The Family and Medical Leave Act - FMLA

Guidelines for Secretaries

This material was produced under a grant from the NYS Department of Labor. These materials do not necessarily reflect views or policies of the U.S. Department of Labor, nor does mention of any trade names, commercial products, or organizations imply endorsement by the U.S. Government.
The Objectives:

- Who Can Use FMLA Leave
- When Can FMLA Leave be used
- What Can the FMLA Do
- Managing FMLA Intermittent Leaves
- How is FMLA Leave Requested
- Communication With Your Employer
- Medical Certification
- Returning to Work
- How to File a Complaint
Introduction

Legislation passed at both federal and state levels provides eligible employees with job-protected leave for certain family and medical reasons. The federal Family and Medical Leave Act (FMLA) was enacted by Congress in 1993 and was amended in 2008 and 2009 to extend additional leave rights to families of members of the Armed Forces.

The federal Department of Labor issued revised regulations regarding the federal FMLA effective January 2009 and March 2013. In addition to explaining the new leave rights for military families, these regulations create new rules and procedures that emphasize more complete documentation and better communication between employers and employees.
Who Can Use FMLA Leave?

- In order to take FMLA leave, you must first work for a covered employer. Generally, private employers with at least 50 employees are covered by the law.

- Employers with fewer than 50 employees are not covered by the FMLA, but may be covered by state family and medical leave laws.

- You must have worked for your employer for at least 12 months.

- You must have worked for the employer for at least 1250 hours in the 12 months before you take leave. That works out to be an average of about 24 hours per week, over the course of a year.
When Can FMLA Leave be Used?

**Serious Health Condition** You may take FMLA leave to care for your spouse, child or parent who has a serious health condition and when you are unable to work because of your own serious health condition.

The most common serious health conditions that qualify for FMLA leave are:

1. conditions requiring an overnight stay in a hospital or other medical care facility;
2. conditions that incapacitate you or your family member (for example, unable to work or attend school) for more than 3 consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);
3. chronic conditions that cause occasional periods when you or your family member are incapacitated and require treatment by a health care provider at least twice a year; and
4. pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).
Military Family Leave

The FMLA also provides certain military family leave entitlements. You may take FMLA leave for specified reasons related to certain military deployments.

Additionally, you may take up to 26 weeks of FMLA leave in a single 12-month period to care for a covered service-member with a serious injury or illness.
**What Can the FMLA Do?**

If you are faced with a health condition that causes you to miss work, whether it is because of your own serious health condition or to care for a family member with a serious health condition, you may be able to take up to 12 weeks of job-protected time off under the FMLA.

- If you take FMLA leave, your employer must continue your health insurance as if you were not on leave (you may be required to continue to make any normal employee contributions).

- As long as you are able to return to work before you exhaust your FMLA leave, you must be returned to the same job (or one nearly identical to it). This job protection is intended to lessen the stress that you may otherwise feel if forced to choose between work and family during a serious medical situation.

- Time off under the FMLA may not be held against you in employment actions such as hiring, promotions or discipline.
FMLA leave is unpaid leave. However, if you have sick time, vacation time, personal time, etc., saved up with your employer, you may use that leave time, along with your FMLA leave so that you continue to get paid.

In order to use such leave, you must follow your employer’s normal leave rules such as submitting a leave form or providing advance notice.

When you use paid leave for an FMLA-covered reason (whether at your request or your employer’s), your leave time is still protected by the FMLA.
What Can the FMLA Do?

- You can take FMLA leave as either a single block of time (for example, three weeks of leave for surgery and recovery) or in multiple, smaller blocks of time if medically necessary (for example, occasional absences due to diabetes).

- You can also take leave on a part-time basis if medically necessary (for example, if after surgery you are able to return to work only four hours a day or three days a week for a period of time).

