



# County Technical Assistance Service

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## Family and Medical Leave Act (FMLA)

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Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

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## Family and Medical Leave Act (FMLA)

**Reference Number:** CTAS-173

The federal Family and Medical Leave Act (FMLA) became effective on August 5, 1993. The FMLA was amended in 2008 to include new military family leave entitlements. It is administered by the U. S. Department of Labor (DOL), Wage and Hour Division. The DOL enacted final regulations implementing the FMLA in 1995, and extensively revised the regulations effective January 2009.

The FMLA requires employers to allow eligible employees to take a certain minimum amount of job-protected unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for specified family and medical reasons.

All counties and cities are covered by the FMLA, regardless of the number of employees. A county or a city is generally considered to be a single employer.

Both male and female employees who have worked at least 12 months for the employer, and who have worked at least 1,250 hours during the preceding 12-month period, are eligible for leave under the act. Special rules apply when a husband and wife are employed by the same employer, for highly compensated employees, and for local educational agencies. "Employee" has the same meaning as under the FLSA, so persons who are covered by the FLSA (even if they are "exempt") are covered by the FMLA. Persons who are *not* covered include elected officials, political appointees, volunteers, independent contractors and legal advisors.

Under the basic leave entitlement, qualified employees are entitled to a total of 12 workweeks of unpaid leave during a 12-month period for the following reasons:

- (a) The birth of a son or daughter, and to care for the newborn.
- (b) The placement of an adopted or foster son or daughter, and care afterwards.
- (c) To care for spouse, son, daughter or parent with serious health condition.
- (d) For the employee's own serious health condition that makes the employee unable to perform the functions of the employee's job.

The 2008 FMLA amendments added two new military family leave entitlements. The first provision allows an eligible employee with a spouse, son, daughter, or parent who is serving on active duty or is called to active duty in a foreign country to use FMLA leave for a "qualifying exigency," which may include attending certain military events, arranging for child care, making financial and legal arrangements, attending counseling sessions, and attending post-deployment reintegration briefings.

The second provision allows an eligible employee to take up to 26 workweeks of leave during a "single 12-month period" to care for a spouse, son, daughter, or parent with a serious injury or illness incurred in the line of duty while serving on active duty. The 12-month period for this type of FMLA leave begins on the first date the employee takes leave to care for the injured servicemember and ends 12 months later. If the employee does not take all of the 26 workweeks during this time, the remainder of the leave is forfeited.

Employees returning to work from FMLA leave must be restored to the same or an equivalent position (one that has equivalent pay, benefits, duties and responsibilities, and no loss of accrued benefits).

Health insurance coverage must be maintained under the same conditions as when the employee is actively at work (i.e., if the employee pays part of the insurance premiums, the employee may be required to continue paying that portion of the premiums), and must be restored immediately upon the employee's return to work, regardless of whether premiums were paid during leave.

Intermittent leave (irregular, e.g., to take periodic medical treatments) is permitted if it is medically necessary for the employee or for the care of family member. Intermittent leave is not available to care for a healthy newborn or newly-placed child unless the employer agrees.

Reduced leave (regular reduced number of hours per day or week) is allowed if it is medically necessary for the employee's illness or for the care of family member. It is only available by agreement with the employer to care for a healthy newborn or newly-placed child.

Employees can use paid leave as part of their FMLA entitlement if the employer already provides it under an established leave plan. However, the FMLA does not require paid leave.

Employers have certain rights under the FMLA. The employer has the right to reasonable advance notice of an employee's need to take FMLA leave. At least 30 days advance notice is required for foreseeable occurrences (birth, adoption, planned medical treatment, etc.); otherwise, as much notice as is "practicable." Scheduled medical treatment should be arranged to avoid disruption of the workplace.

The employer can require medical certifications of the need for leave and the expected dates of the absence, and periodic status reports or re-certification on a reasonable basis. The employer can require a second opinion (at the employer's expense) if the employer has reason to doubt the employee's medical certification, and if the second one is different, the employer can require a third opinion (at the employer's expense). The employer can assign the employee to an "alternative position" if the employee has requested intermittent or reduced leave (with equivalent pay and benefits). The employer can require certification that the employee is able to return to work, pursuant to a uniformly applied policy. The employer can require the employee to repay any health insurance premiums paid by the employer on behalf of the employee if the employee does not return to work (unless the employee is medically unable to return to work). The employer can require the employee to take accrued paid leave as part of the 12 weeks of FMLA leave.

The employer must choose one of the following methods for determining the 12-month period for FMLA leave (except leave to care for an injured servicemember as discussed above): (1) the calendar year; (2) any fixed 12-month period (such as a fiscal year or a year beginning on the employee's anniversary date); (3) the 12-month period measured forward from the date the employee's first leave begins (the employee would be entitled to 12 weeks of leave during the 12 months after leave begins (the next 12-month period would begin the first time the employee requests FMLA leave after completion of the previous 12-month period); or (4) a "rolling" 12-month period counted backward from the date the employee uses any FMLA leave. The employer *must choose one* of the above methods and that method must be applied consistently to all employees.

During leave, there can be no loss of accrued benefits. Special rules apply for salaried employees who are among the highest paid 10 percent of the employer's employees within a 75-mile radius of the work site; these employees can be denied restoration of employment under certain circumstances. Special rules apply for employees of local educational agencies with regard to the timing of leave.

## Coverage under the FMLA

**Reference Number:** CTAS-1016

**Covered Employers.**<sup>[1]</sup> The FMLA only applies to "covered employers" as defined under the act. Public agencies are covered employers, and a county is a public agency under the FMLA. A county is considered a single employer for FMLA purposes. Unlike private employers, coverage is not dependent upon the number of employees employed by the county.

**Eligible Employees.**<sup>[2]</sup> Employees must meet certain requirements before they are entitled to protection under the FMLA. An eligible employee is one who (1) has worked for the employer for at least 12 months (this time does not have to be consecutive, but the employer is not required to count previous employment more than seven years before the most recent hire date<sup>[3]</sup>), (2) has worked at least 1,250 hours during the preceding 12-month period,<sup>[4]</sup> and (3) is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite (which rarely will be an issue in county government because the county is considered to be a single employer).

**"Employee" defined.** Under the FMLA, "employee" is given the same meaning as under the Fair Labor Standards Act (FLSA), which means that the FMLA does not cover anyone who is not covered by the FLSA (e.g., elected or appointed officials).<sup>[5]</sup> However, employees who are covered by the FLSA but fall under an exemption (e.g., executive, administrative and professional employees) *are* covered under the FMLA.

**The 12-month Requirement.** The determination of whether an employee has been employed for at least 12 months is made by looking at the time the employee was *on the payroll*, and not whether the employee was actually physically at work. If an employee is on the payroll for any part of a week, that week is considered a week of employment, and 52 weeks is deemed equal to 12 months. The 12 months of employment need not be consecutive months.<sup>[6]</sup>

**The 1,250-hour Requirement.** Unlike the 12-month requirement, the number of hours worked for the 1,250-hour requirement is determined in the same manner as hours worked under the Fair Labor Standards Act—the 1,250 hours are time the employee actually worked; unworked time for which the employee was paid (paid holidays, leave, etc.) is not counted toward the 1,250-hour requirement.<sup>[7]</sup> For exempt salaried employees for whom the FLSA does not require records of hours worked, the employer has the burden of showing that the employee has not worked at least 1,250 hours during the previous 12-month period in order to claim that these employees are not eligible for FMLA leave. In determining the eligibility of an employee returning from USERRA-covered military service, the employee must be credited with the number of hours the employee would have worked but for the period of military service for purposes of determining whether the 1,250 hour requirement has been met. The employer may use the employee's pre-service work schedule to determine the hours that would have been worked.<sup>[8]</sup>

The determination whether the employee has been employed at least 12 months and has worked at least 1,250 hours during the immediately preceding 12 months is made as of the date the leave is to begin.<sup>[9]</sup>

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[1] 29 C.F.R. §§ 825.104 and 825.108. Special rules apply to local educational agencies.

