

# FMLA and State Leave:

*HOW TO STITCH TOGETHER A COMPLIANCE QUILT*



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WHITEPAPER



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Being human, employees often need (or want) time off from work for several reasons. These reasons could involve anything from taking care of their own health condition or taking a trip to the Grand Canyon with the family.

The U.S. has no law mandating that employers provide paid time off. The federal Family and Medical Leave Act (FMLA), which has been around for over 30 years, requires covered employers to give certain employees job-protected *unpaid* leave.

Not to be forgotten, the U.S. has another law — USERRA — that entitles employees to take time off to serve in the military. Employees may take up to five cumulative years of leave while working for a particular employer.

Don't confuse this with the FMLA's military family leave provisions. Under the FMLA, employees may take leave if a *family member's* military service poses a “qualifying exigency.” That's when a *family member's* military duty puts a demand on the employee. Under the USERRA, the employee takes leave for their own military duty.

The USERRA military leave is generally unpaid, but if a company policy gives employees paid leave for similar types of leave, the company might need to pay employees for military leave.

The federal Americans with Disabilities Act and the Pregnant Workers' Fairness Act are not outright leave laws like the FMLA and the USERRA, but leave could be a reasonable accommodation under them. For purposes of this whitepaper, the focus is on employee leave entitlement laws.

Because there is no federal paid leave law, and because the FMLA has its limitations, states have enacted a variety of employee leave laws — some unpaid, some paid.

A short document cannot cover all details about every state leave law but, instead, can focus on what aspects employers must consider; what they should be looking at as they try to piece together their employee leave compliance quilt.

***With the right information, employers can more confidently know what details to look for and how those details fit into the big picture; therefore, helping make compliance easier.***

## WHY ALL THOSE STATE LEAVE LAWS?

The FMLA applies to private companies with 50 or more employees and all public employers regardless of how many employees.

Employees have to meet three eligibility criteria before they can take the leave:

- Work for an employer for at least 12 months,
- Work at least 1,250 hours in the 12 months before leave begins, and
- Work at a location with at least 50 company employees within 75 miles.

