

FMLA BASICS:

Getting to Know the FMLA



WHITEPAPER

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FMLA BASICS: Getting to Know the FMLA



The federal Family and Medical Leave Act (FMLA) was enacted by Congress to balance workplace needs and employees' personal lives. Basically, the FMLA provides unpaid, job-protected leave for employees who need to take time off work to deal with certain personal issues like taking care of their own or a family member's illness, bonding with a new baby, or addressing a family member's military-related leave.

The FMLA requires employers to not only allow employees time off, but to also return employees to their positions and maintain healthcare benefits during leave, with very limited exceptions.

That's why it's important for those tasked with administering FMLA leave to become familiar with the fundamentals, such as:

- **COVERED EMPLOYERS.** Which employers are covered by the law?
- **ELIGIBLE EMPLOYEES.** What criteria must employees meet to be eligible to take FMLA leave?
- **QUALIFYING REASONS.** What are the qualifying reasons for which employees may take FMLA leave?
- **LEAVE AMOUNT.** How much FMLA leave may be taken and when?
- **FMLA PROCESS.** What are the basic steps involved when administering the FMLA?

While this might not sound like much, there is a lot to understand. The law has nuances that can make managing FMLA leave a challenging process.

The FMLA is an employee entitlement law. This means eligible employees with an FMLA-qualifying reason have the right to the unpaid leave. Employers may not simply forgo their obligations to provide the leave. Read on to find out more about the basics of the FMLA.



WHO IS COVERED?

✓ **All PUBLIC EMPLOYERS** are covered

✓ **PRIVATE EMPLOYERS** are covered if they have

- 50 or more employees
- For 20 or more workweeks

in the current or preceding calendar year

HISTORY

The FMLA was signed into law on February 5, 1993, and became effective on August 5 that same year, so it's been around for a long time. The first final regulations came out on January 6, 1995, and were effective March 30 that year. The law and regulations were changed a few times to add military family leave provisions and to adopt a gender-neutral definition of spouses.

COVERED EMPLOYERS

A covered employer may be a private-sector employer or a public-sector employer (such as a government agency or a school). Covered employers must comply with the FMLA.

Public employers

All public employers are covered by the FMLA regardless of how many employees they have, and these include the federal government, the government of a state or political subdivision of a state; an agency of the U.S., a state, or a political subdivision of a state, including counties, cities and towns, or any interstate governmental agency.

The term "state" includes any state within the U.S., the District of Columbia, and any territory or possession of the U.S.

Local educational agencies are also covered, including public school boards, public elementary and secondary schools, and private elementary and secondary schools.

Private employers

Private employers are covered by the FMLA if they have 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

ELIGIBLE EMPLOYEES

To take FMLA leave, employees must first work for covered employers. Then they need to meet three criteria to be eligible to take FMLA leave. Employees must have:

1. Worked for the employer for at least 12 months (need not be consecutive),
2. Worked at least 1,250 hours in the 12 months before leave is to begin, and
3. Work at a location with at least 50 company employees within 75 miles.

Employees need to meet *all* three criteria to take FMLA leave.

It's important to note that employees' private residences are not considered a worksite/location for the third criterion. Instead, their worksite is the office to which they report and from which assignments are made. If, for example, an employee works from home in Colorado, but reports to a company office in Ohio, the Ohio office is the worksite, and that's the location that needs to have at least 50 company employees within 75 miles. With so many employees working from anywhere, including from their homes, this provision is important.

For the 12-months worked criterion, employers do not have to count time an employee worked before a gap of more than seven years with some exceptions, such as when the break was due to military service.

Employee notice of the need for leave

Employees who are eligible to take FMLA leave do not actually have to "request" the leave initially. They need to *put employers on notice* of the need for leave. Employees do not specifically have to say they need leave, and they certainly do not have to mention the FMLA.

Two court cases illustrate how tricky this can be. In one case, an employee's sleeping on the job was seen as notice of the need for leave. In the other, an employee's crying was considered notice.

If an employee exhibits signs that something is medically wrong, even if the employee says nothing, start thinking FMLA.



Remote employees: *When it comes to FMLA eligibility, an employee's private home is not a worksite. Their worksite is the office to which they report and from which assignments are made. A worksite must have 50 employees within 75 miles.*



Confused about employee eligibility, the definition of a work location, or other nuances of the FMLA? You can access a comprehensive library of word-for-word regulations in the J. J. Keller® **FMLA Manager**.

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Once an employer is put on notice of the need for leave for a possible FMLA-qualifying reason, the FMLA clock starts ticking and the employer has five business days to give the employee an eligibility/rights & responsibilities notice.

