The Employer's Guide to

The Family and Medical Leave Act

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

The Department of Labor has provided this guide as a public service. It is intended as general information only and does not carry the force of legal opinion. The Department reserves the right to update the material and information contained herein to ensure it is accessible, easy to understand and educational, and conforms with regulatory or statutory changes in the law. The Federal Register and the Code of Federal Regulations remain the official sources for regulatory information published by the Department of Labor.

MESSAGE FROM WAGE AND HOUR DIVISION

Since its enactment in 1993, the Family and Medical Leave Act (FMLA) has served as the cornerstone of the Department of Labor's efforts to promote work-life balance and we have worked in support of the principle that no worker should have to choose between the job they need and the family they love. With the FMLA, our country made it a priority to give workers the ability to balance the demands of work and family. It made the healthy development of babies, healthy families, and healthy workplaces a priority. It was a remarkable accomplishment at the time and, since its enactment, the FMLA has been used more than 100 million times to help workers balance the demands of the workplace with the needs of their families and their own health.

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INTRODUCTION

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons. Eligible employees may take up to 12 workweeks of leave in a 12-month period for one or more of the following reasons:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care, and to bond with the newborn or newly-placed child;
- To care for a spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job, including incapacity due to pregnancy and for prenatal medical care; or
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.

An eligible employee may also take up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. An eligible employee is limited to a *combined* total of 26 workweeks of leave for **any** FMLA-qualifying reasons during the single 12-month period.

In addition to providing eligible employees an entitlement to leave, the FMLA requires that employers maintain employees' health benefits during leave and restore employees to their same or an equivalent job after leave. The law sets requirements for notice, by both the employee and the employer, and provides employers with the right to require certification of the need for FMLA leave in certain circumstances. The law protects employees from interference and retaliation for exercising or attempting to exercise their FMLA rights. The law also includes certain employer recordkeeping requirements.

The U.S. Department of Labor's Wage and Hour Division is responsible for administering and enforcing the FMLA for most employees. In most instances, an employee also has the right to file a private law suit under the FMLA in any federal or state court of competent jurisdiction.

The Wage and Hour Division is committed to strengthening compliance with the FMLA by providing assistance to employers and helping increase their knowledge of the law. This *Employer's Guide to the Family and Medical Leave Act* is designed to provide essential information about the FMLA, including information about employers' obligations under the law and the options available to employers in administering leave under the FMLA. The *Guide* is organized to correspond to the order of events from an employee's leave request to restoration of the employee to the same or equivalent job at the end of the employee's FMLA leave. It also includes a topical index for ease of use.

The Department of Labor is providing this *Guide* in an effort to increase public awareness of the FMLA and of the various Departmental resources and services available to the public. This publication is a guidance document that is subject to change in the future. The United States Code, Federal Register, and the Code of Federal Regulations remain the official sources for legislative and regulatory information. For more information about the FMLA, please visit the Department's website at **dol.gov/whd/fmla**, call us at 1-866-4US-WAGE (1-866-487-9243), or visit **the nearest Wage and Hour Division Office**.

INTRODUCTION

Visit the **Department's website** for resources containing information about the FMLA including:

- Key News
- General Guidance
- The Employee's Guide to the Family and Medical Leave Act
- The Employer's Guide to the Family and Medical Leave Act
- Fact Sheets
- E-Tools
- FMLA PowerPoint
- Posters
- Forms
- Interpretive Guidance
- Law
- Regulations

THE EMPLOYER'S ROAD MAP TO THE FMLA

1. **Covered Employer**
2. Display the FMLA poster & provide **General Notice**
3. **Employee asks for FMLA** or the employer learns the employee's leave may be for an FMLA qualifying reason
4. Determine if the employee is **eligible**
5. Provide **Eligibility and Rights & Responsibilities Notices** to the employee
6. Let the employee know that a **Certification** will be required
7. Determine if the leave request is for an **FMLA-qualifying reason**
8. Grant or deny the leave request & provide **Designation Notice** to the employee
9. **Maintain Health Benefits** during the leave
10. **Restore the employee** to the same or an equivalent position at the end of the leave
11. **Maintain records** properly

EXIT

Certification Process

Optional →

None Required ↘

COVERED EMPLOYERS UNDER THE FMLA AND THEIR GENERAL NOTICE REQUIREMENTS

Covered Employers

The FMLA applies only to "covered" employers. A covered employer may be a private-sector employer, a public agency, or a school. Covered employers must provide FMLA benefits and protections to eligible employees and comply with other responsibilities required under the FMLA and its **regulations at 29 CFR Part 825**.

Private Sector Employer

A private-sector employer is covered by the FMLA if it employs 50 or more employees* in 20 or more workweeks in the current or previous calendar year. An employee is considered to be employed each working day of the calendar week if the employee works any part of the week. The workweeks do not have to be consecutive.

Employees who must be counted include:

- Any employee who works in the United States, or any territory or possession of the United States,
- Any employee whose name appears on payroll records, whether or not any compensation is received for the workweek,
- Any employee on paid or unpaid leave (including FMLA leave, leaves of absences, disciplinary suspension, etc.), as long as there is a reasonable expectation the employee will return to active employment,
- Employees of foreign firms operating in the United States, and
- Part-time, temporary, seasonal, and full-time employees.

Others who do NOT have to be counted include:

- Employees with whom the employment relationship has ended, such as employees who have been laid off,
- Unpaid volunteers who do not appear on the payroll and do not meet the definition of an employee,
- Employees of United States firms stationed at worksites outside the United States, its territories, or possessions, and
- Employees of foreign firms working outside the United States.

DID YOU KNOW?

Once an employer meets the requirement for FMLA coverage, the employer is a covered employer and will remain covered as long as it employs 50 or more employees in 20 or more workweeks in either the current calendar year or in the previous calendar year.

For example, last year during its busy season from June 1st to October 31st, a restaurant had more than 50 employees on payroll. In the current year, the same restaurant employs fewer than 50 employees when an employee requests FMLA leave. Because the restaurant employed more than 50 employees for more than 20 workweeks in the previous year, the restaurant is considered to be covered at the time of the request and must offer the FMLA benefits and protections to its employee, if eligible.

Review **sections 825.104** and **825.105 of the FMLA regulations** for more information about coverage.

* The term "employee" means any individual employed by an employer. An employee is employed when he or she is "suffered or permitted" to work, as defined under the Fair Labor Standards Act.

COVERED EMPLOYERS UNDER THE FMLA AND THEIR GENERAL NOTICE REQUIREMENTS

Public Agency

Public agencies are covered employers under the FMLA, regardless of the number of employees they employ.

Public agencies include:

- The federal government,
- The government of a state or political subdivision of a state, and
- An agency of the United States, 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 United States, the District of Columbia, and any territory or possession of the United States.

Review **section 825.108 of the FMLA regulations** for more information about public agency coverage.

Federal Government

The Office of Personnel Management administers the FMLA for most federal employees. The Wage and Hour Division administers the FMLA for a limited number of federal employees, including employees of the:

- United States Postal Service,
- Postal Regulatory Commission,
- Federal Aviation Administration, and
- The judicial branch of the United States (in certain circumstances).

Review **section 825.109 of the FMLA regulations** for more information about coverage of a federal agency.

Schools

Local educational agencies are covered under the FMLA, regardless of the number of employees they employ. Such educational agencies include:

- Public school boards,
- Public elementary and secondary schools, and
- Private elementary and secondary schools.

Review **section 825.600 of the FMLA regulations** for more information about coverage of schools.

Other Ways Employers May Be Covered under the FMLA

Integrated Employers

A corporation is a single employer under the FMLA rather than its separate establishments or divisions; all employees of the corporation, at all locations, are counted for coverage purposes.

In addition, separate businesses may be parts of a single employer for FMLA purposes if they are an integrated employer. Factors to be considered in determining if separate businesses are an integrated employer include:

- Common management,
- Interrelation between operations,
- Centralized control of labor relations, and
- Degree of common ownership or financial control.

For purposes of determining employer coverage under the FMLA, the employees of all entities making up the integrated employer must be counted.

