

## **FAMILY AND MEDICAL LEAVE ACT**

### **INTRODUCTION**

The Family and Medical Leave Act (“Act” or “FMLA”) became law in 1993. The FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for any of the following reasons:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee’s spouse, child, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job, including incapacity due to pregnancy and for prenatal medical care;
- any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty or call to covered active duty status;” or
- 26 workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness who is the spouse, son, daughter, parent, or next of kin to the employee (military caregiver leave).

An eligible employee is limited to a combined total of 26 workweeks of leave for any FMLA-qualifying reasons during the single 12-month period. For example, an employee may need FMLA leave to care for a spouse, then also need FMLA leave to care for a child who is an active duty service member. The employee would be eligible for a maximum of 26 workweeks for both situations in a 12-month period.

### **GENERAL PROVISIONS**

#### **When Does the FMLA Apply?**

The FMLA applies if both of the following two conditions are met:

- The employer is a covered employer under the Act; and
- The employee is an eligible employee under the Act.

### Covered Employers

Covered employers under the FMLA include:

- All public agencies including state, local and federal employers, local education agencies (schools) regardless of how many employees are employed. However, under the FMLA public employers with fewer than 50 employees may not need to provide benefits and leave time depending on the eligibility of the employees (see below).
- Private sector employers “engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year.” If an employer has more than one facility, the number of employees is combined for all facilities within a 75-mile radius of each other. For the purposes of FMLA, most business activities are considered to be activities affecting commerce.

Consider the following examples:

- Employer A has 25 employees working in Facility 1 and 27 employees at Facility 2. If Facility 1 and Facility 2 are within 75 miles of one another, the employer is a covered employer because it has 52 employees for the purposes of determining coverage under the FMLA. If, however, Facility 1 and Facility 2 are greater than 75 miles apart, Employer A would not be a covered employer under the FMLA.
- Employer B is a public entity with 35 employees. Employer B is a covered employer since all public entities are covered employers under the FMLA, regardless of the number of employees. Employer B must therefore grant leave to eligible employees.

### Eligible Employees

An eligible employee is an employee who meets **all four** of the following conditions:

- 1) works for a covered employer; and
- 2) has worked for the covered employer for at least 12 months (the 12 months are not required to be consecutive, however generally only employment within seven years is counted unless the break in service is due to an employee’s fulfillment of military obligations or governed by a collective bargaining agreement or other written agreement); and
- 3) has worked at least 1,250 hours over the previous 12 months (employees fulfilling military service are credited with hours they normally would have worked); and
- 4) works at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer with a 75-mile radius of that work site.

If an employee does not meet all four of these requirements, the FMLA does not apply. The employer may deny FMLA leave to that employee, regardless of whether that employee works for a covered employer.

Consider the following example:

- Employer C is a county governmental entity that employs a total of 100 employees at two facilities. Facility 1 has 75 employees. Facility 2 has 25 employees and is 100 miles from Facility 1. Smith is an employee at Facility 2 who has worked for Employer C for a period of two years and more than 1,250 hours over the past 12 months. As a public entity, Employer C is a covered employer under the FMLA. However, because the facility at which Smith works has fewer than 50 employees and is not within a 75 miles radius of Facility 1, Smith does not meet the qualifications of an eligible employee and is not entitled to leave under the FMLA.

### Qualifying Events for FMLA Leave

Events that will qualify an employee for FMLA leave include the following:

- *The birth of a child or care of a newborn.* Leave for the birth or care of a newborn child is available to both female and male employees. Eligible employees must provide 30 days notice if the need for leave is foreseeable. Employees may not take an intermittent or reduced leave schedule unless the employer agrees, and employees must take the leave within 12 months of the birth.
- *Placement of a child for adoption or foster care.* This type of leave is available to both male and female employees and includes time off before and after the placement, i.e. for interviews, meetings, etc. The leave must be taken within 12 months of placement.
- *To care for a spouse, child, or parent with a serious health condition,* including incapacity due to pregnancy and for prenatal medical care. Leave may be taken for a 12- week period, in increments of as little as one (1) hour, and/or on a reduced leave schedule.
- *For the employee's own serious health condition.* The employee must be unable to work or unable to perform one of the essential functions of his or her job because of the serious health condition. A medical certification verifying that the employee is unable to perform the functions of the position is sufficient to qualify for leave. Leave may be taken for a 12-week period, in increments of as little as 1 hour, and on a reduced leave schedule.
- *To care for a covered service member with a serious injury or illness.* The service member must be the spouse, son, daughter, parent, or next of kin to the employee.
- *Qualifying exigencies for military relative(s).* The exigency must arise out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status as a member of the National Guard or Reserves in support of a contingency operation.

