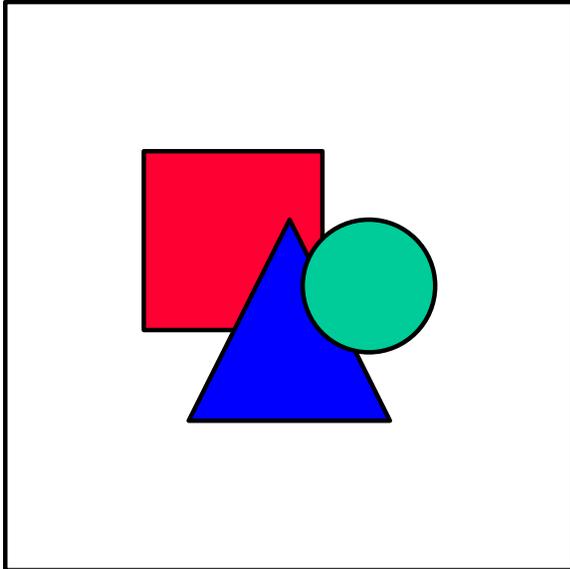


**APPENDIX F**

**FMLA COMPLIANCE**

**GUIDE**

**Employment Standards Administration**  
**U.S. DOL Wage and Hour Division**  
**FMLA Compliance Guide**



[---DISCLAIMER---](#)

[The Family and Medical Leave Act](#) ("FMLA") provides certain employees with up to 12 workweeks of unpaid, job-protected leave a year, and requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave. This **Compliance Guide** summarizes the FMLA provisions and regulations<sup>1</sup>, and provides answers to the most frequently asked questions. More detail on the FMLA may be found in the regulations ([29 CFR Part 825](#)).

## **Summary**

The FMLA became effective **August 5, 1993**, for most employers and employees. (For those covered by a collective bargaining agreement (CBA) in effect on that date, the FMLA became effective on the expiration of the CBA or February 5, 1994, whichever was earlier.)

This law covers only certain employers; affects only those employees eligible for the protections of the law; involves entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; sets requirements for notice and certification of the need for FMLA leave; and protects employees who request or take FMLA leave. The law also includes [certain employer recordkeeping requirements](#).

## **Purposes of the FMLA**

The FMLA allows employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. The FMLA seeks to accomplish these purposes in a manner that accommodates the legitimate interests of employers, and minimizes the potential for

employment discrimination on the basis of gender, while promoting equal employment opportunity for men and women.

## **Employer Coverage**

FMLA applies to all:

- public agencies, including State, local and Federal employers, and local education agencies (schools); and,
- private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year  $\frac{3}{4}$  including joint employers and successors of covered employers.

For FMLA purposes, most Federal and Congressional employees are under the jurisdiction of the U.S. Office of Personnel Management (OPM) or the Congress.

## Employee Eligibility

To be eligible for FMLA leave, an employee *must work for a covered employer and:*

1. have worked for that employer for at least 12 months; and
2. have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and,
3. work at a location where at least 50 employees are employed at the location or within 75 miles of the location.

## Leave Entitlement

A covered employer must grant an eligible employee up to a total of *12 workweeks of unpaid leave* in a 12 month period for one or more of the following reasons:

- for the birth of a son or daughter, and to care for the newborn child;
- for the placement with the employee of a child for adoption or foster care, and to care for the newly placed child;
- to care for an immediate family member (spouse, child, or parent -- but not a parent "in-law") with a serious health condition; and
- when the employee is unable to work because of a serious health condition.

Leave to care for a newborn child or for a newly placed child must conclude within 12 months after the birth or placement. (See [CFR Section 825.201](#))

Spouses employed by the same employer may be limited to a *combined* total of 12 workweeks of family leave for the [following reasons](#):

- birth and care of a child;
- for the placement of a child for adoption or foster care, and to care for the newly placed child; and,
- to care for an employee's parent who has a serious health condition.

[Intermittent/Reduced Schedule Leave](#) - The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances. (CFR Section 203)

- Intermittent/reduced schedule leave may be taken when [medically necessary](#) to care for a seriously ill family member, or because of the employee's serious health condition.
- Intermittent/reduced schedule leave may be taken to care for a newborn or newly placed adopted or foster care child only with the employer's approval.

Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA leave. Employees may not be required to take more FMLA leave than necessary to address the circumstances that cause the need for 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. (See [CFR Section 825-205](#))

Employees needing intermittent/reduced schedule leave for foreseeable medical treatment must work with their employers to schedule the leave so as not to 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.

**Substitution of Paid Leave** - Employees may choose to use, **or** employers may require the employee to use, accrued **paid** leave to cover some or all of the FMLA leave taken. Employees may choose, or employers may require, the substitution of accrued **paid** vacation or personal leave for any of the situations covered by FMLA. The substitution of accrued sick or family leave is limited by the employer's policies governing the use of such leave.

**Serious Health Condition** - "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or
- a period of incapacity requiring absence of more than **three calendar days** from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
- any period of incapacity due to pregnancy, or for prenatal care; or
- any period of incapacity (or treatment therefor) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
- a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,
- any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

**Medical Certification** - An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must allow the employee at least **15 calendar days** to obtain the medical certification.

An employer may, at its own expense, require the employee to obtain a second medical certification from a health care provider. The employer may choose the health care provider for

the second opinion, except that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be approved jointly by the employer and the employee. The "Certification of Health Care Provider" (optional form [WH-380](#)) may be used to obtain the certifications.