[2] 29 C.F.R. § 825.110.

[3] Two exceptions exist: if the break in service was for National Guard or Reserve Duty, or if there was a written agreement to rehire after the break in service. 29 C.F.R. § 825.800.

[4] An exception exists for employees returning from National Guard or Reserve military obligations. These employees must be credited with the hours they would have worked but for the period of military service. 29 C.F.R. § 825.800.

[5] 29 C.F.R. § 825.800.

[6] 29 C.F.R. § 825.110(b). However, periods of employment prior to a break in service of seven years or more need not be counted toward the 12-month requirement unless the break in service was occasioned by the fulfillment of the employee's military service obligation or if there was a written agreement of the employer's intention to rehire the employee after the break in service.

[7] *Mutchler v. Dunlap Memorial Hospital*, 485 F.3d 854 (6th Cir. 2007).

[8] 29 C.F.R. § 825.110(c).

[9] 29 C.F.R. § 825.110(d).

## Qualifying Reasons for FMLA Leave

Reference Number: CTAS-1017

Generally, leave under the FMLA falls into one of the following three broad categories:

1. Leave related to birth, adoption and foster care, which includes:
  - (a) leave taken for pregnancy, birth, and to be with the healthy newborn child; and
  - (b) leave taken for the placement of a child for adoption or foster care, and to care for the child after placement.
2. Leave for a serious health condition of the employee or an immediate family member that includes:
  - (a) leave taken to care for spouse, son, daughter or parent with serious health condition; and
  - (b) leave taken for the employee's own serious health condition that makes the employee unable to perform the functions of the employee's job.
3. Military-related leave, which includes:
  - (a) qualifying exigency leave, taken for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call to covered active duty; and
  - (b) military caregiver leave, taken by an employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to care for the servicemember who has incurred a serious injury or illness in the line of duty on active duty.<sup>[1]</sup>

The following general definitions apply for all types of FMLA leave:

“Spouse” means a husband or wife as defined or recognized under state law.<sup>[2]</sup> Tennessee does not recognize common law marriages within this state, but Tennessee courts will recognize a common law marriage contracted in a state where common law marriages are valid.<sup>[3]</sup> Therefore, “spouse” includes legally married husbands and wives, and persons who are married under the common law of a state that allows common-law marriages.

“Parent” includes biological, adoptive, step or foster parents and persons who stood “in loco parentis” (see definition below) to the employee when the employee was a child. It does not include parents “in law.”<sup>[4]</sup>

“Son/Daughter” includes biological, adopted, and foster children, stepchildren, legal wards, and children of a person standing “in loco parentis”; it includes all children under 18, but does not include children who are over 18 unless they are incapable of self-care because of a mental or physical disability. For military-related leave, the son or daughter can be of any age.<sup>[5]</sup>

“In Loco Parentis” includes persons with day-to-day responsibilities for the care and financial support of a child, regardless of the existence of any biological or legal relationship.<sup>[6]</sup>

Additional definitions for military-related FMLA leave are covered in the section on military-related leave.

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[1] 29 C.F.R. § 825.112

[2] 29 C.F.R. § 825.122.

[3] See, e.g., *Troxel v. Jones*, 322 S.W.2d 251 (1958).

[4] 29 C.F.R. § 825.122.

[5] 29 C.F.R. § 825.122.

[6] 29 C.F.R. § 825.122.

## Leave for Birth, Adoption and Foster Care

**Reference Number:** CTAS-1018

A father, as well as a mother, can take leave for the birth or placement of a child.<sup>[1]</sup> This leave must be concluded within the 12-month period beginning with the date of birth or placement of the child. The employer is not required to allow intermittent or reduced leave for the placement of a child unless it is medically necessary.

Pregnancy and Childbirth.<sup>[2]</sup> Both the mother and father are entitled to FMLA leave for the birth of the child, and to bond with a healthy infant during the 12-month period beginning on the date of birth. The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth. The incapacity due to pregnancy does not have to meet the other requirements for a serious health condition. For example, the employee may be unable to report to work due to severe morning sickness. The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during prenatal care, or to care for her following the birth if the spouse has a serious health condition.

Adoption and Foster Care.<sup>[3]</sup> For adoption and foster care, leave can begin before the actual placement of a child if it is required for the placement to proceed (for example, required counseling, court appearances and the like). Whether an adoption is through a public or private agency does not matter. The age of the child does not matter. Placement for foster care must involve State action, and does not include informal arrangements.

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[1] 29 C.F.R. § 825.112.

[2] 29 C.F.R. § 825.120.

[3] 29 C.F.R. § 825.121.

## Leave for Serious Health Condition

**Reference Number:** CTAS-1019

Eligible employees are entitled to take leave under the FMLA for their own serious health condition that renders them unable to perform the functions of their job, or to care for the employee's spouse, son, daughter or parent with a serious health condition.

**Definition of "Serious Health Condition"** .<sup>[1]</sup> A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves either (1) inpatient care, or (2) continuing treatment by a health care provider.<sup>[2]</sup> "*Inpatient care*" means an overnight stay in a hospital, hospice, or residential medical care facility; any overnight stay in the hospital automatically qualifies as a serious health condition.<sup>[3]</sup> If inpatient care is not involved, the person must be under "*continuing treatment by a health-care provider*," which includes any one or more of the following:

1. **Incapacity and Treatment.** The person is incapacitated (unable to work, attend school, or perform other regular daily activities) for more than three consecutive full days, and either is treated in person two or more times by a health care provider within 30 days (absent extenuating circumstances), or is treated once in person by a health care provider with a regimen of continuing treatment under the supervision of the health care provider. The first treatment by the health care provider must be within seven days of the first day of incapacity. A regimen of continuing treatment includes, for example, a course of prescription medication or therapy requiring special equipment, such as oxygen. It does not generally include over-the-counter medications such as aspirin, antihistamines, or salves, or bed rest, drinking fluids, exercise, or other similar activities that can be initiated without visiting a health care provider. Unless complications arise, the common cold, flu, ear aches, upset stomach, minor ulcers, headaches (other than migraine), routine dental or orthodontia problems, periodontal disease, and the like do not meet the definition of a serious health condition.
2. **Pregnancy or Prenatal Care.** Any period of incapacity due to pregnancy, or for prenatal care. The person is not required to receive medical treatment during the absence, and the absence may be less than three days. For example, an employee may be unable to report to work due to severe morning sickness.
3. **Chronic Conditions.** Any period of incapacity due to a chronic serious health condition, and treatment for a chronic serious health condition. A chronic serious health condition is one that requires periodic visits (at least twice a year) to a health care provider or nurse, continues over an extended period of time, and may cause episodic rather than continuous incapacity. Examples of chronic conditions are asthma, epilepsy, and diabetes. The person is not required to receive medical treatment during the absence, and the absence may be less than three days. For example, an employee may not be able to report to work due to the onset of an asthma attack.
4. **Permanent Long-term Conditions.** These conditions result in a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Examples are Alzheimer's, a severe stroke, or the terminal stages of a disease. The person need not be receiving active treatment, but must be under the continuing supervision of a healthcare provider.
5. **Conditions Requiring Multiple Treatments.** This category includes conditions that if left untreated would likely result in a period of incapacity of more than three days, such as cancer, severe arthritis, and kidney disease, which require treatments like chemotherapy, radiation, physical therapy and dialysis. It also includes restorative surgery after an accident or injury.

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<sup>[1]</sup> 29 C.F.R. §§ 825.113, 825.114, 825.115.

<sup>[2]</sup> 29 C.F.R. § 825.113.

<sup>[3]</sup> 29 C.F.R. § 825.114.