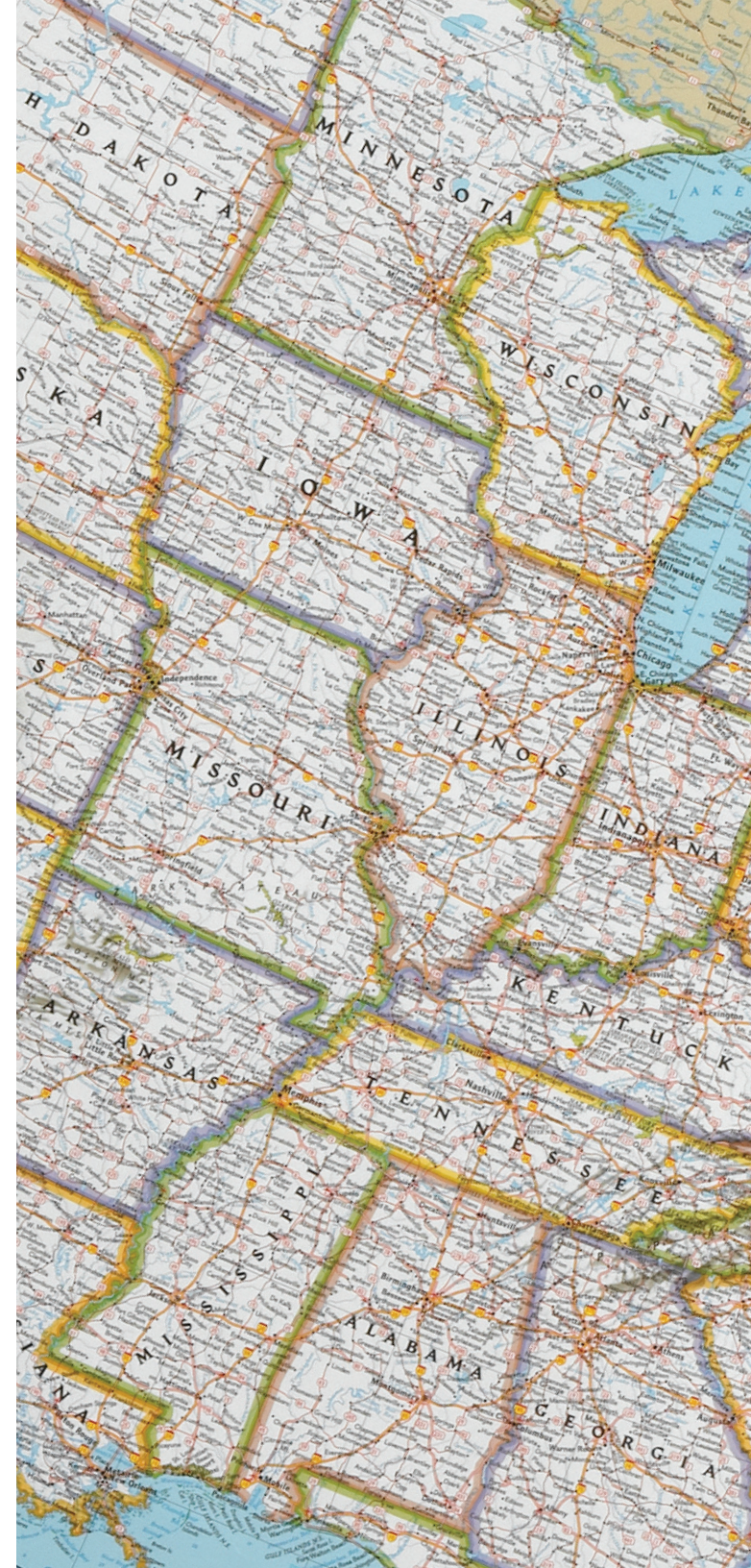
State laws often apply to more employers and have more lenient employee eligibility requirements. The reasons for which employees may take the leave is more expansive than the federal FMLA.

Employees may take FMLA leave for only the following reasons:

- For birth of a child, and to care for the newborn child;
- For placement with the employee of a child for adoption or foster care;
- To care for the employee's spouse, child, or parent with a serious health condition;
- Because of a serious health condition that makes the employee unable to perform the functions of the employee's job;
- Because of any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active-duty status; and
- To care for a covered servicemember with a serious injury or illness if the employee is the spouse, child, parent, or next of kin of the covered servicemember.

***Many state leave laws include many more family members beyond spouse, child, and parent, such as grandparents, grandchildren, and siblings.***

Therefore, more employees reap the greater benefits from state leave laws.



## THE TREND OF STATE LEAVE LAWS

Over half of the states have some form of leave. Currently, 13 states and the District of Columbia have **paid** leave. The leaves can be for various reasons and are often broken down to medical or sick leave and parental or family leave.

Depending on the state, employees may take time off for their own conditions, and/or parental or family leave, or employees may take time off to care for a family member or to bond with a child.

California, for example, has paid family leave and paid sick leave — two separate laws. Colorado has paid family/medical leave one law that includes both.

***Some leave laws apply only to public employers, giving employees of a state have leave benefits. These are quite common.***

The trend of state leave laws shows no signs of slowing. To help illustrate this, effective January 1, 2024, alone:

- Changes were made for California paid sick leave and the new reproductive loss leave began;
- Colorado's FAMLl leave gave employee's 12 weeks of paid leave;
- The Illinois child bereavement leave law was expanded and the Illinois Paid Leave for All Workers Act began; and
- Minnesota amended its paid sick and safe leave.

Since then, other changes became or will become effective:

- Effective July 1, 2024, Oregon's unpaid Oregon Family Leave Act (OFLA) and Paid Leave Oregon (PLO), were changed to make them less intertwined and easier to administer.
- Employers must begin contributing to Maryland's Paid Family and Medical Leave Insurance Program on October 1, 2024. Employees may take the leave beginning January 1, 2026.
- Connecticut's paid sick leave will expand to include more employers beginning 2025.



