

Basics of the Family and Medical Leave Act¹

New Lawyer Training

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Purpose

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 the leave. See dol.gov/whd/fmla (last accessed Mar. 2, 2015).

Employer Coverage

- Private sector employer with 50 or more employees employed for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year (including joint employers and successors of covered employers)
- Public agencies (including local, state and federal employers and schools)

29 CFR §825.104

Employee Eligibility

- Work for a covered employer;
- Employed by the covered employer for a total of at least 12 months (need not be consecutive);
- Worked at least 1250 hours for the covered employer during the 12-month period immediately preceding the commencement of the leave; and
- Is employed at a worksite where 50 or more employees are employed by the covered employer within a 75 mile radius of the worksite.

29 CFR §825.110

Leave Entitlement

In general, the FMLA requires covered employers to provide eligible employees a maximum of 12 weeks of job-protected leave for any of the following:

- Birth of child, and to care for the newborn child;
- Placement with the employee a child for adoption or foster care;
- Care for the employee’s *immediate family member* (definition below) with a *serious health condition* (definition below);
- Serious health condition of the employee that renders the employee unable to perform his or her job;
- Leave for *qualifying exigency* (definition below) arising out of the fact that the employee’s immediate family member is on *covered active duty* (definition below) or call to active duty status as a member of the National Guard or Reserves in support of a contingency operation; or

¹ The Family and Medical Leave Act and its regulations are complex and often counterintuitive. This outline provides a general overview of the basics of the FMLA, but is not intended to be a comprehensive outline of all related regulations and circumstances.

- Care (leave for up to 26 weeks) for a covered servicemember with a serious injury or illness incurred in the line of active duty service in the military if the employee is the immediate family member or next of kin (definition below) of the covered servicemember.

29 CFR §825.112

Substitution of Paid Leave

In general, FMLA leave is unpaid. In certain circumstances, though, employees or employers may choose to “substitute” (run concurrently) accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave. An employee’s ability to substitute accrued paid leave is determined by the terms and conditions of the employer’s normal leave policy. 29 CFR §825.207.

➤ **Immediate family member**

○ *Child.*

- Son or daughter (biological, adopted, foster child, stepchild, legal ward, child of person standing *in loco parentis*) who is under the age of 18; or age 18 or older and incapable of self-care because of a physical or mental disability at the time the FMLA leave begins. 29 CFR §§825.102, 122(c)

○ *Parent.*

- Biological, adoptive, step or foster father or mother or any individual who stood *in loco parentis* to the employee when the employee was a son or daughter as defined above. Does not include in-laws. 29 CFR §825.102.

○ *Spouse.*

- Husband or wife as defined or recognized under state law. Eligible employees in legal same-sex marriages are able to take FMLA leave to care for their spouse or family member, regardless of where they live. See 29 CFR §§825.102, 122.

➤ **Serious health condition**

- an illness, injury, impairment, or physical or mental condition that involves either:
 - a. Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (*i.e.*, inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; or
 - b. Continuing treatment by a health care provider, which includes:
 - (1) A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:
 - treatment two or more times by or under the supervision of a health care provider (*i.e.*, in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or
 - one treatment by a health care provider (*i.e.*, an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (*e.g.*, prescription medication, physical therapy); or

(2) Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or

(3) Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or

(4) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or

(5) 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.

29 CFR §§825.113, 114, 115.

➤ **Qualifying exigency:**

○ *Short-notice deployment.* To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty.

○ *Military events and related activities.* To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member; and to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member.

○ *Childcare and school activities.* To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status of the military member necessitates a change in the existing childcare arrangement (*i.e.*, provide childcare for a child of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of the military member; enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member).

- *Financial and legal arrangements.* To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status (e.g., preparing and executing financial and healthcare powers of attorney; transferring bank account signature authority; enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust); and to act as the military member's representative before a governmental agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status.

- *Counseling.* To attend counseling provided by someone other than a health care provider, for oneself, for the military member, or the child of the military member, provided that the need for counseling arises from the covered active duty or call to covered active duty status of the military member.

- *Rest and Recuperation.* To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment (maximum of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave).

- *Post-deployment activities.* To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and to address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services.

- *Parental care.* To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent; to provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member; to admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and to attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings.

- *Additional activities.* As may be agreed to by the employee and the employer including agreement as to timing and duration of leave.