Review **section 825.104(c) of the FMLA regulations** for more information about coverage for integrated employers.

Joint Employers

Where two or more businesses exercise some control over the work or working conditions of an employee, such as with a temporary employment agency, the businesses may be joint employers under the FMLA. For purposes of determining employer coverage under the FMLA, employees jointly employed by two employers must be counted by both employers, even if the employees are maintained on only one of the employer's payrolls.

DID YOU KNOW?

Two (or more) businesses may simultaneously employ an employee, making them joint employers of the employee. For example, joint employment ordinarily will exist when a temporary employment agency supplies employees to a second employer. In that case, the employee must be counted by both employers when determining FMLA coverage.

Review **section 825.106 of the FMLA regulations** for more information about coverage for joint employers.

Successor Employers

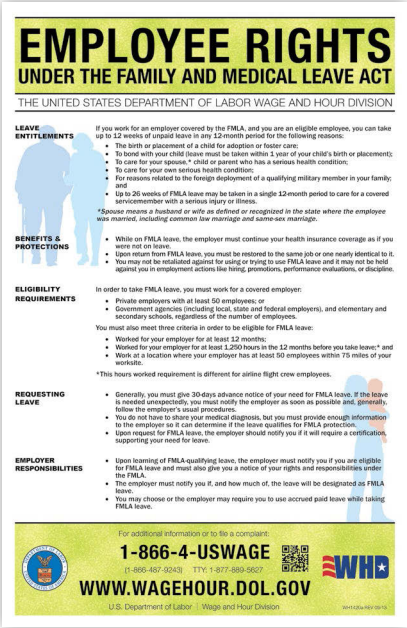
An employer may be a covered employer if it takes over the business operations (i.e., becomes a "successor in interest") of a covered employer. Some of the factors to be considered in determining if an employer is a successor include:

- Continuing the same business operations and providing similar products or services,
- Providing similar jobs and working conditions,
- Continuing to use the same work force and supervisor structure, and
- Using the same location and similar equipment and production methods.

Review **section 825.107 of the FMLA regulations** for more information about coverage of a successor in interest employer.

An Employer's Obligation to Provide Employees with General Notice of FMLA Rights

Every employer covered by the FMLA must provide a general notice to their employees regarding the FMLA. To satisfy the general notice requirement, employers must (1) display or post a general notice (referred to as a poster), and (2) if the employer has any FMLA eligible employees, provide a written general notice to employees.



EMPLOYEE RIGHTS
UNDER THE FAMILY AND MEDICAL LEAVE ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

LEAVE ENTITLEMENTS

If you work for an employer covered by the FMLA, and you are an eligible employee, you can take up to 12 weeks of unpaid leave in any 12-month period for the following reasons:

- The birth or placement of a child for adoption or foster care;
- To bond with your child (leave must be taken within 1 year of your child's birth or placement);
- To care for your spouse,* child or parent who has a serious health condition;
- To care for your own serious health condition;
- For reasons related to the foreign deployment of a qualifying military member in your family; and
- Up to 26 weeks of FMLA leave may be taken in a single 12-month period to care for a covered servicemember with a serious injury or illness.

**Spouse means a husband or wife as defined or recognized in the state where the employee was married, including common law marriage and same-sex marriage.*

BENEFITS & PROTECTIONS

- While on FMLA leave, the employer must continue your health insurance coverage as if you were not on leave.
- Upon return from FMLA leave, you must be restored to the same job or one nearly identical to it.
- You may not be retaliated against for using or trying to use FMLA leave and it may not be held against you in employment actions like hiring, promotions, performance evaluations, or discipline.

ELIGIBILITY REQUIREMENTS

In order to take FMLA leave, you must work for a covered employer:

- Private employers with at least 50 employees; or
- Government agencies (including local, state and federal employers), and elementary and secondary schools, regardless of the number of employees.

You must also meet three criteria in order to be eligible for FMLA leave:

- Worked for your employer for at least 12 months;
- Worked for your employer for at least 1,250 hours in the 12 months before you take leave;* and
- Work at a location where your employer has at least 50 employees within 75 miles of your worksite.

**This hours worked requirement is different for airline flight crew employees.*

REQUESTING LEAVE

- Generally, you must give 30-days advance notice of your need for FMLA leave. If the leave is needed unexpectedly, you must notify the employer as soon as possible and, generally, follow the employer's usual procedures.
- You do not have to share your medical diagnosis, but you must provide enough information to the employer so it can determine if the leave qualifies for FMLA protection.
- Upon request for FMLA leave, the employer should notify you if it will require a certification, supporting your need for leave.

EMPLOYER RESPONSIBILITIES

- Upon learning of FMLA-qualifying leave, the employer must notify you if you are eligible for FMLA leave and must also give you a notice of your rights and responsibilities under the FMLA.
- The employer must notify you if, and how much of, the leave will be designated as FMLA leave.
- You may choose or the employer may require you to use accrued paid leave while taking FMLA leave.

For additional information or to file a complaint:

1-866-4-USWAGE
(1-866-487-9243) TTY: 1-877-889-5627

WWW.WAGEHOUR.DOL.GOV

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WHD

Posting Requirement

Every employer covered by the FMLA must display or post an informative general notice about the FMLA.

- The poster must be displayed in plain view where all employees and applicants can readily see it, and must have large enough text so it can be easily read.
- The information displayed on the poster must explain the FMLA provisions and provide information on how to **file a complaint with the Wage and Hour Division**.
- This poster must be displayed even if no employees are currently eligible for FMLA leave.
- If a significant portion of an employer's employees do not read and write English, the employer must provide the General Notice in a language in which they can read and write. Spanish language FMLA posters are available from **the nearest Wage and Hour Division office** or online at **dol.gov/whd/fmla**. When providing FMLA notices to sensory-impaired individuals, employers must also comply with all applicable requirements under federal and state law.

Employers who willfully violate this posting requirement may be assessed a civil money penalty for each separate offense. Employers may use the Department's FMLA Poster, which is free and publicly available on the Department's website, **dol.gov/whd/fmla**, to satisfy this requirement.

Employers may make the poster available electronically, create their own poster, or use another format, as long as the information provided includes, at a minimum, all the information contained in the Department's FMLA Poster, is viewable by applicants for employment and current employees, and meets all other posting requirements.

Providing General Notice to Employees

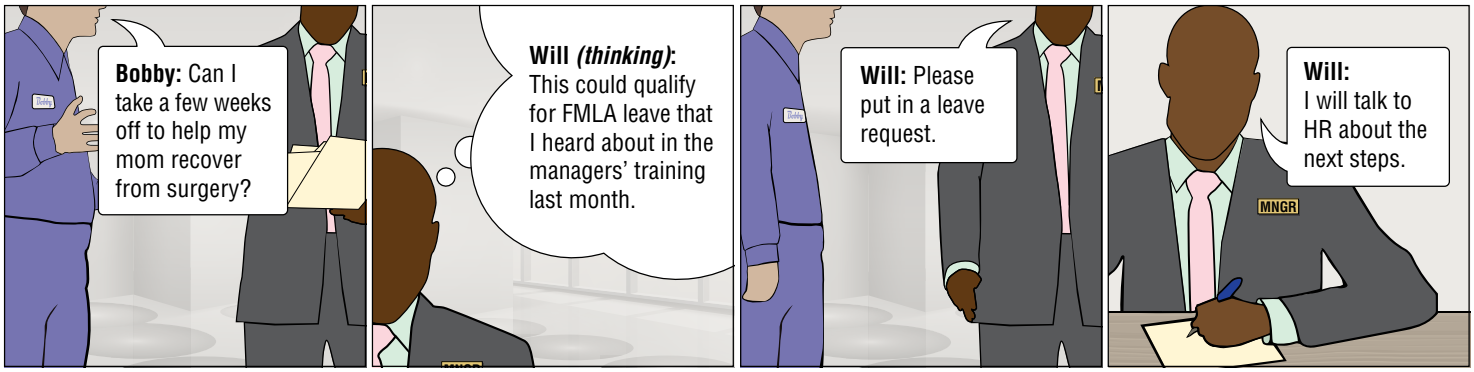
In addition to displaying a poster, if a covered employer has any FMLA eligible employees, it must also provide each employee with a general notice about the FMLA in the employer's employee handbook or other written materials about leave and benefits. If no handbook or written leave materials exist, the employer must distribute this general notice to each new employee upon hire.