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- Rhode Island's Temporary Caregiver benefits will expand to seven weeks in 2025 and to eight weeks in 2026.
- New York's paid parental leave begins January 1, 2025.
- Delaware, Maine, and Minnesota have paid leave coming up in 2026.

The state leave laws can cover a pretty broad array of reasons for leave, such as the following:

- Medical/sick (employee)
- Family leave (care of a family member, bonding)
- Safe leave (domestic violence, crimes)
- Donation (organs, tissue, blood)
- Bereavement
- School activities
- Emergency responders
- Family military
- Court appearances
- Any reason

They might have different names like “parental” leave for reasons such as bonding with a child. Some of the lesser-known reasons include donation (e.g., organ, stem cell, blood), school activities, and emergency responders.

Many of these reasons go way beyond those under the federal FMLA.

Other types of laws can give employees time off, but focus on income replacement, such as disability insurance. A few states, such as New Jersey, New York, California, Hawaii, and Rhode Island, mandate that employers have disability insurance that gives employees time off for their own condition with at least some partial pay — similar to workers' comp laws but for conditions that were not related to the employee's occupation.

Another, fairly new trend, is offering, but not mandating employers to purchase leave insurance policies. Vermont is one example of this. These policies allow employees to take time off and get some pay, similar to disability insurance, but they are totally voluntary on the part of the employer. This could, however, be something employers use to attract and keep employees.

## STATE LEAVE LAW PROTECTIONS

Obviously, state laws involve employee leave. Some protections are similar to the FMLA, such as requiring employers to maintain group health care coverage during leave.

The laws often include other protections, but not all of them. For some, employees may take leave, but they don't get job protections unless they meet certain, additional criteria.

*Many laws — but not all — do require employers to return employees to their positions after the leave is over, since the point of leave for employees is not to risk their jobs.*

## WHAT TO LOOK FOR

But, given all this, how do employers go forward in figuring all this out — how the laws apply to a particular situation? Unfortunately, employers will need to look at each law that applies to their employees — at least to some degree. There is no once-and-done way of handling all the leave provisions under all the laws.

### The defining factors

Because there are many different leave laws, and each one of them is unique, one way to begin to get a handle on them is to look at their definitions. These definitions will, for example, say which employers have to comply, and which employees are eligible to take the leave. Colorado's FAMLI, for example, defines employers as those with one or more employee working in the state. For employee counts, some laws address remote employees, while others do not.

The laws usually define which employees are eligible to take the leave — what criteria they must meet, if any. Some indicate, for example, how much time employees must spend working in the state to be eligible. Others say how much pay an employee must earn to be eligible.

Then, definitions also usually include the reasons employees may take the leave. They might break up the reasons between medical leave, again, where employees may take time off for their own conditions; and family leave, where employees take time off to care for a family member or bond with a new family member.



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If the leave includes caring for a family member, for example, the definitions will usually define who those family members are, and they usually include way more than the federal FMLA does — spouse, parent, and child.

A current trend for leave laws is to include a “designated person,” who is any individual related by blood or whose association with the employee is the equivalent of a family relationship. Employees may usually designate one such person per leave year.

The definitions can also include the “leave year.” Some allow employers to choose from different leave year options like the FMLA does, and some dictate the leave year. The Wisconsin FML, for example, requires employers to use a calendar year. Some refer to this as a “benefit year,” and can use a measured forward method.

### **Beyond the definitions**

After the definitions, the laws spell out how much leave employees may take. If it’s paid leave, they talk about how that all works — how much employees get paid.

The laws often indicate whether employees may take the leave intermittently or on a reduced schedule, or if they’re restricted to only continuous leave.

Some laws require employers to continue group health care coverage while employees are on leave, others are silent.

Many of the laws require employers to post notices about them where employers have the other employment law posters. Some require employers to, in addition to having a poster up, give employees notices about the law at certain times, such as when hired, or when an employee needs the leave.

Employers can also learn a bit about the laws from those posters and notices.