29 CFR§825.126

- **Covered active duty:** means (1) for members of the Regular Armed Forces, duty during deployment of the member with the Armed Forces to a foreign country; or (2) for members of the Reserve component of the Armed Forces (i.e., National Guard,

Reserves), duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation. See 29 CFR§825.126.

- **Next of kin:** the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. See 29 CFR §825.122(e); §825.127(d)(3).

Employee Notice Requirements

If an employee's need for leave is foreseeable (*e.g.*, expected birth; planned medical treatment for a serious health condition), the employee must provide the employer with at least 30 days' notice before the start of the FMLA leave. If 30 days' notice is not practicable, the employee must provide notice to the employer as soon as practicable (generally, the same day or the next business day). When the need for leave is not foreseeable, the employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. While the employee need not refer to the FMLA specifically, he or she must provide information sufficient to place the employer on notice of the employee's need for FMLA leave. 29 CFR §825.302.

Absent unusual circumstances, the employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave. 29 CFR §§825.302, 303.

Employer Response

In addition to General Notice Requirements (*e.g.*, poster, employee handbook as applicable), once an employee has provided notice to his or her employer of the possibility of need for FMLA leave, the employer must provide the employee with a Notice of Eligibility and Rights & Responsibilities Notice within five business days (unless extenuating circumstances). 29 CFR §825.300(2).

Once the employer has sufficient information to determine that the leave qualifies for FMLA leave, the employer must provide the employee with the Designation Notice. 29 CFR §825.301.

Certification

Employers may require that an employee's request for leave due to a serious health condition affecting the employee or a covered family member is supported by a certification from a health care provider. An employer may require second or third medical opinions (at the employer's expense) and periodic recertification of a serious health condition. An employer may use a health care provider, a human resource professional, a leave administrator, or a management official to authenticate or clarify a medical certification of a serious health condition. The employee's direct supervisor is not permitted to authenticate or clarify such a medical certification. An employer may have a uniformly-applied policy

requiring employees returning from leave for their own serious health condition to submit a certification that they are able to resume work. 29 CFR §§305, 306, 307, 308.

Time Limit

Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks during any twelve month period. 29 CFR §825.200.

Intermittent Leave

Under certain circumstances, employees may take FMLA leave intermittently (*i.e.*, taking leave in separate blocks of time for a single qualifying reason) or on a reduced leave schedule (*i.e.*, reducing the employee's usual weekly or daily work schedule). If FMLA leave is after birth of healthy child or placement of a healthy child for adoption or foster care, use of intermittent leave is subject to the employer's approval. 29 CFR §825.202.

When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operation. 29 CFR §825.203.

The employer must account for intermittent or reduced schedule leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that (1) it is not greater than one hour, and (2) the employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. 29 CFR §825.205.

Maintenance of Employee Benefits

The employer must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. Also, the employee must continue to pay his or her share of health insurance premiums while on FMLA leave. 29 CFR §§825.209, 210.

Employee Restoration Rights

On return from a FMLA leave of absence, the returning employee must generally be reinstated to the same position that he or she held prior to the leave, or to an equivalent position (*i.e.*, in terms of pay, benefits, and other terms/conditions of employment including privileges, perquisites and status; must involve same or substantially similar duties and responsibilities which must entail substantially equivalent skills, effort, responsibility and authority). 29 CFR §§825.214, 215.

While a returning employee is not entitled to any additional benefits including seniority during a FMLA leave of absence, he or she may not lose any benefits/seniority accrued prior to the leave. See 29 CFR §825.215 regarding terms of employment relative to work assignment and location, pay, bonuses, and benefits.

There are limitations to an employee's right to job restoration and reinstatement as the FMLA provides that an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. 29 CFR §825.216. Examples of such limitations include if the employee would have been subject to a layoff (29 CFR §825.216); the employee would have been demoted or terminated due to performance deficiencies unrelated to the employee's FMLA leave (29 CFR §825.312); the employee fraudulently

obtains FMLA leave (29 CFR §825.216); or the employee is unable to perform the essential functions of his or her position (29 CFR §825.214).

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. 29 CFR §825.220.

Enforcement

The Wage and Hour Division of the United States Department of Labor (DOL) is charged with administrative enforcement of the FMLA including investigation of complaints. If violations cannot be satisfactorily resolved, the DOL may bring action in court to compel compliance. Individuals may also be able to bring a private civil action against an employer for FMLA violations. 29 CFR §825.400.