This general notice requirement can be met by either duplicating the general notice language found on the Department's FMLA Poster or by using another format as long as the information provided includes, at a minimum, all the information contained in the Department's FMLA Poster. The general notice may be distributed electronically provided all the requirements are met.

Review **section 825.300(a) of the FMLA regulations** for more information about the general notice provisions.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE

Effective communication is critical at all stages of the FMLA process and is a key component of successfully administering the FMLA. Keeping open lines of communication is especially important because employees do not have to specifically request FMLA leave in order to be entitled to it initially.



An Employee's Obligation to Provide Notice of the Need for Leave

Employees must provide notice of their need for FMLA leave. In general, an employer may require that employees comply with the employer's usual and customary policies for requesting leave, unless unusual circumstances prevent the employee from doing so. The employer can take action under its internal rules and procedures if the employee fails to follow its usual and customary rules for requesting leave. Employers may not, however, discriminate against employees taking FMLA leave. An employer may also choose to waive the employee's notice requirement or its own internal rules about leave requests.

Content of an Employee's Notice

An employee's notice of a need for FMLA leave may be oral or written. The first time the employee requests leave for a qualifying reason, he or she is not required to specifically mention the FMLA. However, the employee is required to provide enough information for the employer to know that the leave may be covered by the FMLA. For foreseeable leave, the employee must also indicate when and how much leave is needed.

Once approved for a particular FMLA leave reason, if additional leave is needed for that same reason, the employee may be required to reference that reason or the FMLA. In all cases, the employer may ask additional questions to determine if the leave is FMLA-qualifying.

Timing of an Employee's Notice - Leave that Is Foreseeable

Generally, an employee must give at least 30 days advance notice of the need to take FMLA leave when he or she knows about the need for the leave in advance and it is possible and practical to do so. For example, if an employee is scheduled for surgery in two months, the need for leave is foreseeable and the employee must provide at least 30 days advance notice. If an employee does not provide at least 30 days advance notice, and it was possible and practical to do so, the employer may delay the FMLA leave until 30 days after the date that the employee provides the notice.

If 30 days advance notice is not possible because the foreseeable situation has changed or the employee does not know exactly when leave will be required, the employee must provide notice of the need for leave as soon as possible and practical.

In the case of FMLA leave for a qualifying exigency of a military family member, the employee must give notice of the need for such leave as soon as possible and practical, regardless of how far in advance the leave is needed.

For planned medical treatment, the employee must consult with his or her employer and try to schedule the treatment at a time that minimizes the disruption to company operations. The employee should consult with the employer prior to scheduling the treatment in order to arrange a schedule that best suits the needs of both the employee and employer. Of course, any schedule of treatment is subject to the approval of the treating health care provider.

Timing of an Employee's Notice - Leave that Is Unforeseeable

When the need for leave is unexpected, the employee must provide notice as soon as possible and practical. It should usually be reasonable for the employee to provide notice of leave that is unforeseeable within the time required by the employer's usual and customary notice requirements. Whether the employee's notice of unforeseeable leave is timely will depend upon the facts of the particular case.

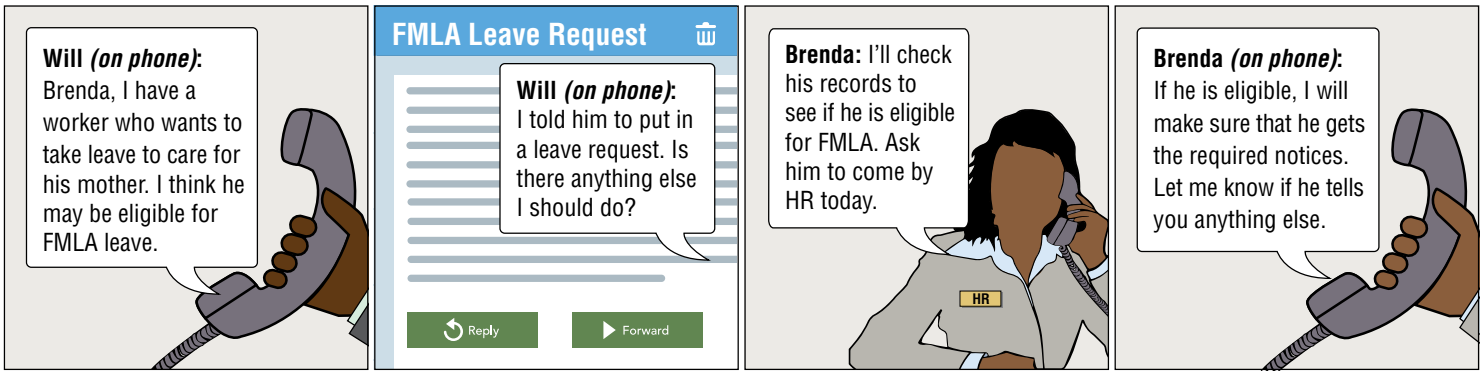
> *For example, if the employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee is not required to leave the child to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.*

DID YOU KNOW?

As soon as an employer has enough information that indicates an employee's need for leave may be for an FMLA-qualifying reason, the employer should begin the FMLA leave process.
An employer's management team and leave administrators play a vital role in ensuring FMLA compliance. Managers, assistant managers, supervisors and leave administrators must be able to recognize FMLA-qualifying reasons for leave and properly initiate the required notifications and eligibility checks. Providing FMLA training regularly helps to make sure those responsible for implementing the FMLA are up-to-date on the requirements of the law and the employer's policy, procedures and practices. Keeping everyone informed, for example by using the FMLA power point found on the Wage and Hour Division's **FMLA webpage**, can help an employer stay in compliance with the law.

Review **sections 825.302** and **825.303 of the FMLA regulations** for more information about employee notice requirements.

Employee Eligibility



The first step in determining an employee's entitlement to the benefits and protections of the FMLA is to establish if he or she is eligible for FMLA leave. The eligibility requirements are the same for all employees, regardless of the reason for the leave request. There are four criteria.

An eligible employee is one who:

1. Works for a covered employer,
2. Has worked for the employer for at least 12 months as of the date the FMLA leave is to start,
3. Has at least 1,250 hours of service for the employer during the 12-month period immediately before the date the FMLA leave is to start (a different hours of service requirement applies to airline flight crew employees), and
4. Works at a location where the employer employs at least 50 employees within 75 miles of that worksite as of the date when the employee gives notice of the need for leave.

12 Months of Employment

The 12 months of employment do not have to be consecutive:

- Part-time, temporary, or seasonal work generally counts towards the 12 months of employment;
- If an employee is maintained on the payroll for any part of a week, that week counts as a week of employment;
- Any combination of 52 weeks equals 12 months, and
- If the employee has a break in employment that lasted seven years or more, the employer is not required to count the time worked prior to the break, unless:
    - The break in employment is due to service covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA), or
    - There is a written agreement, including a collective bargaining agreement, outlining the employer's intention to rehire the employee after the break in employment;
    - An employer may voluntarily consider periods of employment prior to a break of more than seven years, but it must do so uniformly for all employees with similar breaks in employment.

1,250 Hours of Service

The hours of service requirement will be met if an employee has worked a total of 1,250 hours of service in the 12 months immediately preceding the start of the FMLA leave. This averages to a little more than 24 hours of work a week in the 12-month period.

- Generally, the principles for compensable hours of work under the Fair Labor Standards Act (FLSA) are used in determining the hours of service that an employee has worked.
- Only the time actually worked, including overtime hours worked, is counted. Time not actually worked, including vacation, personal leave, sick leave, holidays, and any other form of paid time off (PTO) is not counted towards the 1,250 hours of service. Unpaid leave of any kind or periods of layoff also are not counted.
- Time worked as a part-time, temporary, or seasonal employee counts toward the requirement.
- An employee returning from fulfilling a USERRA-covered military service obligation is credited with the hours of service that would have been performed but for the period of military service. The employee's pre-service work schedule can generally be used for calculations to determine hours that would have been worked during the period of military service.
- If an employer does not maintain accurate time records of hours worked by an employee, the employer has the burden of showing that the employee has not met the hours of service requirement.