- If you need multiple periods of leave for planned medical treatment such as physical therapy appointments, you must try to schedule the treatment at a time that minimizes the disruption to your employer.
FMLA provides employees with unpaid, job-protected leave. This leave may generally be taken in three ways:

**Continuous leave** — Leave that is taken in a continuous block of time (e.g., Aug. 1-31)

**Intermittent leave** — Leave that is taken in separate blocks of time for a single, qualifying medical or family reason (e.g., Aug. 4-6, Aug. 8, Aug. 12-14)

**Reduced leave schedule** — A leave schedule that reduces the usual number of hours per workweek or hours per workday of an employee (e.g., working 1 p.m. to 5 p.m. instead of the employee’s usual 9 a.m. to 5 p.m. schedule or working full days on Tuesdays and Thursdays instead of a set Monday through Friday schedule)
Managing FMLA Intermittent Leaves

It’s no secret that managing intermittent leave is one of the most complex areas to administer under the FMLA and while a surge of employees suddenly requesting intermittent FMLA leaves may seem suspicious, taking disciplinary action can land employers in hot water.

Properly certifying, scheduling and tracking are the basics of the intermittent leave process but knowing how to curb abuse and enforce disciplinary action, when appropriate and required, are equally as important.
Understanding the Law

The basics of intermittent FMLA leave are the same as regular FMLA continuous leaves. Employers and employees are subject to certain requirements for eligibility.

*Under FMLA, intermittent leave must be medically necessary and an employer can require the employee to provide a medical certification.*

*Employers are also entitled to information on the expected frequency and duration of the periods of incapacity.*

*Once approved, employees may take intermittent FMLA leaves in increments of days, hours and even minutes.*

*Employees may have more that one intermittent leave open at any given time.*
Employer Rights

While many employers are aware of their rights and obligations under the FMLA, they are often reluctant to exercise their rights. Enforcing call-in and call-out procedures, requiring complete and sufficient information on the medical necessity of intermittent leave and engaging supervisors and/or managers to properly capture, report and follow up on intermittent leaves all require time and effort.

As an employer you have a right to:
• Require employees to provide complete and sufficient medical documentation that not only supports the leave, but also supports the need for intermittent leave
Employer Rights cont.

- Ask for a second opinion if you receive a medical certification that is suspicious, contains information that does not appear to be consistent with the described injury or illness or appears to be contradictory – (DOE Medical Bureau)

- Ask for a re-certification if the circumstances of the leave have or appear to have changed

Require employees to identify which intermittent leave they are taking an absence for if they have multiple approved leaves

- Require employees to be reasonable when scheduling intermittent leave so as not to cause undue hardship to the operation of the business
Effective management of intermittent leave requires that employers hold employees accountable for fulfilling their legal obligations to give notice, provide supporting medical documentation and meet the established timelines.

However, it is the employer’s responsibility to inform employees in advance of what they must do and say and enforce those obligations.

If an employer does not educate their employees on these processes, employees have no legal obligations.

To summarize, employers may deny intermittent leave requests only if they take action:

- Before the leave is ever requested;
- At the time the leave request is made; and
- After employees fail to meet their own obligations.
Employer May Deny FMLA
Because...

Employee failed to give timely notice of need for leave
- Employer provides general notice to employee of requirement to provide timely notice of need for leave
- Employer evaluates the timing of notice provided by employee
- Employer provides employee written notice denying leave for this reason

Employee failed to provide a timely medical certification
- Employer provides employee written notice of need to provide timely medical certification
- Employer provides employee at least 15 calendar days to return certification
- Employer extends 15 day deadline in appropriate circumstances
- Following deadline, employer provides employee written notice denying leave for this reason

Leave is not for a serious health condition
- Employer obtains a medical certification establishing that the medical condition is not a qualifying serious health condition
- Employer provides employee written notice denying leave for this reason

Employee failed to provide complete or sufficient medical certification
- Employer provides written notice of deficiency in medical certification
- Employer provides employee at least 7 days to resubmit
- Following deadline, employer provides employee written notice denying leave for this reason

Intermittent leave is not medically necessary
- Employer provides employee with medical certification seeking appropriate information to determine medical need for intermittent leave
- Employer receives medical certification that establishes intermittent leave is not medically necessary
- Employer provides employee written notice denying leave for this reason

Only if the employer takes the following steps:
5 Tips for Managing Intermittent FMLA Leave

By Chris Ceplenski

Managing intermittent FMLA leave while minimizing fraud and abuse can be a challenge. But there are ways to try to make the process as smooth as possible. Follow these 5 tips:

1. Confirm eligibility

2. Restrict intermittent leave to only what the law allows and ensure it’s taken properly

3. Use medical certifications

4. Train supervisors (Administration/Secretaries) to get it right

5. Use the tools you have to manage it well: consistent application of policies, tracking all usage, look for patterns to reduce improper usage, and investigate suspected abuse
Managing Intermittent FMLA Leave Tip 1: Confirm Eligibility

Be sure to give the employee notice if they’re not eligible – even if they have not yet asked for FMLA leave but need to be absent. If you don’t inform them they’re not eligible, you may not be able to discharge them for absences that would have been covered under the FMLA.

Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons, with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. See also Fact Sheet 28A: Employee Protections under the FMLA, and Fact Sheet 28M: The Military Family Leave Provisions under the FMLA.

Eligible employees are entitled to take up to 12 workweeks of FMLA leave in a 12-month period for any of the reasons listed below. See Fact Sheet 28: The Family and Medical Leave Act - Overview.

- The birth of a child and to bond with the newborn child within one year of birth.

  An employee’s entitlement to FMLA leave for birth and bonding expires 12 months after the date of birth. Both mothers and fathers have the same right to take FMLA leave for the birth of a child. Birth and bonding leave must be taken as a continuous block of leave unless the employer agrees to allow intermittent leave (e.g., allowing a parent to return to work on a part-time schedule for 10 weeks).

- The placement with the employee of a child for adoption or foster care and to bond with the newly placed child within one year of placement.

  FMLA leave may be taken before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be entitled to FMLA leave to attend counseling sessions, appear in court, consult with his or her attorney or the birth parent’s representative, submit to a physical examination, or travel to another country to complete an adoption before the actual date of placement. FMLA leave to bond with a child after placement must be taken as a continuous block of leave unless the employer agrees to allow intermittent leave. An employee’s entitlement to FMLA leave for the placement of a child for adoption or foster care expires 12 months after the placement.

- A serious health condition that makes the employee unable to perform the functions of his or her job.

  An employee is “unable to perform the functions of the position” where the health care provider finds that the employee
  - is unable to work at all, or
  - is unable to perform any one of the essential functions of the employee’s position.
An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

- To care for the employee’s spouse, son, daughter, or parent who has a serious health condition.

An employee must be needed to provide care for his or her spouse, son, daughter, or parent because of the family member’s serious health condition in order for the employee to take FMLA leave. An employee may be needed to provide care to the family member, for example:
- when the family member is unable to care for his or her own medical, safety or other needs, because of the serious health condition or needs help in being transported to the doctor; or
- to provide psychological comfort and reassurance to the family member with a serious health condition.

**Spouse:** Spouse means a husband or wife as defined or recognized in the state where the individual was married and includes individuals in a same-sex marriage or common law marriage. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States if the marriage could have been entered into in at least one state.

**Parent:** Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a child. This term does not include parents “in law.”

**Son or Daughter:** 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” at the time that FMLA leave is to commence.

**In Loco Parents:** The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for or financially support a child. Employees who have no biological or legal relationship with a child may, nonetheless, stand in loco parentis to the child and be entitled to FMLA leave. Similarly, an employee may take leave to care for someone who, although having no legal or biological relationship to the employee when the employee was a child, stood in loco parentis to the employee when the employee was a child, even if they have no legal or biological relationship.

See also Administrator’s Interpretation No. 21010-3, Fact Sheet #28B: FMLA leave for birth, bonding, or to care for a child with a serious health condition on the basis of an “in loco parentis” relationship; and Fact Sheet #28C: FMLA leave to care for a parent with a serious health condition on the basis of an in loco parentis relationship.

- Any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a military member on covered active duty.

Qualifying exigencies are situations arising from the military deployment of an employee’s spouse, son, daughter, or parent to a foreign country. Qualifying exigencies for which an employee may take FMLA leave include making alternative child care arrangements for a child of the military member when the deployment of the military member necessitates a change in the existing child care
arrangement, attending certain military ceremonies and briefings; taking leave to spend time with a military member on Rest and Recuperation leave during deployment; or making financial or legal arrangements to address a covered military member’s absence, or certain activities related to care of the parent of the military member while the military member is on covered active duty. See Fact Sheet 28M(c): Qualifying Exigency leave under the FMLA. An employee may take qualifying exigency leave for the deployment of a son or daughter of any age.