## Leave for Treatment of Substance Abuse

**Reference Number:** CTAS-1020

Substance abuse can be considered a serious health condition if it falls within one of the categories defining a serious health condition, but FMLA leave can only be taken for treatment for substance abuse that

is given by a health care provider or on referral by a health care provider. Absence for the employee's use of the substance does not qualify for FMLA leave.<sup>[1]</sup>

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[1] 29 C.F.R. § 825.119.

## Military-related Leave

**Reference Number:** CTAS-1021

The 2008 amendments to the FMLA, and additional amendments made in 2009 in the National Defense Authorization Act for FY 2010 (NDAA 2010), added provisions for qualifying exigency leave when the employee's family member is serving on active duty or is called to active duty in a foreign country, and military caregiver leave to care for a family member who becomes seriously injured or ill in the line of duty while on active duty. These new provisions allow eligible employees to take up to 12 workweeks to attend to qualifying exigencies when the employee's spouse, son, daughter or parent is on covered active duty or is called to covered active duty, and up to 26 workweeks in a single 12-month period to care for the employee's spouse, son, daughter, parent, or next of kin with a serious injury or illness incurred in the line of duty on active duty.<sup>[1]</sup>

Protections afforded by Uniformed Services Employment and Reemployment Rights Act (USERRA) extend to all military members (active duty and reserve), and all periods of absence from work due to or necessitated by USERRA-covered service is counted in determining an employee's eligibility for FMLA leave. (29 CFR § 825.110).

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[1] 29 C.F.R. §§ 825.126, 825.127.

## Leave for Qualifying Exigency

**Reference Number:** CTAS-1022

An eligible employee is entitled to take FMLA leave for any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is on, or has been notified of an impending call to, "covered active duty."<sup>[1]</sup> "Covered active duty" means (1) in the case of a member of the regular component of the Armed Forces, duty during deployment to a foreign country, and (2) in the case of a member of the reserve component of the Armed Forces, duty during deployment with the Armed Forces to a foreign country under a call to active duty.<sup>[2]</sup> "Qualifying exigency" includes the following: short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation and post-deployment activities. It also includes any additional activities that are agreed upon by the employee and employer.<sup>[3]</sup>

Eligible employees may take FMLA leave for the following "qualifying exigencies" that occur in connection with covered active duty or a call to covered active duty of the employee's spouse, son, daughter or parent:

1. Short notice deployment. Leave may be taken to address any issues arising from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation seven calendar days or less prior to the date of deployment. Leave for this purpose can be used for seven calendar days after the notice is received.
2. Military events and related activities. Leave may be taken to attend official ceremonies and events sponsored by the military related to the call to active duty, or to attend support or assistance programs or informational briefings.
3. Childcare and school activities. Leave may be taken to arrange for alternative childcare, to provide childcare on an urgent, immediate need basis, to enroll in or transfer to a new school or daycare facility, or to attend school meetings necessitated by the call to active duty.



4. Financial and legal arrangements. Leave may be taken to make legal and financial arrangements to address the military member's absence while on active duty, or to act as the military member's representative before a federal, state, or local agency regarding military service benefits.
5. Counseling. Leave may be taken to attend counseling provided by someone other than a health care provider.
6. Rest and recuperation. Up to fifteen days of leave may be taken to spend time with the military member on rest and recuperation leave during the period of deployment.
7. Post-deployment activities. Leave may be taken to attend arrival ceremonies, reintegration events, and other official ceremonies or programs sponsored by the military for 90 days after termination of active duty status, or to address issues arising from death of a military member while on active duty.
8. Parental care. Care for a military member's parent who is incapable to self-care when the care is necessitated by the member's covered active duty. Such care may include arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility. 29 C.F.R. § 825.126.
9. Additional activities. Leave may be taken for other events related to the military member's active duty or call to active duty as long as the employee and the employer agree that the leave qualifies as an exigency and agree on the timing and duration of the leave.

Employees seeking qualifying exigency leave are required to give their employer reasonable notice if the exigency is foreseeable. The notice must advise the employer that a covered family member is on active duty or call-to-active-duty status, give a listed reason for the leave, and give the anticipated length of the absence. Covered active duty requires deployment to a foreign country. 29 CFR § 825.126.

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[1] 29 C.F.R. § 825.126.

[2] FMLA Section 101, as amended by NDAA 2010.

[3] 29 C.F.R. § 825.126.

## Military Caregiver Leave

**Reference Number:** CTAS-1023

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a "covered servicemember" is entitled to take FMLA leave to care for the covered servicemember with a "serious injury or illness".<sup>[1]</sup> A "covered servicemember" is (1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or (2) a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was a member of the Armed Forces (including National Guard and Reserves) at any time during the period of five years preceding the date on which the veteran undergoes the treatment, recuperation, or therapy.<sup>[2]</sup> "Next of kin" means the nearest blood relative of that individual. A "serious injury or illness" means in the case of a current member of the Armed Forces, including the National Guard or Reserves, an injury or illness incurred in the line of duty on active duty (or which existed prior to active duty but was aggravated by service in the line of duty on active duty) that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. 29 CFR § 825.127.

A serious injury or illness for a covered veteran means an injury or illness that was incurred or aggravated by the member in the line of duty on active duty in the Armed Forces and manifested itself before or after the member became a veteran, and is-

1. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank or rating; or

2. A physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; or
3. A physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; or
4. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. 29 C.F.R. § 825.127.

Leave under this category is calculated differently than other types of FMLA leave. Unlike the other types of leave under the FMLA, eligible employees are entitled to 26 workweeks in a single 12-month period to care for the covered servicemember with a serious injury or illness. The single 12-month period begins on the first day the employee takes leave to care for the servicemember and continues for 12 months thereafter, regardless of the method used to calculate other types of FMLA leave. If the employee does not take all of the 26-workweek entitlement during this single 12-month period, the remainder is forfeited. The leave entitlement applies on a per-covered-servicemember, per-injury basis, so an eligible employee could be entitled to more than one 26-week period of leave if more than one family member is involved or subsequent illness or injury occurs, but no more than 26 workweeks can be taken within any single 12-month period.

An employee is limited to a combined total of no more than 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period, and is limited to a total of 12 workweeks for all other FMLA leave (birth or placement of a child, serious health condition of employee or immediate family or qualifying exigency).

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[1] 29 C.F.R. § 825.127.

[2] 29 C.F.R. §825.127, FMLA Section 101, as amended by NDAA 2010.

## Amount and Timing of Leave under the FMLA

**Reference Number:** CTAS-1024

For most categories of leave, eligible employees may take up to 12 workweeks of FMLA leave during each employer-specified 12-month period. Employers are given four options for their 12-month period. The rules are slightly different for military caregiver leave, where the leave entitlement begins when the reason for the leave arises regardless of which 12-month period the employer uses for other types of FMLA leave, and employees may take up to 26 workweeks of leave per occurrence beginning on the first day leave is taken and continuing for 12 months thereafter. Leave under the FMLA may be taken all at once, in blocks of time, intermittently, or on a reduced work schedule.

The 12-Month Period.<sup>[1]</sup> Employers must choose one of the following four options as their 12-month period for FMLA leave purposes:

1. the calendar year;
2. any fixed 12-month leave year, such as the fiscal year or a year starting on the employee's anniversary date;
3. the 12-month period measured forward from the date the employee first takes FMLA leave; or
4. a rolling 12-month period measured backward from the date the employee uses any FMLA leave.

The method chosen should be set out in the employer's FMLA policy. The employer must apply the chosen method consistently and uniformly to all employees. Once established, the employer may change the 12-month period only by giving 60 days advance notice to employees and implementing the change so that employees do not lose any leave benefits during the transition. If an employer fails to designate one of these four options, the option that provides the most benefit to the employee will be used to calculate an employee's leave entitlement, so it is important that the employer designate the 12-month period.