DID YOU KNOW?

An employer has the burden of showing that the employee has not met the hours of service requirement even if it is not required to maintain time records for that employee. This may be the case with certain employees, such as school teachers, who may work additional time outside of the classroom or at home.

50 Employees within 75 Miles of the Employee's Worksite

- The 50 or more employee count is determined based on the number of employees on payroll regardless of whether they are part-time, temporary, or seasonal employees.
- The 75 miles are measured from the employee's worksite by surface miles, using surface transportation over public streets, roads, highways, and waterways by the shortest route possible.
- The worksite is ordinarily the site the employee reports to, or from which the employee's work is assigned. A worksite can refer to a single location, a group of buildings, such as a campus or industrial park, or to separate facilities in geographic proximity to one another.
- An employee's personal residence is not a worksite. For employees who work from home under "telework" or "flexi-place" arrangements, or other employees, such as salespersons who may leave to work from and return to their residence, the worksite is the office to which they report or from which they receive assignments.
- For employees with no fixed worksite, such as construction workers, transportation workers, and airline flight crew employees, the site to which they report, from which their work is assigned, or the location to which they are assigned as their home base, is their worksite.

For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago.

If 50 employees are employed within 75 miles from the employee's worksite, the employee meets the requirements for the test, regardless of where the employee is currently performing his or her duties.

DID YOU KNOW?

If the employee does not meet the eligibility requirements, an employer may not designate the leave as FMLA even if the leave would otherwise qualify for FMLA protection. If the employee is not eligible for FMLA leave, the employer may grant the employee leave under the employer's policy. Once the employee becomes eligible and the leave is FMLA-qualifying, any of the remaining leave period taken for an FMLA-qualifying reason becomes FMLA-protected leave.

For example, a pregnant employee has been with the company for 11 months as of December 1. She has more than 1,250 hours of service and works at a location that has more than 50 employees. The employee takes leave under the employer's policy beginning on December 1. One month later, on January 1, when she has reached 12 months of service, she becomes immediately eligible for FMLA and can now take up to 12 workweeks of FMLA-protected leave.

Review **section 825.110 of the FMLA regulations** for more information about employee eligibility.

Public Agency and School Employees

Although public agencies and elementary and secondary schools are covered employers without regard to the number of employees they employ, public agency and school employees must still meet FMLA eligibility requirements.

This means that an eligible employee of a public agency or school is one who:

- Will have worked for the employer for at least 12 months as of the date the FMLA leave is to start,
- Will have at least 1,250 hours of service for the employer during the 12-month period immediately before the date the FMLA leave is to start, and
- Works at a location where the employer employs at least 50 employees within 75 miles as of the date when the employee gives notice of the need for leave.

Generally, a public agency is treated as a single employer for purposes of determining employee eligibility. For example, a state is a single employer, a county is a single employer, and a city is a single employer.

DID YOU KNOW?

School employees who are employed permanently or who are under contract are considered "on the payroll" during any portion of the year when school is not in session, and are counted when determining the number of employees at a worksite.

Review **section 825.108(c) of the FMLA regulations** for more information about the eligibility of public agency employees, and **section 825.600(b)** for more information about the eligibility of school employees.

Special Eligibility Rule for Airline Flight Crew Employees

A special rule applies to the hours of service requirement for airline flight crew employees, including pilots, co-pilots, flight attendants, and flight engineers. The special rule does not apply to other employees of the airlines, such as employees of reservations and baggage departments.

Whether an airline flight crew employee meets the FMLA hours of service requirement is determined by assessing the number of hours the employee has worked or been paid over the previous 12 months. An airline flight crew employee will meet the hours of service requirement if, during the previous 12 months, he or she has:

- worked or been paid for not less than **60 percent of the employee's applicable monthly guarantee, and**
- worked or been paid for not less than **504 hours**.

The applicable monthly guarantee for an airline flight crew employee who is not on reserve status **(line holder)** is the minimum number of hours an employer has agreed to *schedule* the employee. The applicable monthly guarantee for an airline flight crew employee who is on **reserve status** is the minimum number of hours an employer has agreed to pay the employee.

The hours an employee has *worked* during the previous 12 months is the employee's **duty hours** during that time. The hours an airline flight crew employee has been *paid* during the previous 12 months is the number of hours for which the employee received wages during that time. The 504 hours do not include personal commute time or time spent on vacation, medical, or sick leave.

Review **section 825.801 of the FMLA regulations** for more information about the hours of service requirement for airline flight crew employees.

An Employer's Obligation to Provide Employees with an Eligibility Notice

After an employer has determined an employee's FMLA eligibility status, the employer must:

- Provide an Eligibility Notice to the employee, either orally or in writing, informing the employee whether he or she is eligible for FMLA leave;
  - If the employer determines that the employee is not eligible for FMLA leave, it must state at least one reason why the employee is not eligible.
- Provide the Eligibility Notice to the employee within five business days of the initial request for leave or of learning that an employee's leave may be for an FMLA-qualifying reason, unless there are extenuating circumstances;
- Provide the Eligibility Notice the first time the employee takes leave for an FMLA-qualifying reason in the designated 12-month leave year, and
- If a significant portion of the employer's workforce is not literate in English, provide the Eligibility Notice in a language in which employees are literate.

Employers are not required to provide a new Eligibility Notice for:

- FMLA absences for the same qualifying reason during the same leave year, or
- FMLA absences for a different qualifying reason where the employee's eligibility status has not changed.

Employers can use the Wage and Hour Division prototype form WH-381, **Notice of Eligibility and Rights and Responsibilities**, which is available on the Department's website at **dol.gov/whd/fmla**, or from **the nearest Wage and Hour Division office**, or may create their own version.

DID YOU KNOW?

An employer could be exposing itself to liability by failing to make a timely eligibility determination or failing to provide timely notice to its employees. Failure to timely notify employees of their eligibility status may constitute interference with, restraint, or denial of the exercise of an employee's FMLA rights.

Review **section 825.300(b) of the FMLA regulations** for more information about the Eligibility Notice.

An Employer's Obligation to Provide Employees with a Rights and Responsibilities Notice

Employers must provide a written Rights and Responsibilities Notice each time the employer provides an eligible employee the Eligibility Notice, within five business days of having notice of the employee's need for leave. If the employee's leave has already begun, the Rights and Responsibilities Notice should be mailed to the employee's address of record. The Rights and Responsibilities Notice details the specific expectations and obligations of the employee relating to his or her FMLA leave.

Employers are expected to be responsive in answering questions from employees concerning their rights and responsibilities under the FMLA. If a significant portion of an employer's workforce is not literate in English, the Rights and Responsibilities Notice must be provided in a language in which employees are literate.

Contents of the Rights and Responsibilities Notice

The Rights and Responsibilities Notice must be in writing and must include all of the following information, as appropriate:

- A statement of the period of leave that may be designated and counted against the employee's FMLA leave entitlement,
- The 12-month period used to track FMLA leave usage,
- Whether the employee will be required to provide certification of the need for leave,
- The employee's right to use paid leave, whether the employer will require the substitution of paid leave, any conditions related to the substitution, and the employee's right to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
- The employee's status as a "key employee" and potential restoration consequences, if applicable;
    - A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10% of all employees, both eligible and ineligible, within 75 miles of the worksite.
- The employee's right to job restoration and maintenance of benefits,
- Whether the employee will be required to make premium payments to maintain health benefits and any arrangements for doing so, the consequences of failing to make payments on a timely basis, and the employee's potential liability for premium payments made by the employer if the employee fails to return to work; and
- The consequences of failing to meet his or her obligations.

If information provided in the Rights and Responsibilities Notice changes, the employer must inform the employee of the changes, in writing, within five business days of the first time subsequent to the changes that the employee gives notice of need for leave.