An eligible employee may also take up to 26 workweeks of FMLA leave in a single 12-month period:

- To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (military caregiver leave).

Eligible family members of both current servicemembers and certain veterans are entitled to military caregiver leave. See Fact Sheet 28M(a): Military Caregiver Leave for a Current Servicemember under the FMLA, and Fact Sheet 28M(b): Military Caregiver Leave for a Veteran under the FMLA.

ENFORCEMENT

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. See Fact Sheet 77B: Protections for Individuals under the FMLA. The Wage and Hour Division is responsible for administering and enforcing the FMLA for most employees. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management or Congress. If you believe that your rights under the FMLA have been violated, you may file a complaint with the Wage and Hour Division or file a private lawsuit against your employer in court.

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243 Contact Us
Managing Intermittent FMLA Leave Tip 2: Restrict It (Within the Law)

The next step an employer can take is to give detailed definitions of what is (and what is not) allowed within the law for intermittent FMLA leave. By restricting the leave to only what the law allows, this still ensures you’re in compliance while minimizing the potential for abuse.

For example, employers can:

- Define the smallest increment allowed for leave. When leave is taken, count all of it and track it.

- Choose not to allow intermittent leave for the birth, adoption or placement of a child. (The employer can require this leave to be taken in time blocks rather than intermittently).

- Require advance scheduling of planned intermittent leave. The law requires employees to try to schedule planned absences in a way that’s least obtrusive.

- Consider a temporary transfer for employees who require planned intermittent leave. This is allowed if there is a position that would better accommodate the leave.
FMLA Intermittent Leave

Require advance scheduling of planned intermittent leave.

When an employee is considering taking intermittent FMLA leave, it is a good idea for the employers to remind him/her that if he/she intends to take intermittent FMLA leave he/she must make a reasonable effort (which is a greater effort than under previous regulations that simply required an attempt) to schedule his/her leave without disrupting the employer’s operations.

Employees must give 30 days’ notice for intermittent FMLA leave that’s foreseeable that far in advance, or as much notice as practicable if it’s not possible to give 30 days’ notice.

If the need for intermittent FMLA leave is unforeseeable, the employee must give notice as soon as practicable.

It generally should be practicable for the employee to follow his/her employer’s usual and customary notice requirements for such leave.

The FMLA’s regulations suggest that oral notification to the employer of the need for leave should be, at the latest, made within no less than 1 or 2 business days of the event giving rise to the need for leave.
Managing Intermittent FMLA Leave Tip 4: Train Supervisors to Get it Right

Training supervisors (Administration/Secretaries) to get it right is often the first line of defense against FMLA abuse.

It can also mean that fewer FMLA leaves are granted to individuals who actually don’t qualify.
Managing Intermittent FMLA Leave Tip 5: Use All Tools at Your Disposal

Last but certainly not least, be sure to use the tools you have at your disposal to manage FMLA leave well: consistently apply your policies, track all FMLA usage, look for patterns to reduce improper usage, and investigate suspected abuse.

**Consistently apply policies.** Have and uniformly apply and enforce call-in policies. “Make anybody who is going to miss work gives you adequate notice as soon as they know they’re going to miss work.” *Plumb advised. Apply the policy consistently not only to FMLA leave, but to others missing work as well.*

**Track your intermittent FMLA leave use.** Look at where your intermittent leave is coming.
- Is it in a particular chapter of the school (i.e. teachers, paras, etc.)?
- Does it involve a particular individual? Because sometimes there are patterns that are very revealing and it may be a supervision issue.
- It may be a documentation issue.”

**Look for patterns.** Periodically looking and tracking where intermittent leave is being used may be helpful to see if there is a problem. This goes for both individual use and company-wide patterns.

**Investigate suspected FMLA leave abuse.** Don’t ignore it. Employers are entitled to investigate if there is an honest suspicion. “When employees who are not entitled to FMLA are using it in an exploitive or abusive fashion, it’s harming coworkers and it’s harming the workplace as well.” *Plumb noted.*
How is FMLA Leave Requested?