The 12-Workweek Entitlement.<sup>[2]</sup> Eligible employees are entitled to a total of 12 workweeks of leave during each 12-month period for all categories of FMLA, with the exception of military caregiver leave. The 12-workweek entitlement applies to leave taken for one or more of the following reasons: for the birth or

placement of a child; to care for the employee's parent, son, daughter or spouse with a serious health condition; for the employee's own serious health condition; and for a qualifying exigency.

The 26-Workweek Entitlement.<sup>[3]</sup> Eligible employees are entitled to a total of 26 workweeks of military caregiver leave to care for a family member who becomes seriously injured or ill while on active duty in the line of duty. This is a one-time entitlement per covered servicemember, per injury or illness, and it begins on the first day the employee takes leave for this purpose. During the single 12-month period of military caregiver leave, the employee's leave entitlement is limited to a combined total of 26 workweeks for all FMLA purposes, and to a total of 12 workweeks for those purposes set out above to which the 12-workweek entitlement applies.

Spouses Working for the Same Employer.<sup>[4]</sup> If both husband and wife work for the same employer (i.e., the county), they are limited to a combined total of 12 workweeks of leave in any one 12-month period for (1) birth or placement of a child and routine care afterward, or (2) caring for a parent with a serious health condition. If the husband and wife both use a portion of the 12 workweeks for those purposes, each is entitled to use their remaining entitlement (the difference between the amount he or she has taken individually and 12 workweeks) for other qualifying purposes. Note that this limitation does not apply to leave to care for a child with a serious health condition; for example, if a newborn child has a serious health condition the mother and father each may take up to 12 workweeks of leave if needed to care for the child, even if they work for the same employer. When military caregiver leave is involved, spouses working for the same employer may be limited to a combined total of 26 workweeks of leave during the single 12-month period.

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[1] 29 C.F.R. §825.200.

[2] 29 C.F.R. § 825.200.

[3] 29 C.F.R. §§ 825.127, 825.200.

[4] 29 C.F.R. §§ 825.120, 825.121, 825.127.

## Intermittent Leave and Reduced Leave Schedules

**Reference Number:** CTAS-1025

Intermittent leave is FMLA leave taken in separate blocks of time for a single qualifying reason. A reduced leave schedule is a reduction in an employee's usual working hours. A reduced leave schedule is a change in the employee's work schedule for a period of time, usually from full time to part time.<sup>[1]</sup>

Medical Necessity. For intermittent leave or a reduced leave schedule for the employee's own serious health condition, or to care for a covered family member with a serious health condition, or for military caregiver leave, there must be a medical need for the leave to be taken in this manner. The medical necessity can be addressed in the medical certification, if the employer requires one. When leave is taken after the birth or placement of a healthy child, the employee is not entitled to take intermittent leave or a reduced leave schedule unless the employer agrees. Leave for a qualifying exigency may be taken on an intermittent or reduced leave schedule without medical necessity.

Scheduling.<sup>[2]</sup> Scheduling when there is medical necessity will usually be dependent on the medical necessity, but when an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt the employer's operations unduly. Intermittent or reduced leave may be taken whenever there is a qualifying exigency.

Transfer or Reassignment.<sup>[3]</sup> When an employee is taking intermittent or reduced leave that is foreseeable based on planned medical treatment, or if the employer agrees to permit it for the birth or placement of a healthy child, the employer may transfer the employee to an available alternative position for which the employee is qualified and which better accommodates the recurring periods of leave. The position need not have equivalent duties, but the pay and benefits must be equivalent. The employer may proportionally reduce benefits such as vacation leave where the normal practice is to base the benefit on the number of hours worked. The employee cannot be required to take more leave than is medically necessary, and the employer cannot use the transfer to discourage the employee from taking leave or to

otherwise work a hardship on the employee. When the employee is able to return to full-time work, the employee must be placed in the same or an equivalent job as the job he or she left when the intermittent or reduced leave commenced.

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[1] 29 C.F.R. § 825.202.

[2] 29 C.F.R. §§825.203, 825.302(e).

[3] 29 C.F.R. § 825.204.

## Calculating FMLA Leave

**Reference Number:** CTAS-1026

The employee's actual workweek is the basis of the FMLA leave entitlement. Accordingly, if an employee who regularly works 40 hours in a workweek uses eight hours of leave, that employee has taken 1/5 of a workweek. Similarly, if an employee who regularly works eight-hour days works four-hour days under a reduced leave schedule, that employee uses ½ workweek of FMLA leave for each week of the reduced leave schedule. A part-time employee who normally works 30 hours each week but works only 20 hours under a reduced leave schedule is taking 1/3 of a workweek of FMLA leave each week. The employer may convert these fractions to the hourly equivalent as long as the conversion equitably reflects the employee's total normally-scheduled hours.

The employer must account for FMLA leave using the smallest increment the employer uses to account for other forms of leave, but it cannot be more than one hour. For example, if the employer accounts for other leave in ½ day increments, the employer must use one-hour increments for FMLA leave. If the employer accounts for other leave in 15-minute increments, FMLA leave must be accounted for in 15-minute increments. The employee's FMLA entitlement cannot be reduced by more than the amount of leave actually taken.

Employers may not require the employee to take more leave than necessary to address the circumstances that precipitated the need for leave. Employees may not be charged FMLA leave for periods during which they are working. 29 C.F.R. § 825.205.

When it is physically impossible for an employee to start or end work mid-way through a shift, the entire period the employee is forced to be absent is counted against the employee's FMLA leave entitlement. The physical impossibility provision is to be applied in only the most limited circumstances, and the employer bears the responsibility to restore the employee to the same or equivalent position as soon as possible. 29 C.F.R. § 825.205.

**Overtime.** If an employee normally would be required to work overtime but cannot due to an FMLA-qualifying reason, the hours the employee normally would have been required to work may be counted against the employee's FMLA entitlement. For example, if an employee normally would be required to work 48 hours in a workweek but because of a serious health condition can work only 40 hours, that employee is on a reduced leave schedule and would be using eight hours out of each 48-hour workweek, or 1/6 of a workweek. Voluntary overtime hours that the employee does not work may not be counted against the employee's FMLA leave entitlement.

**Holidays.** If a holiday occurs during a full week of FMLA leave, the holiday has no effect and the week is counted as a week of FMLA leave. However, if the employee is using leave in increments of less than one week, the holiday does not count against the employee's FMLA leave entitlement unless the employee was scheduled and expected to work on the holiday.<sup>[1]</sup>

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[1] 29 C.F.R. § 825.205.

## Required Notices and Designation of Leave

**Reference Number:** CTAS-1027

Employers are required to notify employees of their rights and obligations under the FMLA as well as providing notice of their eligibility for leave, the terms and conditions of the leave, and the consequences of not meeting these terms and conditions.

## Employer Notice Requirements

**Reference Number:** CTAS-1028

Employers are required to provide four types of notice: (1) general notice, (2) eligibility notice, (3) rights and responsibilities notice, and (4) designation notice. If an employer fails to provide the required notices, the employer can be held liable for any damages the employee incurs as a result of the lack of notice. The DOL has developed three forms the employer may use for these purposes (the eligibility notice and the rights and responsibilities notice have been combined into one notice). Employers are not required to use these forms, but it is highly recommended in order to avoid mistakes in giving the required notices.<sup>[1]</sup>

[Fact Sheet #28D: Employer Notification Requirements under the Family and Medical Leave Act](#)

[1] 29 C.F.R. § 825.300.

## General Notice

**Reference Number:** CTAS-1029

All employers who are covered by the FMLA are required to post a notice in a conspicuous place explaining the FMLA's provisions and explaining how employees may file complaints with the DOL's Wage and Hour Division. The notice must be posted where it can be seen by employees and applicants for employment. This notice may be given electronically as long as it meets the other requirements. An employer who willfully fails to post this notice may be assessed a civil money penalty of \$169 for each offense under 29 C.F.R. 825.300(a)(1).