For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, notice of new arrangements for making health insurance premium payments may be required.

The Rights and Responsibilities Notice may be distributed electronically provided it meets all of the requirements stated above. Employers can use the Wage and Hour Division prototype form WH-381, **Notice of Eligibility and Rights and Responsibilities**, which is available on the Department's website at **dol.gov/whd/fmla**, or from **the nearest Wage and Hour Division office**, or may create their own version of the notice containing the same basic information.

DID YOU KNOW?

If the employer opts to provide the Eligibility Notice in writing, it may be combined and provided to the employee at the same time that the employer provides the Rights and Responsibilities Notice.

Review **section 825.300(c) of the FMLA regulations** for more information about the Rights and Responsibilities Notice.

QUALIFYING REASONS FOR LEAVE

An employee who meets the FMLA eligibility requirements may take leave for certain FMLA-qualifying reasons.

Circumstances that Qualify for FMLA Leave

Eligible employees may take up to 12 workweeks of FMLA leave in a 12-month period for the following qualifying reasons:

- The birth of a child and to bond with the newborn child within one year of birth,
- The placement with the employee of a child for adoption or foster care and to bond with the newly-placed child within one year of placement,
- A serious health condition that makes the employee unable to perform the functions of his or her job, including incapacity due to pregnancy and for prenatal medical care,
- To care for the employee's spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
- Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.

In addition, eligible employees may take up to 26 workweeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (referred to as military caregiver leave). An eligible employee is limited to a *combined* total of 26 workweeks of leave for **any** FMLA-qualifying reasons during the single 12-month period.

DID YOU KNOW?

The right to take FMLA leave applies equally to male and female employees. Fathers are equally entitled to take up to 12 workweeks of FMLA leave for the birth or placement for adoption or foster care of a child and to bond with the child within 12-months from the date of birth or placement.

Review **section 825.112 of the FMLA regulations** for more information about qualifying reasons for FMLA leave.

DID YOU KNOW?

Eligible employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption.

Review **section 825.121 of the FMLA regulations** for more information about FMLA leave for adoption or foster care.

Immediate Family Members

Employees can take FMLA leave due to a serious health condition of the following immediate family members:

- Spouse
- Parent
- Son or Daughter

Spouse

Spouse means a husband or wife as defined or recognized in the state where the individual was married, including in a common law marriage or same-sex marriage. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States, if the marriage could have been entered into in at least one state.

Parent

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was a child. This term does not include "parents-in-law."

Son or daughter

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age or who is 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. The onset of a disability may occur at any age for purposes of the definition of an adult "son or daughter" under the FMLA.

DID YOU KNOW?

In order for a parent to take FMLA leave for a child who is 18 or over, the son or daughter must:

- Have a disability as defined by the Americans with Disabilities Act (ADA) at the time the leave is to commence,
- Be incapable of self-care because of the disability,
- Have a serious health condition, and
- Need care because of the serious health condition.

Review **section 825.122 of the FMLA regulations** for more information about the definition of family members for purposes of FMLA leave and **Administrator's Interpretation No. 2013-1** for more information about an adult son or daughter incapable of self-care because of a mental or physical disability.

Note: The definition of son or daughter for purposes of FMLA military family leave is different. Information on FMLA military family leave (qualifying exigency leave and military caregiver leave) can be found in **chapter 5**.

In Loco Parentis

An individual stands in *loco parentis* to a child if he or she has day-to-day responsibilities to care for or financially support the child. The person standing *in loco parentis* is not required to have a biological or legal relationship with the child. Although no legal or biological relationship is necessary, grandparents or other relatives, such as siblings, may stand *in loco parentis* to a child under the FMLA where all other requirements are met. The *in loco parentis* relationship exists when an individual intends to take on the role of a parent. Similarly, an individual may have stood *in loco parentis* to an employee when the employee was a child even if the individual has no legal or biological relationship to the employee.

Review **Administrator's Interpretation No. 2010-3** for more information about *in loco parentis*.

Documenting the Family Relationship

An employer may, but is not required to, request that an employee provide reasonable documentation of the qualifying family relationship. An employee may satisfy this requirement by providing either a simple statement asserting that the requisite family relationship exists, or other documentation such as a child's birth certificate or a court document. It is the employee's choice whether to provide a simple statement or other documentation. Employers may not use a request for confirmation of a family relationship in a manner that interferes with an employee's exercise or attempt to exercise his or her FMLA rights.

Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves **inpatient care** or **continuing treatment** by a health care provider. The FMLA does not apply to routine medical examinations, such as a physical, or to common medical conditions, such as an upset stomach, unless complications develop.

For all conditions "incapacity" means inability to work, including being unable to perform any one of the essential functions of the employee's position, or inability to attend school, or perform other regular daily activities due to the serious health condition, treatment of the serious health condition, or recovery from the serious health condition. The term "treatment" includes but is not limited to examinations to determine if a serious health condition exists and evaluations of the condition.

The chart below describes the different types of conditions that are serious health conditions under the FMLA. Serious health conditions may include conditions that involve an inpatient hospital stay or ones that include one or more visits to a health care provider and ongoing treatment. Chronic conditions and long-term or permanent periods of incapacity may also meet the requirements. Certain conditions requiring multiple treatments may also be FMLA-qualifying. See the chart on the next page for more information.

Inpatient Care

- An overnight stay in a hospital, hospice, or residential medical care facility.
- Includes any period of incapacity or any subsequent treatment in connection with the overnight stay.

Continuing Treatment by a Health Care Provider
(any one or more of the following)

Incapacity Plus Treatment

A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

- Two or more in-person visits to a health care provider for treatment within 30 days of the first day of incapacity unless extenuating circumstances exist. The first visit must be within seven days of the first day of incapacity; or,
- At least one in-person visit to a health care provider for treatment within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of the health care provider. For example, the health provider might prescribe a course of prescription medication or therapy requiring special equipment.

Pregnancy

Any period of incapacity due to pregnancy or for prenatal care.

Chronic Conditions

Any period of incapacity due to or treatment for a chronic serious health condition, such as diabetes, asthma, migraine headaches. A chronic serious health condition is one which requires visits to a health care provider (or nurse supervised by the provider) at least twice a year and recurs over an extended period of time. A chronic condition may cause episodic rather than a continuing period of incapacity.

Permanent or Long-term Conditions

A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, but which requires the continuing supervision of a health care provider, such as Alzheimer's disease or the terminal stages of cancer.

Conditions Requiring Multiple Treatments

- Restorative surgery after an accident or other injury; or,
- A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days if the employee or employee's family member did not receive the treatment.

DID YOU KNOW?

If an eligible employee requests FMLA leave for surgery which requires and/or results in an overnight stay in the hospital, the leave request would meet the definition of a serious health condition under the inpatient care criteria, even if the surgery is considered elective.

Review **sections 825.113 to 825.121 of the FMLA regulations** for more information about serious health conditions.

THE CERTIFICATION PROCESS

In certain circumstances, an employer may require that an employee submit a certification to support the employee's need for FMLA leave. The certification is a document or form that is completed by the employee and, as appropriate, a health care provider.

The certification will allow the employer to:

- Obtain information related to the FMLA leave request, including the likely periods of absences; and
- Verify that an employee, or the employee's ill family member, has a serious health condition (or, in the case of military family leave, that facts exist to support the employee's request for such leave).

The employee has the responsibility to provide the initial certification if his or her employer requests it. This includes the responsibility, when applicable, to find a health care provider to provide a complete and sufficient certification, and to pay for the cost of the initial certification.

If the employee does not provide the certification, the employer may deny the employee's request for FMLA leave.