Most laws prohibit employers from taking a negative employment action against employees when those employees exercise their rights under the laws. This includes when employees ask for leave as well as when they take the leave.

If employers have employees in multiple states, remember that the employment law of the state in which the employee works generally govern. It doesn’t matter where the employee lives or where the company headquarters are.

### **Where do employers find information on state leave laws?**

Employers can start digging in by going to state government sites, probably the





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legislative branch. they might want to start with the laws instead of the regulations/ rules, as there might not be any of the latter.

While the laws come from the legislature, the regulations come from the state agencies, and there can be multiple agencies that enforce different state leave laws — for those states that have multiple leave laws. In California, for example, the Employment Development Department enforces the Paid Family Leave, while the Civil Rights Department enforces the California Family Rights Act.

In some cases, the state insurance agency is involved, particularly for the voluntary paid leave insurance offerings. Sometimes a workers' comp agency is involved for disability insurance.

State regulations can also have definitions — maybe some that the weren't included in the law.

### **How the different leaves can function or operate**

Under the federal FMLA, eligible employees are entitled to take the leave for qualifying reasons. Employees don't accrue the leave; they don't pay into a fund. They don't apply for leave with an agency.

State laws can require all of that, so state leaves can look very different that the federal FMLA.

Employer obligations are also different. State laws often don't involve notices like the FMLA's eligibility/rights & responsibilities notice or a designation notice. They can include certifications or something similar supporting the need for leave, but they will often look different than the FMLA's.

### **Unpaid leave**

These laws can have some similarities to federal FMLA, in that employees who meet certain eligibility criteria may take up to a certain amount of leave in a leave year.

Rhode Island's Parental and Family Medical Leave Act, for example, gives employees up to 13 consecutive weeks of unpaid leave in two calendar years. Employees are eligible if they work an average of 30 hours a week or more and have been employed continuously for at least 12 months. Employees may also take 10 hours of leave during



any 12-month period to attend their child’s school conferences or other school-related activities.

Wisconsin’s FMLA gives eligible employees two weeks of unpaid leave for their own condition, two weeks to care for a family member, and six weeks to bond with a new child.

### **Paid leave**

Congress hasn’t been able to pass a paid leave law, so states also work to fill in those blanks.

On June 10, 2024, a group of paid leave supporters delivered a petition to pass federal paid leave to all members of Congress.

A few states — Nevada, Illinois, and Maine — have laws that entitle employees to some paid leave for any reason. Interestingly, these are not the usual bell-weather states such as California or New York.

***Of course, the paid leave laws give employees income during the time off. Some give employees full pay, some only partial pay.***

### *Accrued paid leave*

A law might entitle employees to accrue (or earn) paid leave, gaining one hour for every 30 or 40 hours worked, for example. This is particularly popular for medical/sick leave.

New Mexico’s Healthy Workplaces Act (paid sick leave), for example, gives employees one hour of paid leave for every 30 hours worked. Michigan’s Paid Medical Leave Act gives nonexempt employees one hour for every 35 hours worked.

Employees might begin accruing the leave upon hire but may not take it until they’ve been with the company for a while, such as 90 days, like the Illinois Paid Leave for All Workers Act does.

Employers can usually cap the amount of leave accrued and the amount of leave used in a leave year. Under Vermont’s Earned Sick Time employers may cap the amount of leave used to 40 per year.



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If allowed, employees can carryover unused accrued leave from one leave year to the next. Maryland's Healthy Working Families Act allows employees to carryover up to 40 hours of unused leave but leave use may be capped at 64 hours per year.

In some accrued leave laws, employers may choose to allow employees to accrue the leave or frontload it. Frontloading could impact an employee's ability to carry over unused leave from year to year. The California paid sick leave (Healthy Workplaces, Healthy Families Act) allows employers to frontload and not allow employees to accrue or carryover the leave, as long as they give the full five days or 40 hours of leave.

For some paid leave laws, employees — and sometimes employers — pay into a state fund handled by an agency that administers the leave and payout of benefits.