The employer also is required to provide the general notice to employees by including it in the employee handbook or other written materials concerning employee benefits or leave rights, if the employer has any of these, or by distributing the general notice to each new employee upon hiring. This also may be accomplished electronically.

This notice can easily be given using the DOL's prototype notice, commonly known as the "FMLA poster" (WHD publication 1420). If the prototype is not used, the notice given must contain all information that is in the prototype notice.

## Eligibility Notice

**Reference Number:** CTAS-1030

When an employee requests FMLA leave, or when the employer learns that an employee's leave may be for an FMLA-qualifying reason, the employer is required to notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. The eligibility notice must state whether the employee is eligible to take leave under the FMLA, and if not, at least one reason why not. This notice may be oral or in writing. Employers may use the DOL's combined prototype [Notice of Eligibility and Rights and Responsibilities](#) (Form WH-381) for this purpose.

If an employee provides notice of a subsequent need for FMLA leave during the same 12-month period and the employee's status has not changed, no further eligibility notice is required. If the employee's status has changed, the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

## Rights and Responsibilities Notice

**Reference Number:** CTAS-1031

The employer must give the employee written notice detailing the specific expectations and obligations of the employee during leave, and the consequences of failure to meet those obligations. This notice must be provided each time a Notice of Eligibility is provided. If the leave already has begun, the notice must be mailed to the employee's address of record. This notice must include the following information:

1. That the leave may be designated and counted against the employee's annual FMLA leave entitlement and the applicable 12-month period;
  2. Any certifications the employer requires, such as certification of a serious health condition, serious injury or illness, or qualifying exigency, and the consequences of failure to provide these;
  3. The employee's right to substitute paid leave, whether the employer will require the employee to take paid leave, the conditions related to any substitution of paid leave, and the employee's entitlement to take unpaid leave if the employee does not meet the requirements for paid leave under the employer's paid leave policies;
  4. Any requirements for the employee to make any insurance premium payments and the consequences of failure to make these payments timely;
  5. Whether the employee is a "key employee" and explaining the potential consequence that restoration may be denied;
  6. The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and
  7. The employee's potential liability for payment of any health insurance premiums paid by the employer if the employee fails to return to work after the leave.
- 29 C.F.R. § 825.300.

The Notice of Rights and Responsibilities may, but is not required to, contain other information, such as whether the employer requires periodic reports of the employee's status and intent to return to work. This Notice should be accompanied by any certification forms that are required.

Employers may use the DOL's combined prototype [Notice of Eligibility and Rights and Responsibilities](#) (Form WH-381) for this purpose. While use of this prototype is not required, it is strongly recommended that employers use it to ensure that all required information is provided. This notice also may be distributed electronically.

## Designation Notice

**Reference Number:** CTAS-1032

The employer is responsible for designating leave as FMLA leave and for giving the employee notice of the designation. The notice is to be given within five business days after employer has enough information to determine whether the leave is for a FMLA-qualifying reason (e.g., after medical certification has been received), absent extenuating circumstances. Only one designation notice is required for each qualifying FMLA reason in a 12-month period. If the employer determines that the leave does not qualify, the employer must notify the employee of that determination.

If the employer will require a fitness for duty certification before the employee returns to work, this requirement should be included in the designation notice. If this requirement is clearly set out in the employee handbook or other written documents describing the employer's leave policies, written notice is not required with the designation notice but oral notice must be given.

The designation notice must be in writing. The DOL has a prototype [Designation Notice to Employee of FMLA Leave](#) (Form WH-382) that can be used for this purpose. The employer is not required to use the DOL form, but it is strongly recommended.

Designating Leave as FMLA Leave. An employee does not need to state rights expressly under the FMLA or even mention the FMLA giving notice of the need for leave, but the employee does need to state a qualifying reason for the leave. It is the employer's responsibility to designate the leave as FMLA leave. The employer's decision to designate leave as FMLA leave must be based solely on information received from the employee, or the employee's spokesperson if the employee is incapacitated, and if additional information is needed the employer should inquire further of the employee or spokesperson (including making a request for any appropriate certifications). When the employer has sufficient knowl-



edge that the leave is being taken for a FMLA-qualifying reason, the employer must designate the leave and the designation notice must be given within five business days, absent extenuating circumstances.

**Retroactive Designation.** An employer may retroactively designate leave as FMLA leave with appropriate notice to the employee, but only if the employer's failure to designate the leave in a timely manner does not cause harm or injury to the employee. Failure to timely designate leave resulting in harm to the employee can be considered interference with, a restraint of, or denial of an employee's FMLA rights. If it causes harm, the employer could be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result, and for appropriate equitable or other relief such as employment, reinstatement, promotion, or other relief tailored to the harm suffered. For example, if an employee took leave to provide care for a parent with a serious health condition believing it would not count against his or her FMLA leave entitlement, and planned to use that FMLA leave later to provide care for a spouse recovering from surgery planned for a later date, the employee may be able to show harm as a result of the employer's failure to designate the leave timely. The employee could establish this by showing that he or she would have arranged alternative caregivers for the parent if the employer had designated the leave timely.

29 C.F.R. §§ 825.300 and 825.301.

## Employee Notice Requirements

**Reference Number:** CTAS-1033

The FMLA rules for employee notices<sup>[1]</sup> are not as stringent as those for the employer, but employees are required to give their employers reasonable notices related to their leave. When substituting paid leave, employees may be required to follow the employer's usual and customary notice and procedural policies for that type of paid leave.

When the need for leave is foreseeable, the employee must provide at least 30 days advance notice before the FMLA leave is to begin. If 30 days notice is not practicable, notice must be given as soon as practicable (meaning both possible and practical based on the individual circumstances). If the employee fails to give the required 30 day notice, upon request by the employer the employee must explain why giving this notice was not practicable.

The notice may be verbal. It must be sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.

The first time an employee requests leave for an FMLA-qualifying reason the employee need not assert rights under the FMLA or even mention the FMLA. Subsequent requests for leave for the same reason must specifically reference the qualifying reason or the need for FMLA leave.

If the employee fails to give notice as required by the FMLA without reasonable excuse the employee's leave may be delayed, but only if it is clear that the employee had actual notice of the FMLA notice requirements. This condition may be satisfied by proper posting of the general notice and distribution of the general notice either in an employee handbook or other written distribution.<sup>[2]</sup>

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<sup>[1]</sup> 29 C.F.R. § 825.302.

<sup>[2]</sup> 29 C.F.R. § 825.304.

## Certifications and Reports

**Reference Number:** CTAS-1034

**General Rules.**<sup>[1]</sup> Employers may require certification of the need for leave related to a serious health condition of the employee or a family member, and leave for qualifying exigencies and military caregiver leave. In most cases, this certification should be requested at the time the employee gives notice of the need for leave or within five business days thereafter (this is included in the prototype **Notice of Eligibility and Rights and Responsibilities**, Form WH-381), but the employer may request certification at a later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification within 15 calendar days after the employer's request, unless it is not practicable despite the employee's diligent, good faith efforts.

The employee must provide a complete and sufficient certification. The certification is incomplete if one or more of the applicable entries have not been completed. It is insufficient if the information provided is vague, ambiguous or non-responsive. If the certification is incomplete or insufficient, the employer must advise the employee in writing of the information necessary to make it complete or sufficient and give the employee seven calendar days (unless impracticable) to cure the deficiency.

At the time the certification is requested the employer must advise the employee of the consequences of failure to return the certification. If an employee fails to provide complete and sufficient certification despite an opportunity to cure, or fails to provide any certification, the employer may deny FMLA coverage until the required certification is provided. If the employee never provides the certification, the leave is not protected under the FMLA.

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[1] 29 C.F.R. § 825.305.