Certification at a Glance

STEP 1
The employer must notify the employee if a certification is required

→

STEP 2
The employee provides a completed certification within 15 calendar days, absent unusual circumstances

→

STEP 3
The employer must notify the employee, in writing, if the leave will or will not be FMLA-protected

↕

THE EMPLOYER MAY:

- Identify, in writing, any deficiencies in the medical certification and ask the employee to provide corrected information within 7 calendar days
- Contact the health care provider to clarify and/or authenticate the certification
- Require a 2nd medical opinion, at the employer's expense, if there are concerns about the validity of the certification
- Require a 3rd medical opinion, at the employer's expense, if the 1st and 2nd opinions differ

THE EMPLOYER MAY DENY FMLA LEAVE IF THE EMPLOYEE FAILS TO PROVIDE A REQUESTED CERTIFICATION

Circumstances When an Employer May Require a Certification

An employer may require a certification when an employee requests leave for:

- The employee's own serious health condition,
  - An employer may also, in certain circumstances, require a fitness-for-duty certification at the conclusion of the employee's leave as a condition to returning the employee to the job (see chapter 6 for information about the fitness-for-duty certification).
- The serious health condition of the employee's parent, spouse, son or daughter, and
- Military family leave (see **chapter 5** for information about certification for military family leave).

DID YOU KNOW?

Employers may **not** request a certification for leave to bond with a healthy newborn child or a child placed for adoption or foster care. However, employers may request documentation to confirm the family relationship (see **chapter 3** for information about documenting the family relationship).

Health Care Providers

If an employer requires a medical certification, part of it must be completed by a health care provider, which is defined as:

- A doctor of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices,
- A podiatrist, dentist, clinical psychologist, optometrist, or chiropractor (with limitations) authorized to practice in the state and performing within the scope of his or her practice;
- A nurse practitioner, nurse-midwife, clinical social worker, or physician assistant authorized to practice in the state and performing within the scope of his or her practice;
- A Christian Science practitioner listed with the First Church of Christ, Scientist, in Boston, Massachusetts; or
- Any health care provider from whom the employer or the employer's group health plan's benefits manager will accept a medical certification to substantiate a claim for benefits.

Medical Certification Notice and Timing

Employers must notify employees each time they require a medical certification. The employer's notice that a certification is required must be included in the written Rights and Responsibilities Notice that the employer gives the employee within five business days of becoming aware of the employee's need for FMLA leave. In some instances, an employer may request a medical certification at a later date if the employer has reason to question the appropriateness of the leave or its duration. When requesting a medical certification, the employer must advise the employee of the consequences of failing to provide a complete and sufficient certification.

The employee must provide the requested medical certification within 15 calendar days after an employer's request, unless it is not feasible under the particular circumstances to do so despite the employee's good faith efforts, or if the employer permits more than 15 calendar days to return the requested certification. When an employee makes diligent good faith efforts but is unable to meet the 15-calendar day deadline, the employee is entitled to additional time to provide the certification. If an employee fails to return the certification in a timely manner, the employer can deny FMLA protections for the leave following the expiration of the 15-calendar day time period until a complete and sufficient certification is provided. However, the 15-day period and the period of absence beginning the day the certification was received is FMLA-protected leave.

> *For example, an employer gives an employee 15 calendar days to provide a certification and the employee does not provide certification for 45 calendar days without sufficient reason for the delay, the employer may deny FMLA protections for the period following expiration of the 15-calendar day time period, i.e., from day 16 through day 44.*

If an employee fails to provide a certification within 15 calendar days from receipt of the request for certification but made diligent, good faith efforts to do so and the delay was due to extenuating circumstances outside his or her control, the employer may not deny the leave for the period that the certification was late. In all cases, if the employee never produces the certification, the leave is not FMLA-protected leave.

Review **sections 825.305** and **825.313 of the FMLA regulations** for more information about the medical certification and failure to provide the certification.

Contents of a Complete and Sufficient Medical Certification

The medical facts appropriate for inclusion on the certification form will vary depending on the nature of the serious health condition and are to be determined by the health care provider but must be sufficient to support the need for leave. The information requested may relate only to the serious health condition for which the employee is seeking leave.

A complete and sufficient certification need only include the following information:

- Contact information for the health care provider, including name, address, telephone number, fax number, and type of medical practice / specialty;
- When the serious health condition began,
- How long the serious health condition is expected to last,
- If the employee is the patient, whether the employee is unable to work, and the likely duration of this inability;

- If a family member is the patient, whether the family member needs care, and an estimate of the frequency and duration of the leave required to care for the family member;
- Whether the employee's need for leave is continuous or intermittent, and
- Appropriate medical facts about the condition.

Appropriate Medical Facts

At the health care provider's discretion, the medical facts may include information on symptoms, doctor's visits, or a diagnosis. Whether a diagnosis is included in the certification form is left to the discretion of the health care provider and an employer may not reject a complete and sufficient certification because it lacks a diagnosis.

Additional Information for Intermittent or Reduced Schedule Leave

For intermittent or reduced schedule leave, the employer may require certain additional information in the certification:

Planned Medical Treatment for the Employee's Own or Family Member's Serious Health Condition	**Unforeseeable** Leave for the Employee's Own Serious Health Condition, Including Pregnancy	**Unforeseeable** Leave for the Family Member's Serious Health Condition
• Information that establishes the medical necessity of intermittent or reduced schedule leave • An estimate of the **dates** and duration of such treatment and periods of recovery	• Information that establishes the medical necessity of intermittent or reduced schedule leave • An estimate of the **frequency** and duration of the episodes of incapacity due to the serious health condition	• A statement that the leave schedule is medically necessary for the care of the family member, which can include assisting in the family member's recovery • An estimate of the **frequency** and duration of leave

THE CERTIFICATION PROCESS

Not all absences caused by certain serious health conditions are predictable. Health care providers are expected to provide only their best informed medical judgment when estimating the need for unforeseeable intermittent leave. The FMLA does not permit an employer to require an exact schedule of leave for such instances.

Review **section 825.306 of the FMLA regulations** for more information about the content of the medical certification.

The employer must accept a complete and sufficient medical certification, regardless of the format. The employer cannot reject a medical certification that contains all the information needed to determine if the leave is FMLA-qualifying.

The employer cannot refuse:

- A fax or copy of the medical certification,
- A medical certification that is not completed on the employer's standard company form, or
- Any other record of the medical documentation, such as a communication on the letterhead of the health care provider.

DID YOU KNOW?

The FMLA does not require employees to use any specific certification form. An employer may provide employees with the Department of Labor's optional-use forms, listed below, for obtaining certification.

- WH-380-E, **Certification of Health Care Provider for Employee's Serious Health Condition**;
- WH-380-F, **Certification of Health Care Provider for Family Member's Serious Health Condition**;
- WH-384, **Certification of Qualifying Exigency for Military Family Leave**;
- WH-385, **Certification for Serious Injury or Illness of a Covered Servicemember – for Military Family Leave**;
- WH-385-V, **Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave**.

These are available on the Department's website at **dol.gov/whd/fmla** or from **the nearest Wage and Hour Division office**. An employer may also develop its own certification forms, but it may not request any additional information beyond what is specified in the FMLA and its regulations.

Incomplete or Insufficient Medical Certification

Whenever an employer finds any medical certification "incomplete" or "insufficient," the employer must give the employee a written notice stating what additional information is necessary to make the certification complete and sufficient. The employer may use the designation notice to inform the employee that the certification is incomplete or insufficient and identify what information is needed to make the certification complete and sufficient. See **chapter 6** for more information about the designation notice.

- A certification is considered **incomplete** if one or more applicable entries have not been completed.
- A certification is considered **insufficient** if the information provided is vague, ambiguous, or non-responsive.

The employer must provide the employee with at least seven calendar days to correct any deficiency in the certification. If it is not practicable under the particular circumstances for the employee to cure any deficiency in the seven-day period despite the employee's diligent good faith efforts, the employer should provide additional time.

If an employee fails to provide a complete and sufficient certification despite the opportunity to cure the deficiency, an employer may deny the employee's request for FMLA leave.

DID YOU KNOW?

After acquiring a complete and sufficient certification, an employer is not permitted to ask for more information, such as requiring a doctor's note for each FMLA-related absence. Requiring a doctor's note for each *unpaid* FMLA related absence may be considered interference with the employee's use of FMLA leave.

Review **section 825.305(c) of the FMLA regulations** for more information about complete and sufficient certifications.