This is one area where managers play a vital role in ensuring FMLA compliance. Managers, assistant managers, and supervisors, as well as leave administrators, must be able to recognize notices of the need for leave. They also benefit from having basic knowledge of the FMLA-qualifying reasons for leave. Then they can properly initiate the required notifications and eligibility checks. That's why manager training is so important.

Failure to timely notify employees of their eligibility status might constitute interference with, restraint, or denial of the exercise of an employee's FMLA rights. This means employees could file claims.

QUALIFYING REASONS

Not every reason an employee needs time off from work will qualify for FMLA protections. In general, an eligible employee may take FMLA leave when incapacitated by their own serious health condition, to care for a spouse, child, or parent with a serious health condition, to bond with a newborn or newly placed child, for qualifying exigencies (i.e., an urgent need or demand) caused by a family member's military duty, and to care for a military family member with a serious injury or illness.

While the qualifying reasons appear to be rather simple at first glance, details need to be considered.

Birth/bonding: Eligible employees may take a full 12 weeks of leave for birth, adoption, or foster care placement of a child. Placement doesn't generally include other forms of custody, unless the employee will be standing in as a parent to the child.

Following the birth or placement, the bonding leave must be taken within 12 months.

QUALIFYING REASONS FOR LEAVE

- ✓ Birth of a child and bonding
- ✓ Placement of a child with an employee for adoption or foster care and bonding
- ✓ Employee's own serious health condition
- ✓ Care for a family member with a serious health condition
- ✓ Qualifying exigency because of a family member's military duty
- ✓ Military caregiver

Serious health conditions: Whether for employees or family members, a serious health condition is something that results in incapacity, which is the inability to work, attend school, or perform other regular daily activities due to the condition. It also includes incapacity because of the treatment and recovery time. The condition can be physical or mental, but must involve inpatient care OR continuing treatment.

Inpatient care is an overnight stay (or longer) in a medical facility. If an overnight stay is not involved, you consider whether continuing treatment is.

Many conditions fall under continuing treatment, such as:

- ✓ Pregnancy
- ✓ Chronic conditions that require treatment
- ✓ Permanent or long-term conditions
- ✓ Conditions that require multiple treatments
- ✓ Incapacity and treatment – This is a period of incapacity of more than three consecutive calendar days and involves two or more episodes of treatment or one episode of treatment plus a regimen of continuing treatment. (NOTE that the “more than three days” is a period of *incapacity*, not absence.)

Notice that only one of the five requires a period of incapacity of more than three consecutive calendar days. For the others, any period of incapacity will do. Therefore, for example, a pregnant employee could take one day of FMLA leave for severe morning sickness or to go to a prenatal visit.

Military family member leave: The military family member provisions entitle employees to up to 12 weeks of FMLA leave for a qualifying situation (called an “exigency” in the law) when a family member’s military duty puts urgent demands on an employee.

Some of the qualifying exigencies include short-notice deployment, military events, childcare issues, financial and legal issues, military rest and recuperation, counseling, and parental care. Generally, the reasons are not medical in nature.



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✓ **Qualifying exigency**

- 12 weeks
 - Deployment
 - Events
 - Childcare
 - Rest and recuperation
 - Counseling
 - Financial/legal
 - Parental care

✓ **Military caregiver**

- 26 weeks

Being a military caregiver, however, is medical. Employees may take up to 26 weeks of FMLA leave to care for a family member who has a serious condition caused or exacerbated by military duty. This includes current military members and veterans.

Who is a family member under the FMLA?

Eligible employees may take FMLA leave to care for a spouse, parent, or child with a serious health condition. Not all families have clear-cut definitions, however, and the FMLA was designed to take this into consideration.

The FMLA uses these definitions for the basic familial relationships:

- ✓ **SPOUSE:** In a legal marriage as recognized by state law.
- ✓ **CHILD:** Biological, adopted, foster, stepchild, legal ward, in loco parentis (someone for whom the employee is acting as parent).
- ✓ **PARENT:** Biological, stepparent, adoptive, foster, in loco parentis (acting as parent).



Employees may take FMLA leave to care for a family member who has a serious condition caused or exacerbated by military duty.

LEAVE AMOUNT

Eligible employees get up to 12 weeks of FMLA leave in a designated 12-month leave year. So, an employee who normally works 40 hours per week would have 480 hours of FMLA leave.

In a perfect world, all employees would work Monday through Friday, 40 hours a week, and take FMLA leave in full weeks. Unfortunately, employers must contend with the reality of workweeks that are greater or fewer than 40 hours and don't run Monday through Friday. Furthermore, FMLA leave may be taken a day, or even an hour, at a time.

Here are the variations of FMLA leave:

- ✓ **CONTINUOUS LEAVE:** A block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include an uninterrupted period of leave.
- ✓ **INTERMITTENT LEAVE:** Leave taken in separate periods of time due to a single reason, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.
- ✓ **REDUCED LEAVE SCHEDULE:** A leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

The FMLA Leave Year

Covered employers should decide which method they will use to calculate the 12-month leave year period for the 12 weeks of leave. Employers may choose one from four options.