Qualifying exigencies include:

- issues arising from a covered military member's short notice deployment (i.e. deployment on seven or less days of notice) for a period of seven days from the date of notification;
- military events and related activities, such as official ceremonies, programs or events sponsored by the military or family support or assistance programs, and informational briefings

sponsored or promoted by the military, military service organizations or the American Red Cross;

- certain childcare and related activities arising from the active duty or call to active duty status of a covered military member, such as arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate need basis, enrolling or transferring a child in a new school or day care facility and attending certain meetings at school or a day care facility if they are necessary due to circumstances arising from the active duty or call to active duty of the covered military member;
- making or updating financial and legal arrangements to address a covered military member's absence;
- attending counseling provided by someone other than a health care provider for oneself, the covered military member or the child of the covered military member, the need for which arises from the active duty or call to active duty status of the covered military member;
- taking up to five days of leave to spend time with a covered military member who is on short-term temporary, rest and recuperation leave during deployment;
- attending to certain post-deployment activities, including attending arrival ceremonies, reintegration briefings and events and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status and addressing issues arising from the death of a covered military member; and
- any other event that the employee and employer agree is a qualifying exigency.

#### Duration and Scheduling of Leaves

- The FMLA entitles eligible employees to a maximum of 12 workweeks of FMLA leave in a 12-month period. The leave can be unpaid.
- Spouses employed by the same employer are jointly entitled to a combined total of 12 workweeks of family leave.
- Employers, at their option, may substitute paid leave for any part of the 12 weeks of leave required by the Act. In addition, employers may require employees to take any unused vacation and/or personal time as part of the leave. The employer should specify these requirements in writing.
- An eligible employee may also take up to 26 workweeks of unpaid leave during a single 12-month period to care for a covered service member with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the service member.
  - The single 12-month period for leave to care for a covered service member (both current service members and veterans) with a serious injury or illness begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12-month period established by the employer for other types of FMLA leave.

- Under certain circumstances, employees may take leave on an intermittent or on a reduced schedule basis. Intermittent leave is leave that the employee takes in separate blocks of time but because of one qualifying reason. For example, the employee may need medical treatment for an illness that requires the employee to be absent from work for multiple individual days spread out over a period of time.
- 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 operations.
- A reduced schedule is a reduction in the amount of hours worked per week or per day. The FMLA may allow smaller increments of time. Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA 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. (Employers should periodically review this issue since the United States Department of Labor, Wage and Hour Division is currently considering changes to the definition of reduced schedule.)
- Employees may not be required to take more FMLA leave than necessary to address the circumstances that cause the need for leave.
- Employees needing intermittent/reduced schedule leave for foreseeable medical treatment must make a reasonable effort to work with their employers to schedule the leave to not unduly disrupt the employer's operations, subject to the approval of the employee's health care provider. In such cases, the employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodates recurring periods of leave better than the employee's regular job.
- Employees may not take intermittent or reduced schedule leave for the birth or placement of a child unless the employer agrees. However, an employee does not need the employer's agreement for intermittent or reduced schedule leave for a serious health condition if it is medically necessary.

## **COVERED EMPLOYERS' OBLIGATIONS UNDER FMLA**

### Reinstatement of Employee

Employers must reinstate employees returning from leave to their prior job or an equivalent position with equal pay, benefits and other terms and conditions of employment.

### Health Coverage

Under the Act, employers must provide group health plan coverage for employees on leave if the employer provided such insurance before the leave was taken. The employer must provide the coverage on the same terms as if the employee had continued to work. If applicable, the employer and employee must make arrangements for the employee to pay his or her share of health insurance premiums while on leave.