Employers might be required to withhold some pay from employees and submit it to the agency's fund.

Some might have to add the employer's portion to the fund, as well.

Under Paid Leave Oregon, for example, employers must pay their portion of the contribution if they have 25 or more employees on average. They must also withhold employee portions from employees' wages. Then, they must pay the contributions each quarter.

Some state agencies, like Paid Leave Oregon (yes, that's the agency's name), require employers to create an account through which they submit the contributions and file payroll reports. The latter is so the agency knows how much paid leave benefit each employee gets. Some laws limit how much employees can be paid while on leave.

For Delaware's upcoming paid leave, employers enrolled in the state's plan will begin payroll deductions if employees are contributing — employers don't have to have employees contribute. Those deductions begin January 1, 2025.

Employees might apply for the leave and the pay through a state agency dedicated to administering the leave.

Many of the paid leave programs allow employers to either follow the state plan or create their own private or equivalent plan. Usually, employers have to apply for a private plan approval. Such private plans must have the same or more benefits as the state one, cover all the applicable employees, and allow for the same leave reasons.



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In some cases, private plans can be insured through an insurance carrier. For employers who don't want to have to deal with administering their part of the requirements, having a private plan through insurance can help. The employer can often still on the hook for any violations.

## COMMUNICATION

For some laws, employees must notify *their* employer of the leave in advance, while for others they don't; they just apply to the state for the paid leave.

Some state leave agencies give employers some information regarding an employee's leave, and others don't.

The Connecticut Paid Leave authority, for example, requires employees to submit claims to the state's leave administrator in advance. Employees give employers an Employment Verification Form to complete and verify the wage and schedule/hour information of the employee. Employers sign the form and submit it to Aflac, who then administers the leave.

Paid Leave Oregon, however, requires employees to tell their employer about the need for leave in advance, if possible. Therefore, employers are aware of the leave. After an employee has filed an application for Oregon Paid Leave benefits, the state will also notify the employer of the application.

Many state paid leave agencies also handle certifications supporting the need for leave, removing employers from that loop. The state then determines if the employee is entitled to the leave.

Thus, the communication between employee, employer, and state agency can have many variables.

## CONCURRENCY

Whether leave under one law can run concurrently with leave under another law, including the federal FMLA is a common question. Usually, it can.

A law can, however, be written to specifically indicate that the state leave may not run concurrently with federal FMLA leave.

Given the more expansive nature of many state leave laws, employees can often get

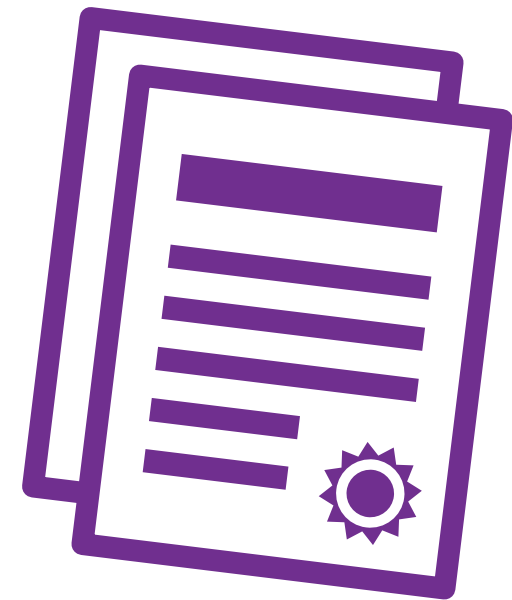


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more than the 12 weeks of federal FMLA leave. If, for example, an employee takes leave to care for a grandchild, that leave will not generally fall under the federal FMLA, so it's not counted against the employee's 12-weeks. It would, however, fall under state law.

While the employee would be burning the state leave, they would not be burning the FMLA leave. If, however, an employee takes five weeks leave for their own condition, that usually falls under both state medical/sick and federal FMLA, so it would be counted under both, and is not stacked on top of the FMLA.

Basically, if the employer is covered by the law, the employee is eligible for leave under both state and federal laws, and the reason qualifies under both, they may run concurrently.