## Medical Certifications

**Reference Number:** CTAS-1035

When leave is taken for the employee's own serious health condition or that of a family member, the employer may require that the employee provide certification from a health care provider containing the following information<sup>[1]</sup>:

1. Name, address, telephone and fax number of the health care provider and type of medical practice or specialty;
2. Approximate date of onset of the serious health condition and its probable duration;
3. Statement of medical facts to support the need for leave (may include information such as symptoms, diagnosis, hospitalization, prescribed medication, referrals for evaluation or treatment, or other regimen of treatment);
4. If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job, as well as the nature of any work restrictions, and the likely duration of the incapacity;
5. If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care and an estimate of the frequency and duration of the leave required to provide the care;
6. If intermittent or reduced leave is requested for planned medical treatment, information sufficient to establish the medical necessity for the intermittent or reduced leave and an estimate of the dates and duration of treatment and any period of recovery;
7. If intermittent or reduced leave is requested for the employee's serious health condition that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for the intermittent or reduced leave and an estimate of the frequency and duration of the episodes of incapacity; and
8. If intermittent or reduced leave is requested to care for a covered family member with a serious health condition, a statement that the leave is medically necessary to care for the family member and an estimate of the frequency and duration of the required leave.

"Health care provider" includes any of the following: doctors of medicine or osteopathy authorized to practice medicine or surgery in the state; podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers and physician assistants properly authorized to practice and perform within the scope of their practice; Christian Science Practitioners listed with the First Church of Christ, Scientist, in Boston (in such case a second or third opinion may be obtained from someone other than a Christian Science Practitioner); any health care provider from whom the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and a health care provider practicing in a foreign country in accordance with the laws of that country and within the scope of that practice as defined by that country's law.

The DOL has developed two forms for this purpose: [Form WH-380E is for the employee's own serious health condition](#), and [Form WH-380F is for leave to care for a covered family member with a serious health condition](#). The use of these forms is optional, but highly recommended.

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[1] 29 C.F.R. § 825.306.

## Authentication and Clarification

**Reference Number:** CTAS-1036

If the employee submits a complete and sufficient certification, the employer may not request additional information from the health care provider. The employer may, however, contact the health care provider for authentication and clarification of the certification after the employer has given the employee an opportunity to cure any deficiencies in the certification. To make this contact, the employer must use a health care provider, human resources professional, leave administrator, or management official. Under no circumstances may the employee's direct supervisor contact the employee's health care provider.

Authentication means verification that the certification form was completed or authorized by the health care provider. Clarification means contacting the health care provider to understand the handwriting or the meaning of a response. Employers may not ask health care providers for more information that is contained on the form.<sup>[1]</sup>

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[1] 29 C.F.R. § 825.307.

## Second and Third Opinions

**Reference Number:** CTAS-1037

If the employer has reason to doubt the validity of a medical certification, the employer may require the employee to obtain a second opinion, at the employer's expense, from a health care provider designated by the employer, as long as the health care provider is not employed on a regular basis by the employer and does not regularly contract with the employer. If the first and second opinions differ, the employer may require the employee to obtain a third certification, again at the employer's expense, from a health care provider chosen or approved by the employer and the employee. The third opinion will be binding. The employer is required to provide the employee with copies of the second and third opinions upon request, within five business days after the request is made.<sup>[1]</sup>

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[1] 29 C.F.R. § 825.307

## Recertification

**Reference Number:** CTAS-1038

The general rule is that an employer may ask for recertification no more often than every 30 days while the employee is on leave. If the medical certification indicates that the duration is expected to be more than 30 days, recertification cannot be requested until expiration of that duration or six months, whichever is sooner. An employer may request recertification in less than 30 days if the employee requests an extension of leave, if circumstances change significantly from the prior medical certification, or if the employer receives information that casts doubt on the employee's stated reason for leave or the continuing validity of the certification. The employer may ask for the same information on recertification as permitted for the original certification. The employer must allow the employee at least 15 calendar days to provide the recertification. Recertifications are at the employee's expense.<sup>[1]</sup>

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[1] 29 C.F.R. § 825.308.

## Annual Medical Certification

**Reference Number:** CTAS-1039

When an employee's leave for a serious health condition extends beyond a single leave year, the employer may require a new medical certification in each subsequent leave year, subject to the same provisions for authentication, clarification, and second and third opinions as the original certification.<sup>[1]</sup>

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[1] 29 C.F.R. § 825.305(e).

## Military-related Certifications

**Reference Number:** CTAS-1040

Employers are entitled to obtain certification of the need for leave for qualifying exigencies and for military caregiver leave. The DOL has developed forms for these purposes: [Form WH-384 for qualifying exigency](#), and [Form WH-385 for military caregiver leave](#). These forms are optional, but highly recommended.

Certification of Leave for Qualifying Exigency.<sup>[1]</sup> The first time an employee requests leave for a qualifying exigency arising out of the active duty or call to active duty of a covered military member, the employer may require a copy of the military member's active duty orders or other military documentation showing the call to active duty or active duty status, and the dates of the active service. This need only be provided once.

When the employee asks for leave for a qualifying exigency, the employer may require a certification signed by the employee containing the information contained in [DOL's Form WH-384](#). The use of this form is not required, but it is highly recommended. No information other than that set out in the DOL's form may be requested from the employee.

The employer may contact the appropriate unit of the Department of Defense to verify that a covered military member is on covered active duty or call to active duty status, but no further information may be requested. If the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity to verify the meeting schedule and the nature of the meeting. The employee's permission is not necessary to make either of these contacts.

Certification for Military Caregiver Leave.<sup>[2]</sup> When leave is taken to care for a covered servicemember with a serious injury or illness, the employer may require the employee to provide certification by an authorized health care provider of the covered servicemember, which includes any of the following:

1. A U.S. Department of Defense ("DOD") health care provider,
2. A U.S. Department of Veterans Affairs ("VA") health care provider.
3. A DOD TRICARE network authorized private health care provider, or
4. A DOD non-network TRICARE authorized private health care provider.

The employer may request certification from the health care provider, and from the employee or covered servicemember, relative to the injury or illness and the need for leave. The information the employer is authorized to request is contained on the optional [DOL Form WH-385](#). It is highly recommended that the employer use the DOL form in order to ensure that the appropriate information is obtained and no unauthorized information is requested. In lieu of this form, however, employers are required to accept "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA, and authorizes leave either in a single block of time or on an intermittent basis; no further certification is necessary.

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[1] 29 C.F.R. § 825.309.

[2] 29 C.F.R. § 825.310.

## Reports of Status and Intent to Return to Work

**Reference Number:** CTAS-1041

An employer may require an employee who is on FMLA leave to report periodically on the employee's status and intent to return to work. If an employee gives unequivocal notice that he or she does not intend to return to work, the employer's obligations to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. The intention must be expressed unequivocally; if the employee states that he or she may not be able to return to work but expresses a desire to do so, the employer's obligations continue.

If the employee's status changes during leave (i.e., the employee needs more or less leave than originally anticipated), the employer may require reasonable notice of the changed circumstances where foreseeable. Two business days is considered reasonable for this purpose. The employer may receive this information through the requested periodic status reports.

**Fitness for Duty Certification.**<sup>[1]</sup> As a condition to being restored to employment, an employer may require an employee who has been on FMLA leave for the employee's own serious health condition to provide a fitness for duty certification from a health care provider stating that the employee is able to resume work. The employer's policy must be applied uniformly and require all similarly-situated employees to present the certification. The certification only applies to the condition for which leave was taken. The employer may require that the certificate specifically address the employee's ability to resume the essential functions of the employee's job. The employee must be advised in the **Designation Notice** whether the employer requires a fitness for duty certification and whether it must address the essential functions of the employee's position. The employer may delay restoration to employment until the employee submits the required fitness for duty certification. No second or third opinions on a fitness-for-duty certification may be required.

### Sample Fitness for Duty Certification

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<sup>[1]</sup> 29 C.F.R. § 825.312.