### Posting of Notice

- All covered employers must conspicuously post and keep posted on their premises a notice regarding the FMLA (an FMLA poster). Both employees and applicants must be able to see and read the notice.
- An employer who fails to meet the posting requirement is subject to a fine for each separate offense. Free FMLA posters can be found online at <https://www.dol.gov/agencies/whd/fmla/posters>.
- If the employer has FMLA eligible employees, a written notice must be provided to employees, either in an employee handbook or other document. The notice must explain the Act's provisions and provide information about the procedures for filing complaints of violations of the FMLA with the Wage and Hour Division.
- If the employer has an employee handbook or written employment policies, including collective bargaining agreements, it must include a written FMLA policy.

### Designation of FMLA Leave

Federal regulations require the employer to designate leave as FMLA leave in order for it to count against the total 12 weeks of FMLA leave entitlement. If the employee does not provide enough information to determine if FMLA leave is being requested, the burden is on the employer to seek further information to make such determination. NOTE: Employees do not need to specifically request "FMLA leave" initially to be entitled to it.

The employer is also required to provide a written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.

For more information, employers may go to the Department of Labor FMLA website:  
<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>.

### Reporting Requirements

A covered employer is required to make, keep, and preserve records pertaining to their obligations under FMLA in accordance with the recordkeeping requirements of the Fair Labor Standards Act (FLSA). The FMLA does not require employers to keep their records in any particular order or form, or revise their computerized payroll or personnel records systems to comply.

Employers must keep the records for no less than three years and make them available for inspection, copying, and transcription by Department of Labor representatives upon request. Records kept in computer form must be made available for transcription and copying.

A list of the required records can be found at the Department of Labor web site at  
<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-C/part-825/subpart-E/section-825.500>.

## **ELIGIBLE EMPLOYEES' OBLIGATIONS UNDER FMLA**

If the leave is foreseeable, the employee must provide 30 days' advance notice. If the leave is not foreseeable, the employee must provide such notice as is practicable.

The Act has special provisions regarding intermittent or reduced leave periods. Employees who require intermittent leave related to planned medical treatment for themselves or an immediate family member must try to schedule the treatment so that it affects the employer as little as possible.

Employees must comply with their employers' requirements for documentation from a health care provider substantiating the health condition for which they need a leave. Employers may also require periodic reports during leave regarding the employee's status and intent of return to work.

## **HARDSHIP EXCEPTION FOR EMPLOYERS**

The Act provides no general "hardship" or "essential employee" exemption. Employers may, however, deny job restoration to certain "highly compensated employees." This includes salaried employees who are among the highest paid 10 percent of an employer's work force and who work within 75 miles of the employer's facility. The following conditions apply:

- the individual must be a "key" employee whose absence would create substantial and grievous economic injury to an employer's operations;
- the employer must notify the employee of his or her status as a "key" employee in writing at the time the employee gives notice of the need for FMLA leave; and
- the employee elects not to return to work once he or she has received notice.

Employers are strongly encouraged to consult with a qualified labor attorney when undertaking a denial of job restoration for key employees.

## **SOME PRACTICAL TIPS**

- If a leave qualifies as FMLA leave and the employer fails to designate the leave as FMLA leave, the leave taken is not subtracted from the 12 weeks allowed and the employee is entitled to all FMLA protections.
- Train supervisors regarding the FMLA and document the training. Although supervisors may not have authority to approve or deny a request for leave, supervisors should be aware of the FMLA and its application such that they can provide appropriate responses to questions from employees, and document reasons for employee absences.
- Consider all requests for time off very carefully. Employees are not required to state that they need time off for FMLA reasons. They need only to provide the employer enough information to put the employer on notice that the leave may qualify for the FMLA

- The Wage and Hour Division of the United States Department of Labor is responsible for enforcement of the FMLA.
- As with any employment-related issue, employers should discuss their concerns with an attorney knowledgeable in employment practices.

## **INFORMATION RESOURCES**

Family and Medical Leave Act of 1993

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

The Employer's Guide to the Family and Medical Leave Act:

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>

Free FMLA posters:

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

FMLA recordkeeping requirements:

<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-C/part-825/subpart-E/section-825.500>

***Contact MML Risk Management Services Staff  
or your Loss Control Consultant for more information.***



### **Important Phone Numbers**

MML Risk Management Services	800.653.2483
Loss Control Services	800.482.2726

### ***Note:***

***This document is not intended to be legal advice.  
It only identifies some of the issues surrounding this topic.  
Public agencies are encouraged to review their procedures with an expert  
or a competent attorney who is knowledgeable about the subject.***