Sometimes leave under multiple state leave laws can't run concurrently. Leave under the California Pregnancy Disability Leave, for example, may not run concurrently with leave under the California CFRA. The CFRA does not include pregnancy as a serious health condition. Therefore, employees may take 4 months of PDL followed by 12 weeks of CFRA leave for a qualifying reason, such as bonding with a child.

Leave under the FMLA can run concurrently with PDL and/or the CFRA, so an employee could exhaust all 12 weeks of FMLA leave during a PDL leave. The employee would need to be eligible for both. Under PDL, employees don't have to meet any eligibility criteria; they simply must need time off for a disability related to pregnancy, childbirth, or a related medical condition. Therefore, the FMLA (or the CFRA) might not even be involved.

***Many laws — but not all — do require employers to return employees to their positions after the leave is over, since the point of leave for employees is not to risk their jobs.***

Unlike the federal FMLA, for example, leave under the Minnesota parental leave law does not provide leave for foster care placement.

Again, most state leave laws allow their leave to run concurrently with federal FMLA if the employer is covered by both, the employee is eligible for both, and the reason qualifies for both. The state laws might not even mention the FMLA.



Determining whether a reason qualifies for leave can be tricky. Under some state safe leaves, for example, employees may take time off deal with stalking — if, let's say, they are repeatedly getting unwanted telephone calls or text messages. That reason wouldn't qualify for federal FMLA leave.

If the stalking gave the employee high anxiety, however, that could be a serious health condition under the FMLA.

When looking at the concurrency of all these laws, don't expect one entire law to supersede another entire law. Employers must look at each provision of each law and apply the provision that gives employees the greatest benefit or protection.

The FMLA is the floor of leave. State laws can be more generous. If one has provisions that are less generous than federal, the federal FMLA provisions will apply.

Some laws cover more employers, so that would apply because it's more generous than the federal FMLA. Some cover different employees — like paid leave that applies only to employees who have earned enough pay during a certain period.

All this can end up with employees stacking one leave on top of another, running them continuously instead of concurrently.

## POLICIES

Employers likely have a policy or policies related to employee leave. Perhaps they have one policy that tries to capture all of the most generous leave law provisions — that would take some research, and employers might not want all their employees to have the best of all worlds — particularly if they have employees all over the country.

They might want to have different policies for different states, keeping each state separate. That way, employees in, let's say, Georgia, might not even be aware of what leave employees in New York or California get.

Otherwise, employers might have one general policy, then have addendums for each different state.

Any of these methods are fine; employers just need to have one that fits their organization.



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## ADMINISTRATION

Obviously, someone has to administer all this employee leave. Smaller companies likely have one lucky person who is bestowed with the task of handling all employee leaves. If there are employees all over the country, that one person needs to stay on top of the ever-changing state leave law landscape.

Some bigger companies might have broken this task up to be handled by multiple people or offices. Perhaps it's broken up such that, for example, one person handles the leave for employees in three states where employees work.

If an employer has different people handling different leaves, such as workers' comp — which can be handled by a safety department separate from an HR department — some coordination will be required.

Employers might also need to consider how each type of leave interacts with other reasons employees take time off under company policies, such as vacation, PTO, holidays, personal days, sick leave, or whatever else company policies provide in addition to federal and state leave.

When employees leave the company, the state leave law consideration doesn't necessarily end. Some laws require employers to pay out any unused — usually accrued — paid leave upon separation.

## SUMMARY

Until and unless the federal government passes a national paid leave law, we will continue dealing with the patchwork of state leave laws and all their differing details.

In summary:

- Look at the definitions in state leave laws. They will tell which employers are covered, which employees are eligible to take the leave, the reasons for the leave, family members, and so on.
- Look at how the leave is handled, whether the company and employees have to pay into a fund, employees accrue the leave, they apply through the state, and so on.
- Be aware of what rights and protections employees have while they are on leave.
- Also look at whether the leave can run concurrently with federal FMLA or other leaves.

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