## Employee Rights During and After Leave

**Reference Number:** CTAS-1042

**Substitution of Paid Leave.**<sup>[1]</sup> Generally, FMLA leave is unpaid leave. However, if an employee has accrued paid leave under the employer's established paid leave policies and the employee complies with the employer's policies for taking that leave, the employee may choose to substitute the accrued paid leave for all or part of the FMLA leave entitlement. Even if the employee does not choose to substitute paid leave, the employer may require the employee to substitute the employee's accrued paid leave. This substitution means that the FMLA leave and the accrued paid leave will run concurrently and the employee receives pay during the period of otherwise unpaid FMLA leave. If neither the employee nor the employer elects to substitute paid leave, the employee will remain entitled to all paid leave earned or accrued under the employer's leave plan.

**Maintenance of Benefits.**<sup>[2]</sup> Generally, the employer is required to treat employees on FMLA leave the same as employees who are on non-FMLA leave (paid or unpaid) for benefits purposes. Employers are not required to maintain most benefits unless the employer does so for employees who are on other similar types of leave.

**Group Health Coverage.**<sup>[3]</sup> Regardless of how other benefits are handled, employers are required to maintain group health plans for employees on FMLA leave on the same terms and conditions as if the employee were continuously at work during the entire leave period. "Group health plan" is defined as any plan provided by or contributed to by the employer to provide health care to employees, former employees or the families of these employees.<sup>[4]</sup> If the employer provides a new health plan or benefits or changes benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan or benefits to the same extent as if the employee were not on leave. Any other plan changes, such as changes in coverage, premiums, or deductibles, apply to the employee as well. The employee on FMLA leave must be notified of these changes like other employees.

If employees are required to pay a share or all of their group health coverage premiums, the employee must continue to pay these premiums while the employee is on FMLA leave. If premiums are raised or lowered during the leave, the employee is subject to the new rates. If the FMLA leave is paid leave, the employee's share of the premiums must be paid by the method used during any paid leave (usually payroll deduction). If it is unpaid, the employee must make payments during leave. The employer may require the employee to pay either the employer or the employer's insurance company, in any of the following ways:

1. payment due at the same time as if done by payroll deduction;
2. payments due on the same schedule as under COBRA;
3. payments pre-paid pursuant to a cafeteria plan at the employee's option;
4. using the employer's existing rules for payment of premiums on leave without pay as long as they do not require pre-payment of all premiums before the leave begins; or
5. using another system voluntarily agreed to by the employer and employee, which may include pre-payment.

The employer must provide the employee advance notice of the terms and conditions under which these payments must be made. This is done in the [Notice of Eligibility and Rights & Responsibilities \(DOL Form WH-381\)](#).

**Failure to Pay Premiums.** <sup>[5]</sup> If an employee's payments are more than 30 days late (or longer if the employer has an established grace period that is longer), the employer's obligation to maintain health insurance coverage ceases. The employer must provide written notice to the employee that the coverage will be dropped on a specified date at least 15 days after the date of the letter unless payment is received prior to that date, and the letter must be mailed to the employee at least 15 days before coverage is to cease.

If coverage lapses for non-payment, the employer is still required to reinstate the employee's coverage when the employee returns to work, and the coverage must be reinstated to the same level the employee would have had if leave had not been taken, including any family or dependent coverage. The employee may not be required to meet any qualification requirements imposed by the plan, including any pre-existing condition waiting period, or to pass a medical examination to obtain reinstatement of coverage.

If the employee fails to return to work after FMLA leave has been exhausted or expires, the employer may recover its share of health plan premiums paid during *unpaid* FMLA leave, unless the reason the employee does not return to work is either the continuance, recurrence, or onset of another serious health condition, or other circumstances beyond the employee's control. The employer may require certification of the serious health condition. An employee is deemed to have returned to work if the employee works for at least 30 calendar days. Also, an employee who transfers directly, or within 30 days after FMLA leave, to retirement is deemed to have returned to work. An employer may not recover its share of premiums paid during any kind of paid leave.

If the employer elects to pay the employee's share of health or non-health premiums in order to maintain the coverage during leave (e.g., to enable the employer to reinstate the employee with the same benefits upon return to work), the employer may recover these payments (but only the employee's share) regardless of whether the employee returns to work. If the employee fails to return to work, the amount may be deducted from any amounts owed to the employee, such as unpaid wages, vacation pay, and the like, subject to applicable state and federal laws. Alternatively, the employer may initiate legal action against the employee to recover these costs.

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[1] 29 C.F.R. § 825.207.

[2] 29 C.F.R. § 825.209.

[3] 29 C.F.R. §§ 825.209, 825.210.

[4] 29 C.F.R. § 825.800.

[5] 29 C.F.R. § 825.212.

## Protections for Employees Who Assert FMLA Rights

**Reference Number:** CTAS-1043

The FMLA contains the following protections for employees who assert rights under the FMLA<sup>[1]</sup>:

1. An employer is prohibited from interfering with or denying the exercise of any rights under the FMLA.
2. An employer is prohibited from discharging or discriminating against any person for opposing or complaining about any unlawful practice under the FMLA.
3. All persons are prohibited from discharging or in any way discriminating against any person who has filed a charge or instituted a proceeding related to the FMLA, given information or testified in connection with an inquiry or proceeding related to rights under the FMLA.

The prohibition on interference means that employers may not discriminate or retaliate against an employee or prospective employee for having exercised or attempting to exercise FMLA rights. Employers cannot use the taking of FMLA leave as a negative factor in employment decisions.

Employers who violate the act by interfering with or denying rights under the FMLA may be liable for compensation and benefits lost by the employee and other actual monetary losses sustained as a direct result of the violation. Individuals may obtain appropriate equitable relief, including employment, reinstatement, promotion, or other relief tailored to the harm suffered.

Right to Reinstatement.<sup>[2]</sup> The general rule is that upon return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave began, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. This requirement does not extend to de minimis, intangible or unmeasurable aspects of the job.

Equivalent Position.<sup>[3]</sup> An equivalent position is one that is virtually identical in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must have the same or substantially similar duties and responsibilities and entail equivalent skill, effort, responsibility and authority. The employee is normally entitled to return to the same shift or the same or an equivalent work schedule, but if the employee requests a different shift, schedule, or position that better accommodates the employee's needs on return from leave, the employer may agree to the changes. However, the employee cannot be induced into a different position against the employee's wishes.

Equivalent Pay.<sup>[4]</sup> The employee is entitled to any unconditional pay increases and bonuses that occurred during the employee's leave period, such as cost of living increases. Pay increases and bonuses based on seniority, length of service, or work performed must be granted in the same way the employer does for employees on an equivalent leave status that does not qualify for FMLA leave. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked or perfect attendance, and the employee does not meet the requirements due to FMLA leave, the payment may be denied unless the employer pays it to employees on equivalent non-FMLA leave. The employee also is entitled to a position with equivalent pay premiums (such as a position that usually has overtime work with overtime pay).

Equivalent Benefits.<sup>[5]</sup> Benefits includes all benefits provided or made available to employees, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits and pensions. When the employee is reinstated, the benefits must be resumed in the same manner and at the same levels as provided when the leave began, with any changes applicable to the entire workforce. An employee cannot be required to re-qualify for any benefits the employee had prior to the leave's commencement. Employers should make sure they are able to meet this requirement, even if it means paying the employee's share of the costs to maintain the benefits (subject to recovery from the employee upon return from leave – see *Failure to Pay Premiums*).

For purposes of pension and other retirement benefits, a period of unpaid FMLA leave is not treated as a break in service for vesting or eligibility to participate, but periods of unpaid FMLA leave need not be treated as credited service.

Accrual of Additional Benefits.<sup>[6]</sup> The employee is not entitled to accrue any additional benefits (such as sick leave or annual leave) or seniority during unpaid FMLA leave unless the employer allows it. Benefits accrued at the time leave began, however, must be made available to the employee upon return from leave.