**Health Care Provider** - Health care providers who may provide certification of a serious health condition include:

- doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
- podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice under State law;
- nurse practitioners, nurse-midwives, and clinical social workers authorized to practice under State law and performing within the scope of their practice as defined under State law;
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
- any health care provider recognized by the employer or the employer's group health plan's benefits manager; and,
- a health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country.

### **Maintenance of Health Benefits**

A covered employer is required to maintain group health insurance coverage, including family coverage, for an employee on FMLA leave on the same terms as if the employee continued to work.

Where appropriate, arrangements will need to be made for employees taking unpaid FMLA leave to pay their share of health insurance premiums. For example, if the group health plan involves co-payments by the employer and the employee, an employee on unpaid FMLA leave must make arrangements to pay his or her normal portion of the insurance premiums to maintain insurance coverage, as must the employer. Such payments may be made under any arrangement voluntarily agreed to by the employer and employee.

An employer's obligation to maintain health benefits under FMLA stops if and when an employee informs the employer of an intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is exhausted. The

employer's obligation also stops if the employee's premium payment is more than 30 days late and the employer has given the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received.

In some circumstances, the employer may recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave.

***Other Benefits*** - Other benefits, including cash payments chosen by the employee instead of group health insurance coverage, need not be maintained during periods of unpaid FMLA leave.

Certain types of earned benefits, such as seniority or paid leave, need not continue to accrue during periods of unpaid FMLA leave provided that such benefits do not accrue for employees on other types of unpaid leave. For other benefits, such as elected life insurance coverage, the employer and the employee may make arrangements to continue benefits during periods of unpaid FMLA leave. An employer may elect to continue such benefits to ensure that the employee will be eligible to be restored to the same benefits upon returning to work. At the conclusion of the leave, the employer may recover only the employee's share of premiums it paid to maintain other "non-health" benefits during unpaid FMLA leave.

## **Job Restoration**

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an "**equivalent**" job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using (but not necessarily during) FMLA leave.

**"Key" Employee Exception** - Under limited circumstances where restoration to employment will cause "substantial and grievous economic injury" to its operations, an employer may refuse to reinstate certain highly-paid, salaried "key" employees. In order to do so, the employer must notify the employee in writing of his/her status as a "key" employee (as defined by FMLA), the reasons for denying job restoration, and provide the employee a reasonable opportunity to return to work after so notifying the employee.

## **Notice**

**Employee Notice** - Eligible employees seeking to use FMLA leave **may** be required to provide:

- 30-day advance notice of the need to take FMLA leave when the need is foreseeable;
- notice "as soon as practicable" when the need to take FMLA leave is not foreseeable ("as soon as practicable" generally means at least verbal notice to the employer within **one or two business days** of learning of the need to take FMLA leave);
- sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons (the employee need not mention FMLA when requesting leave to meet this requirement, but may only explain why the leave is needed); and,

- where the employer was not made aware that an employee was absent for FMLA reasons and the employee wants the leave counted as FMLA leave, timely notice (generally within **two business days** of returning to work) that leave was taken for an FMLA-qualifying reason.

**Employer Notices** - Covered employers must take the following steps to provide information to employees about FMLA:

- post a notice approved by the Secretary of Labor (**WH Publication 1420**) explaining rights and responsibilities under FMLA;
- include information about employee rights and obligations under FMLA in employee handbooks or other written material, including Collective Bargaining Agreements (CBAs); or
- if handbooks or other written material do not exist, provide general written guidance about employee rights and obligations under FMLA whenever an employee requests leave (a copy of [Fact Sheet No. ESA 95-24](#) will fulfill this requirement); and
- provide a written notice designating the leave as FMLA leave and detailing specific expectations and obligations of an employee who is exercising his/her FMLA entitlements. The employer may use the "Employer Response to Employee Request for Family or Medical Leave" (optional form [WH-381](#)) to meet this requirement. This employer notice should be provided to the employee within **one or two business days** after receiving the employee's notice of need for leave and include the following:
  - that the leave will be counted against the employee's annual FMLA leave entitlement;
  - any requirements for the employee to furnish medical certification and the consequences of failing to do so;
  - the employee's right to elect to use accrued paid leave for unpaid FMLA leave and whether the employer will require the use of paid leave, and the conditions related to using paid leave;
  - any requirement for the employee to make co-premium payments for maintaining group health insurance and the arrangement for making such payments;
  - any requirement to present a fitness-for-duty certification before being restored to his/her job;
  - rights to job restoration upon return from leave;
  - employee's potential liability for reimbursement of health insurance premiums paid by the employer during the leave if the employee fails to return to work after taking FMLA leave; and
  - whether the employee qualifies as a "key" employee and the circumstances under which the employee may not be restored to his or her job following leave.

## Unlawful Acts

FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by this law. 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 FMLA.

Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

## Enforcement

FMLA is enforced by the Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration. This agency investigates complaints of violations. If violations cannot be satisfactorily resolved, the Department may bring action in court to compel compliance.

An eligible employee may bring a private civil action against an employer for violations. An employee is not required to file a complaint with the Wage and Hour Division prior to bringing such action.

## Other Provisions

Some special rules apply to *employees of local education agencies*. Generally, these rules provide for FMLA leave to be taken in blocks of time when the leave is needed intermittently or when leave is required near the end of a school term (semester).

Several States and other jurisdictions also have family or medical leave laws. If both the Federal law and a State law apply to an employer's operations, an employee is entitled to the most generous benefit provided under either law.

Employers may also provide family and medical leave that is more generous than the FMLA leave requirements.

The FMLA does not modify or affect any Federal or State law which prohibits discrimination.