While you do not have to specifically ask for FMLA leave for your first leave request, you do need to provide enough information so your employer is aware it may be covered by the FMLA.

Once a condition has been approved for FMLA leave and you need additional leave for that condition (for example recurring migraines or physical therapy appointments), your request must mention that condition or your need for FMLA leave.

*If you don’t give your employer enough information to know that your leave may be covered by the FMLA, your leave may not be protected.*

You do not have to tell your employer your diagnosis, but you do need to provide information indicating that your leave is due to an FMLA-protected condition (for example, stating that you have been to the doctor and have been given antibiotics and told to stay home for four days).
Communication with Employer

Your employer must notify you if you are eligible for FMLA leave within 5 business days of your first leave request.

If the employer says that you are not eligible, it has to state at least one reason why you are not eligible (for example, you have not worked for the employer for a total of 12 months).

At the same time that your employer gives you an eligibility notice, it must also give you a notice of your rights and responsibilities under the FMLA.
Communication with Employer

This notice must include:

- a definition of the 12-month period the employer uses to keep track of FMLA usage. For example, it can be a calendar year, 12 months from the first time you take leave, a “fixed” year such as your anniversary date, or a “rolling” 12-month period measured backward from the date you use FMLA leave.

You need to know which way your employer measures the 12-month window so that you can be sure of how much FMLA leave you have available when you need it;
Communication with Employer

- whether you will be required to provide medical certification from a health care provider;

- your right to use paid leave;

- whether your employer will require you to use your paid leave;

- your right to maintain your health benefits and whether you will be required to make premium payments; and

- your right to return to your job at the end of your FMLA leave.

When your employer has the information necessary to determine if your leave is FMLA protected, it must notify you whether the leave will be designated as FMLA leave and, if possible, how much leave will be counted against your FMLA entitlement.

*If your employer determines that your leave is not covered by FMLA, it must notify you of that determination.*
Medical Certification

If your employer requests medical certification, you only have 15 calendar days to provide it in most circumstances.

The medical certification must include some specific information, including:

- contact information for the health care provider;
- when the serious health condition began;
- how long the condition is expected to last;
- appropriate medical facts about the condition (which may include information on symptoms, hospitalization, doctors visits, and referrals for treatment);
- whether you are unable to work or your family member is in need of care; and
- whether you need leave continuously or intermittently. If you need to take leave a little bit at a time, the certification should include an estimate of how much time you will need for each absence, how often you will be absent, and information establishing the medical necessity for taking such intermittent leave.
Medical Certification

If your employer finds that necessary information is missing from your certification, it must notify you in writing of what additional information is needed to make the certification complete.

You must provide the missing information within 7 calendar days.
Returning to Work

Please keep in mind that if you exhaust your FMLA leave entitlement and are unable to return to work, your employer is not required to restore you to your position.

SPECIAL CIRCUMSTANCES:

“Key” employees
Certain “key” employees may not be guaranteed reinstatement to their positions following FMLA leave. A “key employee” is defined as a salaried, FMLA-eligible employee who is among the highest paid 10 percent of all the employees working for the employer within 75 miles of the employee’s worksite.

Teachers
Special rules apply to employees of local education agencies. Generally, these rules apply when you need intermittent leave or when you need leave near the end of a school term.
How to File a Complaint

The U.S. Department of Labor’s Wage & Hour Division (WHD) is responsible for administering and enforcing the Family and Medical Leave Act for most employees.

If you have questions, or you think that your rights under the FMLA may have been violated, you can contact WHD at 1-866-487-9243. You will be directed to the WHD office nearest you for assistance. There are over 200 WHD offices throughout the country staffed with trained professionals to help you.

Your employer (NYC DOE) is prohibited from interfering with, restraining, or denying the exercise of FMLA rights, retaliating against you for filing a complaint and cooperating with the Wage and Hour Division, or bringing a private action to court.

You should contact the Wage and Hour Division immediately if your employer retaliates against you for engaging in any of these legally protected activities.
United Federation of Teachers
A Union of Professionals