's share of premiums when the employee returns to work), but only if they treat other non-FMLA leaves in the same manner
  
- ➔ **If the employee continues coverage and must pay the employee portion of the premium during the FMLA leave, they may do so in the following ways:**
  - Foreseeable leave – May collect premiums “in advance” on pre-tax basis at employee’s option. Pay-as-you-go and catch-up options also available.
  - Unforeseeable leave – Periodic post-tax payments (pay-as-you-go) sent to employer or collected on return to active work (catch-up)
  
- ➔ **Open enrollment rights apply during FMLA leave**

# Group Health Plans

## Employer's obligation to offer health coverage stops when:

Employee notifies employer of intention to not return to work;

Employment relationship would have terminated if employee had not taken FMLA leave (e.g., position is eliminated);

Employee fails to return to work at the end of FMLA leave;

Employee exhausts FMLA leave entitlement and continues on non-FMLA leave;

- Coverage during non-FMLA leave will depend on plan's eligibility provision(s)

Employee fails to pay premium within 30 days after due date – employer must provide written notice that payment was not received at least 15 days in advance of coverage ending

# FMLA & COBRA

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## COBRA continuation rights apply at the end of FMLA leave

- Regardless of whether employee's premiums are kept current during the job-protected leave

## A COBRA qualifying event occurs if the following three circumstances exist:

- The employee, spouse or a dependent child is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave);
- The employee does not return to employment at the end of the FMLA leave; and
- The individual would, in the absence of COBRA continuation coverage, lose coverage under the group health plan before the end of the maximum coverage period.





# FMLA & Cafeteria Plan Elections

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If an employee goes out on paid FMLA leave (e.g., PTO), the employer can require that the employee continue benefits, so long as they require this during non-FMLA leave.

- If the employer requires benefits to continue while the employee is on paid FMLA leave, the employer must continue to pay his or her share of the premiums by the method normally used a paid, based on the employer's leave policies (e.g., pre-tax salary reductions).



# Special Rule: Cafeteria Plan Elections

**Reinstatement of election on return from leave (if benefits have been dropped):**

**Safe Harbor:**

- Leaves shorter than 30 days – Reinstatement prior election (unless intervening status change)
- Leaves greater than 30 days – Plan design may allow for reinstatement of prior election or may allow employee to make new election for remainder of plan year

- **Unpaid FMLA:** Employers can require reinstatement of coverage upon return from FMLA leave if this is required for all unpaid leaves



# FMLA & Health FSA Elections

An employee on FMLA leave has the right to continue coverage (e.g., continue to incur and submit expenses for reimbursement) under their HFSA during the FMLA leave period.



## If an employee is on an unpaid FMLA leave, the employer can:

- Allow the employee to revoke coverage during the FMLA leave period, or
- Require coverage to continue during the FMLA leave period but allow the employee to discontinue contributions to the HFSA



## If an employee continues HFSA while on FMLA leave, contributions can be collected in several ways:

- Pre-pay (cannot be the only option)
- Pay-as-you-go, or
- Catch-up methods to pay for the required HFSA premium

# Special Rule: Dependent Care FSAs

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## Eligibility to participate:

- Determined by cafeteria plan's eligibility language
- FMLA leave eligibility must be maintained if employees on non-FMLA leaves remain eligible

## Reinstatement:

- Employees may reinstate elections on return to active employment following FMLA

## Dependent care claims eligibility:

- If daycare costs continue to accrue, are they to enable employee and spouse to work or seek work?
- Is employee able to care for children during leave?
- Is the leave of short duration? If so, employee may continue to receive full reimbursement. For example:
  - » 2-weeks for vacation or minor illness, if employee must pay for care anyway
  - » Periods of part-time employment when employee is charged weekly regardless of the number of days care is needed



# Other Benefits

Benefit Coverage	Requirements
Cash Payments (in lieu of health coverage)	Not required
Seniority Benefits (e.g., vacation/sick pay accrual)	Not required during unpaid FMLA leave
Non-Health Benefits (Life, Disability, etc.)	<p>May be maintained during the term of the FMLA leave <b>if permitted by contract</b></p> <ul style="list-style-type: none"><li>• Helps preserve reinstatement right on return to active status</li><li>• Employer may require employee to pay employee portion of any premiums during the term of the leave or recover employee contributions on employee's return to active status</li></ul>

# FMLA Leaves Due to a Disability

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## Life insurance:

- Life waiver of premium – If included in the contract
  - » May apply different waiting periods for qualifying for disability waiver than LTD or STD plans
  - » Premiums must be paid during the waiting period
- Definition of disability may be more restrictive than LTD or STD contracts. For example, inability to perform “any gainful occupation” for a disability beginning prior to a certain age
  - » Typical waiting periods: 6 months or 9 months
  - » Typical Age Limit: 60 or 65
- May require separate claim submission
- In some cases, premium waiver is automatic with approval of a disability claim

# Summary

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The FMLA provides specific job and benefit protections for employees going out on FMLA leave

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Reinstatement of employee welfare benefits is required when an employee returns from FMLA leave (if benefits were discontinued)

3

Make sure non-health benefit contracts allow for immediate reinstatement of benefits upon an employee's return from FMLA leave





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