Medical Certification from Abroad

If the employee or employee's family member is visiting another country, or a family member resides in another country, an employer must accept a medical certification, including second and third opinions, from a health care provider who is authorized to practice in that country and is performing within the scope of his or her practice. If a certification by a foreign health care provider is not in English, the employee must provide a written translation at the employer's request.

Authentication and Clarification

After the employer has given the employee the opportunity to cure any deficiencies, the employer may contact the health care provider **only** for purposes of authentication and/or clarification of the medical certification.

Under no circumstances may the employee's direct supervisor contact the employee's health care provider. A human resources professional, a leave administrator, or a management official must make the contact.

Authentication means providing the health care provider with a copy of the certification and confirming that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document.

Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.

An employer may not ask health care providers for additional information beyond that in the certification form.

The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule govern the privacy of individually-identifiable health information created or held by HIPAA-covered entities. Therefore, HIPAA requirements must be satisfied for a HIPAA-covered entity to share an employee's or an employee's family member's individually-identifiable health information with an employer. HIPAA requires, among other things, a written authorization by the employee (or the employee's family member) in order to release information for clarification purposes.

An employee may choose to authorize his or her health care provider to provide clarification directly to the employer; however, the employee *may not be required* to do so. If the employee chooses not to provide such authorization and does not otherwise clarify the certification, the employer may deny the FMLA leave request if the certification is unclear. It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

Second and Third Opinions

If an employer has received a complete and sufficient certification but has a reason to doubt that it is valid, the employer may require the employee to obtain a second opinion at the employer's expense. The employer can choose the health care provider to provide the second opinion, but generally may not select a health care provider who it employs on a regular or routine basis.

If the first and second opinions reach different conclusions, the employer may require a third opinion at the employer's expense. The third health care provider must be approved by both the employer and the employee. The opinion of the third health care provider is final.

While waiting for the second (or third) opinion, the employee is provisionally entitled to FMLA leave, including the right to maintain his or her group health benefits. If the certifications do not ultimately establish that the employee is entitled to FMLA leave, the leave is not considered FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policy.

If the employee requests it, the employer must provide copies of second or third opinions within five business days absent extenuating circumstances.

If a second or third opinion health care provider requests information relevant to the serious health condition at issue from the employee's or his or her family member's health care provider, and the employee or their family member does not authorize their health care provider to release such information, the FMLA leave may be denied.

Review **section 825.307 of the FMLA regulations** for more information about authentication, clarification, and second and third opinions.

Recertification

An employer may, under certain circumstances, request that an employee "recertify" his or her serious health condition or the serious health condition of his or her family member within the same leave year.

In general, an employer may request the employee provide a recertification no more often than every 30 days and only when the employee is actually absent or has requested to be absent.

In some instances, an employer must wait longer than 30 days to request recertification. If the initial certification indicates that the minimum duration of the serious health condition will be more than 30 days, an employer must generally wait until that minimum duration expires before requesting recertification. In all cases, an employer may request recertification every six months in connection with an absence. If the initial medical certification indicates that the employee will need intermittent or reduced schedule leave for longer than six months, including cases where the serious health condition has no anticipated end, the employer may request a recertification every six months, but only in connection with an absence by the employee.

An employer may request a recertification in connection with an absence by the employee in less than 30 days **only** if:

- The employee requests an extension of leave,
- The circumstances described by the previous certification 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 existing medical certification.

In general, an employer may ask for the same information in a recertification as that permitted in the initial medical certification. As with the initial certification, in most circumstances, the employee has 15 calendar days after the employer's request to provide a complete and sufficient recertification. The employee is responsible for paying for the cost of a recertification.

During recertification an employer may provide the health care provider with a record of the employee's absence pattern, such as an attendance record of FMLA leave use, and ask the health care provider if the serious health condition and need for leave is consistent with the absence pattern provided.

DID YOU KNOW?

For serious health conditions, an employer may contact the health care provider to authenticate or clarify recertification, but cannot require second or third opinions for recertification.

Review **section 825.308 of the FMLA regulations** for more information about recertifications.

Annual Medical Certification

Where the need for leave for an employee's or family member's serious health condition lasts beyond a single leave year, the employer may require a new certification in each subsequent FMLA leave year. That means the employer may request a new medical certification with the first absence in a new 12-month leave year. Because it is a new certification and not a recertification, an employer may seek second and third opinions for these new medical certifications, as well as authenticate or clarify the certification with the health care provider.

Review **section 825.305(e) of the FMLA regulations** for more information about annual medical certifications.

MILITARY FAMILY LEAVE

Eligible employees are entitled to two types of FMLA leave related to a qualifying family member's military service. This type of FMLA leave is referred to as military family leave.

Types of Military Family Leave

The military family leave provisions of the FMLA entitle eligible employees of covered employers to take FMLA leave for:

- Any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the Armed Forces, or
- To care for a covered servicemember with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.
    - FMLA leave for this purpose is called "military caregiver leave."

Qualifying Exigency Leave

An eligible employee may take qualifying exigency leave when the employee's spouse, son, daughter, or parent who is a member of the Armed Forces (including the National Guard and Reserves) is on covered active duty or has been notified of an impending call or order to covered active duty.

Covered Active Duty

In order for the employee to take qualifying exigency leave, the military member must be on covered active duty, under a call to covered active duty status, or have been notified of an impending call or order to covered active duty.

For members of the **Regular Armed Forces**, covered active duty is duty during the deployment of the member with the Armed Forces to a foreign country.

For members of the **Reserve components** of the Armed Forces (members of the U. S. National Guard and Reserves), covered active duty is duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation.

Deployment to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any territory or possession of the United States. It also includes deployment to international waters.

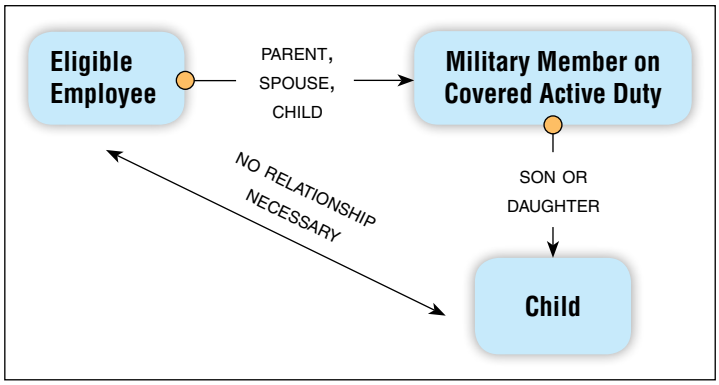
Family Members for Whom an Employee May Take Qualifying Exigency Leave

To take qualifying exigency leave, the military member must be the employee's spouse, parent, or son or daughter. Unlike non-military FMLA leave, for purposes of qualifying exigency leave, an employee's son or daughter on covered active duty refers to a son or daughter of any age.

Qualifying Exigency Categories

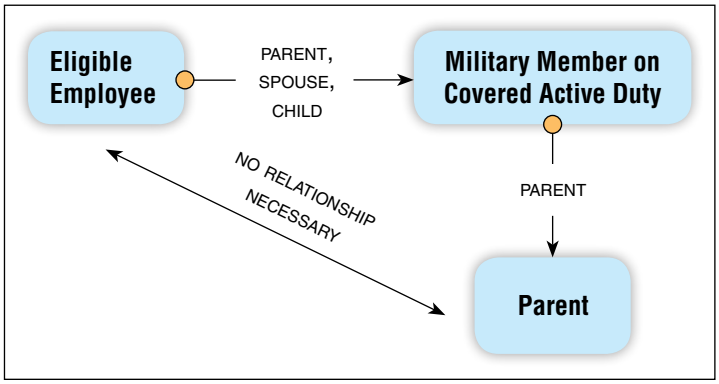
An eligible employee with a family member on covered active duty may take FMLA leave for the following qualifying exigencies:

1. Issues arising from the military member's short notice deployment (i.e., deployment within seven or fewer days of notice),
2. To make or update financial and legal arrangements to address a military member's absence,
3. To attend counseling for the employee, the military member, or a child of the military member when the need for that counseling arises from the covered active duty or call to covered active duty status of the military member and the counseling is provided by someone other than a health care provider;
4. To attend military events and related activities, including official military ceremonies and programs or informational briefings related to the military member's covered active duty sponsored or promoted by the military or military service organizations;
5. To spend up to 15 calendar days with a military member who is on rest and recuperation leave,
6. Certain childcare and related activities for the military member's child while the military member is on covered active duty,
   - The employee does not need to be related to the military member's child to take qualifying exigency leave for this purpose. But, (1) the military member must be the parent, spouse, or child of the employee taking leave; and (2) the child for whom the employee is arranging for or providing childcare must be the child of the military member.