1. The calendar year,
2. Any fixed 12-month leave year such as a fiscal year (for example, August 1 to July 31),
3. The 12 months measured forward from the date an employee begins leave, or
4. A rolling backward 12-month period measured backward from the date an employee uses any FMLA leave.

Note: Employees get 26 weeks of military caregiver leave, and those 26 weeks are on a measured forward method. Employers do not get a choice on that one.





Employers are not mandated to ask for certifications, but may request that employees provide one to support the need for leave in most cases.



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Whichever leave year a company chooses, it must provide employees with information regarding which method is chosen. This is usually done in the policy and/or employee handbook and in the eligibility/rights and responsibilities notice. If an employer does not choose and/or communicate a leave year, and an employee goes on leave, the employee gets to choose which leave year to use.

FMLA PROCESS

There are many steps involved in the FMLA process. This whitepaper just scratches the surface.

But one of the key parts to the process involves a medical certification. In general, once a covered employer has a hunch that an employee may have an FMLA-qualifying reason, after providing an eligibility/rights & responsibilities notice, requesting a medical certification can help determine if the situation qualifies for protections.

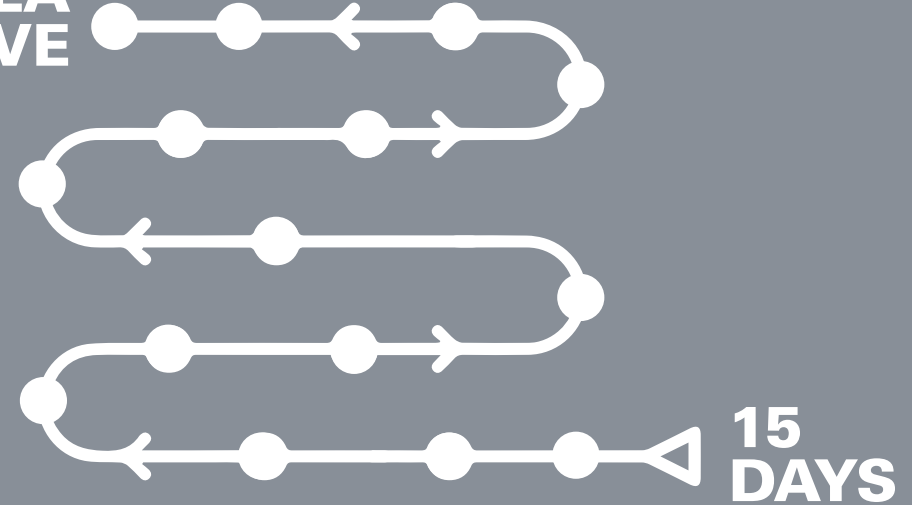
Certifications

Employers are not mandated to ask for certifications, but may request that employees provide one to support the need for leave. There are five different model certification forms:

1. The employee's condition,
2. A family member's condition,
3. Qualifying exigency,
4. Military caregiver – current member, and
5. Military caregiver – veteran.

There is no certification for bonding with a healthy child because employers may not ask for one for bonding. No health condition exists, therefore, healthcare providers would have no input.

FMLA LEAVE



Timeline

Once the employee receives the certification request, the employee has 15 calendar days to return a completed certification, unless unusual circumstances are involved.

A certification should include information about the condition; however, employers may not require a diagnosis. In addition to the medical information, it should include information on the timing and duration of the leave, so employers know when to expect the employee to be out, whether it's for one long period or many small periods.

If a certification is incomplete or insufficient, return it to the employee with a written list of what is needed to make it complete and sufficient. The employee then has seven days to address the deficiencies.

If an employer doesn't receive a requested certification in time and the delay is not justified, the employer may delay or deny FMLA protections after the 15-day period is over and until one is received.

Recertifications

When an employee is out on FMLA leave, situations sometime change. When this happens, an employer may request recertifications at certain times.

Employers may request a recertification no more often than every 30 days and only in connection with an absence by the employee. If, however, the initial certification indicates that the minimum duration of the condition will be more than 30 days, employers need to wait until that minimum duration expires, even if that minimum duration is "lifetime" or "years."

That is why, in all cases, employers may request a recertification every six months, again, in connection with an absence.