Limitations on the Right to Reinstatement.<sup>[7]</sup> The employee on FMLA leave has no greater right to reinstatement than if he or she had been continuously working during the leave period. Other factors also can affect an employee's right to reinstatement after FMLA leave.

Job Elimination or Changes. To deny reinstatement due to elimination of the employee's position, the employer must be able to show that the employee would not otherwise have been employed at the time

reinstatement is requested. For example, if the employee is laid off and employment is terminated during FMLA leave, the employer's responsibilities under the FMLA cease as long as the employer can prove that the employee would have been laid off regardless of the FMLA leave. Similarly, if a shift has been eliminated or overtime has been decreased, the employee would not be entitled to return to work that shift or the original overtime hours upon restoration. If the employee was hired for a specific term or project and that term expires or project ends during the FMLA leave period and the employer would not otherwise have continued to employ the person, the employer has no obligation to reinstate the employee.

Fraud or Failure to Comply with Requirements. An employee who fraudulently obtains FMLA leave is not entitled to job restoration or maintenance of health benefits. Restoration may be delayed or denied if an employee fails to provide a required fitness for duty certification.

Supplemental Employment while on FMLA Leave. If the employer has a uniformly-applied policy governing outside or supplemental employment, the policy may continue to apply to an employee on FMLA leave. An employer who does not have such a policy may not deny benefits on this basis unless the FMLA leave was fraudulently obtained.

Inability to Perform Essential Functions of Position. If at the end of FMLA leave the employee is unable to perform the essential functions of the position due to a mental or physical condition, including the continuation of a serious health condition or an injury or illness that is covered by worker's compensation, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act, worker's compensation or other laws.

Key Employees.<sup>[8]</sup> Under a very limited exception, employers may deny restoration to key employees when necessary to prevent substantial and grievous economic injury to the operations of the employer. A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all employees employed by the employer within 75 miles of the work site. The test for substantial and grievous economic injury is a stringent one that requires a threat to the economic viability of the employer or substantial long-term economic injury, and would not include minor inconveniences or costs that the employer would experience in the normal course of doing business.

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[1] 29 C.F.R. § 825.220.

[2] 29 C.F.R. § 825.214.

[3] 29 C.F.R. § 825.215.

[4] 29 C.F.R. § 825.215.

[5] 29 C.F.R. § 825.215.

[6] 29 C.F.R. § 825.215.

[7] 29 C.F.R. § 825.216.

[8] 29 C.F.R. §§ 825.216--825.219.

## Special Rules for Schools

**Reference Number:** CTAS-1044

Special rules apply to instructional employees of local educational agencies (including county school boards) that affect the taking of intermittent leave, leave on a reduced schedule or leave near the end of an academic term. The term "instructional employees" includes teachers, athletic coaches, driving instructors, and special education assistants, but it does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, bus drivers or maintenance workers. Special rules also apply to restoration to an equivalent position, and these apply to all school employees.<sup>[1]</sup>

The period during summer vacation when the employee would not have been required to work is not counted against the employee's FMLA leave entitlement. Leave that ends with the school year and begins the next semester is considered leave taken consecutively rather than intermittently.

Limitations on Intermittent and Reduced Leave. If an eligible instructional employee needs intermittent leave or leave on a reduced schedule that is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to take leave in a



block or blocks of time not greater than the duration of the planned treatment, or transfer temporarily to an available alternative position for which the employee is qualified, with equivalent pay and benefits, and which better accommodates recurring periods of leave. The block or blocks of time begin no sooner than the first day leave is needed and end no later than the last day on which leave is needed; it may be one uninterrupted block of time. If an instructional employee fails to give the required notice of foreseeable FMLA leave to be taken intermittently or on a reduced schedule, the employer may require the employee to take leave of a particular duration or transfer temporarily to an alternative position, or delay the leave until the notice requirement is met.

Limitations on Leave Near End of Term. Instructional employees who take leave near the end of the term are subject to the following rules:

1. If the leave begins more than five weeks before the end of a term, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than three weeks and the employee would return to work during the three-week period before the end of the term.
2. If the leave begins during the five-week period before the end of the term because of the birth or placement of a child, to care for a family member with a serious health condition, or to care for a covered servicemember, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than two weeks and the employee would return to work during the two-week period before the end of the term.
3. If the employee begins leave during the three-week period before the end of the term for the birth or placement of a child, to care for a family member with a serious health condition, or to care for a covered servicemember, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

If the employee is required to take leave until the end of the term under these rules, only the leave taken until the employee is ready and able to return to work is charged against the employee's FMLA leave entitlement. The additional leave required by the employer is not counted as FMLA leave, but the employer is required to maintain group health insurance and restore the employee to the same or a similar position upon conclusion of the leave.

Special Rules on Restoration to Equivalent Position. The determination of how all school employees are to be restored to an equivalent position is to be made on the basis of established written school board policies and collective bargaining agreements. The policy or collective bargaining agreement must provide for restoration to a position with equivalent benefits, pay, and other terms and conditions of employment.

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[1] 29 C.F.R. § 825.600 *et seq.*

## Recordkeeping

**Reference Number:** CTAS-1045

Covered employers are required to keep records in accordance with the recordkeeping requirements of the federal Fair Labor Standards Act (FLSA)<sup>[1]</sup>. No particular form of records is required, but employers having eligible employees are required to keep records containing the following information for at least three years:

1. Basic payroll and identifying employee data, including name, address and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period, additions to or deductions from pay; and total compensation paid.
2. Dates FMLA leave is taken by eligible employees; leave must be designated as FMLA leave in records and such leave may not include leave required under state law or an employer plan that is not also covered by FMLA.
3. If FMLA leave is taken in increments of less than one full day, the hours of the leave.
4. Copies of employee notices of leave furnished to the employer under FMLA if in writing, and copies of all written notices given to employees as required by the FMLA; copies may be maintained in employee files.
5. Any documents (including written and electronic records) describing employee benefits or employer policies regarding taking paid and unpaid leave.
6. Premium payments for employee benefits.

7. Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

If an employee is not subject to the FLSA's recordkeeping requirements for minimum wage and overtime purposes (i.e., "exempt" employees), the employer need not keep a record of actual hours worked by the employee as long as eligibility for leave is presumed if the employee has been employed for at least 12 months, and with regard to employees who take leave intermittently or on a reduced leave schedule, as long as the employer and the employee maintain a written record of their agreement on the employee's normal schedule or average hours worked each week.

Records and documents related to certifications, re-certifications, or medical histories must be maintained as confidential medical records in separate files from the usual personnel files. If the Americans with Disabilities Act (ADA) applies, these records also must be maintained in accordance with the ADA's confidentiality requirements (see 29 CFR 1630.14(c)(1)), except that--

1. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
2. First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
3. Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request. 29 C.F.R. § 825.500(g).

If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (see 29 CFR 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA, stated above.

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[1] 29 C.F.R. § 825.500.

## Interaction with Tennessee's Parental Leave Act

**Reference Number:** CTAS-1046

Tennessee has a parental leave law (T.C.A. § 4-21-408) that applies to all employers who employ 100 or more full-time employees at a job site or location. This state law allows both male and female employees to take up to four months off for adoption, pregnancy, childbirth and nursing an infant, as long as the employee has been employed for 12 months. The leave may be with or without pay, at the option of the employer. This law requires that the employee give *at least three months advance notice*, except in cases of medical emergency.

The FMLA does *not* supersede the Tennessee law, since the Tennessee law provides greater benefits. Therefore, if you have 100 or more employees, and an employee gives at least three months' advance notice, you must allow the employee to take leave up to a total of four months (which can include the 12 workweeks of FMLA leave) for adoption, pregnancy, childbirth and nursing an infant. Note that under Tennessee's law the employee may choose to begin leave before the birth of the child; for adoption the four-month period begins at the time the employee receives custody of the child. For a discussion of the interaction of the state law with the FMLA, see *Op. Tenn. Att'y Gen.* 94-006 (1/13/94).

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