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FMLA PROCESS SEQUENCE

EMPLOYEE PUTS YOU ON NOTICE OF THE
NEED FOR LEAVE

YOU DETERMINE ELIGIBILITY AND
GIVE EMPLOYEE ELIGIBILITY/RIGHTS &
RESPONSIBILITIES NOTICE

YOU ASK FOR A CERTIFICATION

EMPLOYEE RETURNS CERTIFICATION

YOU DETERMINE IF REASON QUALIFIES
FOR FMLA PROTECTIONS AND GIVE
EMPLOYEE DESIGNATION NOTICE

EMPLOYEE GOES ON FMLA LEAVE

YOU CONTINUE GROUP HEALTHCARE
BENEFITS DURING LEAVE

EMPLOYEE RETURNS TO WORK

Employers don't have to wait the 30-days minimum duration or six months in limited situations, including when:

- ✓ The employee requests an extension of leave;
- ✓ The circumstances described by the previous certification (such as the duration or frequency of the absence, the nature or severity of the condition, or complications) have changed significantly; or
- ✓ The employer receives information that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification.

Long-term conditions

Where the need for leave lasts beyond a single leave year, employers may require a new certification in each new 12-month leave year period. Many chronic conditions such as migraines, for example, last very long. That means employers may request a new certification with the first absence in a new 12-month leave year. Employers should wait until the employee actually puts them on notice of the need for leave for the first time in the new 12-month period. Don't automatically request one when a new leave year begins.

Don't confuse new certifications with recertifications; new certifications are basically a new initial certification for leave in a new leave year. Recertifications occur within the 12-month leave year period.

Designation notices

When employers have enough information to determine if the reason for leave qualifies — often based on the information from a certification — they have five business days to give the employee a designation notice. The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving a designation notice to the employee. Even if an employee would rather not “use” FMLA leave for a particular absence, it is up to the employer to determine if the FMLA applies. Failure to provide the FMLA protections when they are otherwise called for could lead to an interference claim. Employees may not waive their prospective FMLA rights.

If an employer has enough information to designate the leave as FMLA leave immediately after receiving the notice of the need for leave, the employer may provide the employee with a designation notice at that time.

Employers may also use the designation notice to inform employees that a certification is incomplete or insufficient and identify what information is needed to make it complete and sufficient.

Similar to the eligibility/rights & responsibilities notice, failure to provide a designation notice can be considered interference with the employee's FMLA rights.

Retroactive designation

If an employer fails to timely designate time off as FMLA leave, the employer may retroactively do so, as long as it does not pose harm or injury to the employee. If, for example, an employee couldn't return to work regardless of the designation, the employee likely couldn't show harm or injury. In all cases, an employer and employee may mutually agree to retroactive designation.

Income replacement

FMLA leave can run concurrently with workers' compensation leave or short-term or long-term disability, if they apply. Those generally provide for income replacement while the FMLA provides for job-protected, unpaid leave.

MISCELLANEOUS

Here are a few more miscellaneous FMLA items to help you get a grasp on the basics of the law:

FMLA poster

All covered employers must display the FMLA poster where both employees and applicants can see it. This might seem odd since the law does not apply to applicants, and employees may not take FMLA leave until they meet the eligibility criteria.

Applicants might, however, want to know if a prospective employer is covered by the FMLA. If, for example, they plan on having a family in the next few years, this might be important.



According to the Department of Labor (DOL), employers with remote workers or that have job seekers applying online should place a prominent notice on the company's website where job postings are listed. The notice should state: "Applicants have rights under Federal Employment Laws" and have a link to the poster.

During and after leave

While an employee is on FMLA leave, an employer must keep the employee's group healthcare coverage intact on the same basis as before leave began. Employees may be required to continue to pay their share of the plan's premiums.

While employers are not strictly prohibited from contacting employees while they're on FMLA leave, they should not ask that employees perform work. If employees are working, that time is not FMLA leave.

Employers may, however, require employees to provide periodic status reports while on FMLA leave. This would involve the employee's intent to return to work but would not include any medical information — that's restricted to the certifications. A policy regarding such periodic reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

Employees who were out for their own condition may be required to provide a fitness-for-duty certification before returning to work.

At the end of FMLA leave when employees come back to work, they are to be returned to their position or an equivalent one. Equivalent is not "similar." An equivalent position not only has to have the same pay, it must also have the same benefits, working conditions, privileges, perks, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, and authority. The employee is to be returned to the same shift, location, and so on, as well. Generally, the equivalent position should be virtually identical to the original one.



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CONCLUSION

The FMLA is a complex employee entitlement law that gives many employers headaches. While the design of the law is meant to create a work/life balance, administering FMLA leave and adhering to the regulations can be difficult.

Before reaching for the aspirin, lean into the FMLA basics addressed here. Having a good foundation and knowing the fundamentals of the law will go a long way to help protect not only employees' rights, but also the company's future.



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Michelle also contributes content on compliance and best practices for use in J. J. Keller & Associates, Inc. products including Compliance Network and the *Benefits & Compensation Regulatory Alert* newsletter.



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