7. To attend post-deployment activities within 90 days of the end of the military member's covered active duty or to attend to issues arising from the death of a military member while on covered active duty;

8. Certain parental care activities for the military member's parent who is incapable of self-care, and
   - The employee does not need to be related to the military member's parent to take qualifying exigency leave for this purpose. But, (1) the military member must be the parent, spouse, or child of the employee taking FMLA leave; and (2) the parent receiving assistance must be the parent of the military member.



9. Any other event that the employee and employer agree is a qualifying exigency.
   - Both the employee and employer must agree to the timing and duration of the leave.

DID YOU KNOW?

FMLA allows qualifying exigency leave for counseling services that are non-medical in nature. This non-medical counseling could include, for example, counseling provided by a military chaplain, pastor, or minister, or counseling offered by the military or a military service organization that is not provided by a health care provider.

Review **section 825.126 of the FMLA regulations** for more information about qualifying exigency leave.

Certification for Qualifying Exigency Leave

When an eligible employee requests qualifying exigency leave, the employer may request the following information and documentation:

- A copy of the military member's active duty orders (or other official documentation issued by the military) which indicates the military member is on covered active duty or call to covered active duty status, which need be provided only once per deployment;
    - An employer may contact the Department of Defense to request verification that the military member is on covered active duty.
    - However, an employer may not request any additional information from the Department of Defense.
- A statement or description of the appropriate facts regarding the qualifying exigency,
- The approximate date on which the leave began (or will begin), and how long and/or how often leave will be needed; and
- The contact information for any meeting with a third party and a brief description of the purpose of the meeting.

The employer may contact a third party to confirm the nature of a third-party meeting, but may not request additional information from the third party during this contact. The employer does not have to obtain permission from the employee for this contact.

The employer may choose to use the Wage and Hour Division prototype form WH-384, **Certification of Qualifying Exigency for Military Family Leave**, which is available on the Department's website at **dol.gov/whd/fmla**, or from **the nearest Wage and Hour Division office**, or may create its own version of the certification containing the same basic information; however, no additional information can be requested.

DID YOU KNOW?

For qualifying exigency leave, an employer is not permitted to require second and third opinions or recertifications. However, when the leave involves meeting with a third party, an employer may contact the third party to confirm that the meeting is taking place and the nature of the meeting, but no additional information may be requested. An employer may also contact the Department of Defense to verify a military member's covered active duty status.

	Authentication & Clarification	Recertification	2nd / 3rd Option
Qualifying Exigency Leave	Only to verify a meeting, an appointment, or the military member's covered active duty status.	X	X

Review **section 825.309 of the FMLA regulations** for more information about certification for leave taken because of a qualifying exigency.

The notice and timing requirements for a certification for qualifying exigency leave are the same as for medical certifications. See **chapter 4** for more information about certifications.

Military Caregiver Leave

Military caregiver leave allows an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness to take up to a total of 26 workweeks of unpaid leave during a "single 12-month period" to provide care for the servicemember.

Covered Servicemember

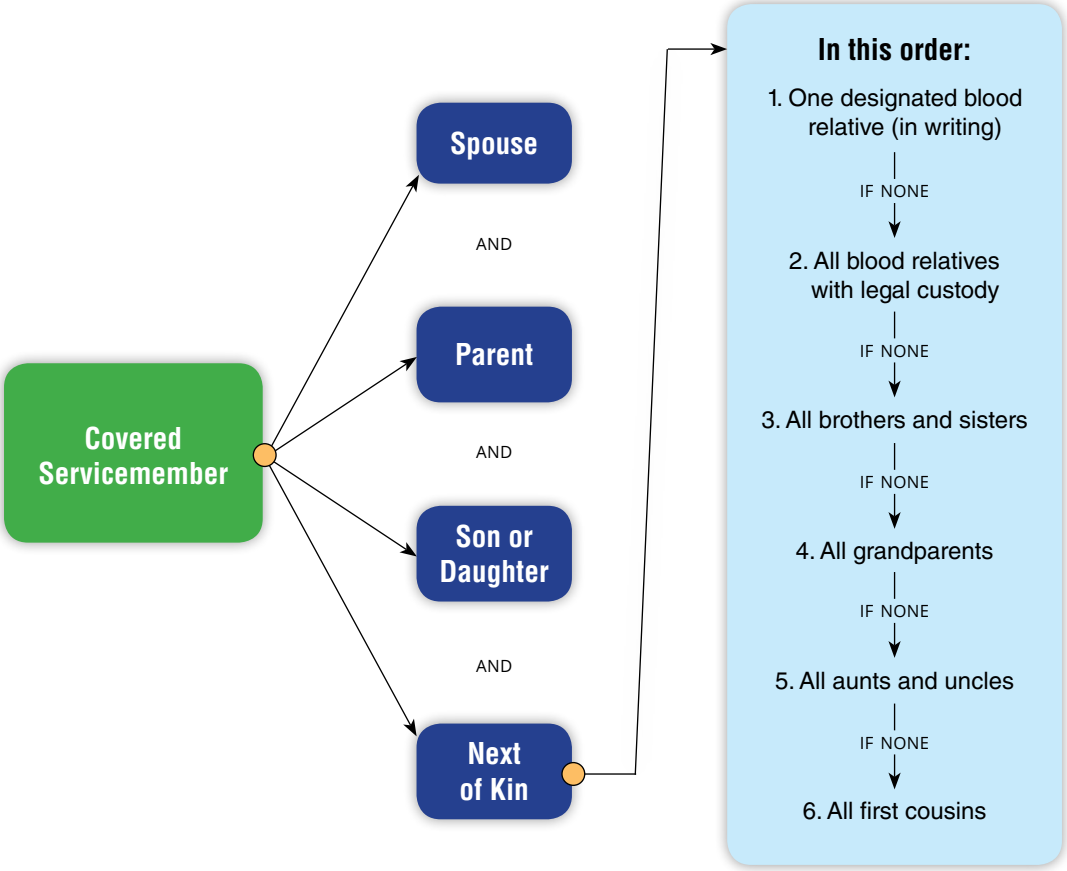
A covered servicemember is either:

- **A Current Servicemember**: A covered servicemember means a current member of the Armed Forces, including a member of the U. S. 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
- **A Veteran**:A covered servicemember means a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness, and who was discharged within the previous five years before the employee takes military caregiver leave to care for the veteran.

Family Members for Whom an Employee May Take Military Caregiver Leave

To take military caregiver leave, the eligible employee must be the spouse, parent, son or daughter, or next of kin of the covered servicemember. For purposes of military caregiver leave, a son or daughter refers to the servicemember's son or daughter of any age.

A next of kin is the servicemember's nearest blood relative, other than the servicemember's spouse, parent, son, or daughter, in the following order of priority:



DID YOU KNOW?

If the servicemember designates in writing a next of kin, that relative is the **only** next of kin for FMLA leave purposes. However, if the servicemember makes no such designation, all the family members sharing the closest level of family relationship to the servicemember or veteran are considered the next of kin.

For example, if a servicemember has three siblings, and has not designated a next of kin in writing or granted legal custody, all three siblings may take military caregiver leave as the next of kin if each works for a covered employer and meets the eligibility requirements.

A Serious Injury or Illness

A serious injury or illness for a current servicemember is an injury or illness that was incurred by the servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating. A serious injury or illness may also result from the aggravation of a pre-existing condition in the line of duty on active duty.

A serious injury or illness for a veteran is an injury or illness that was incurred in the line of duty when the veteran was on active duty in the Armed Forces, including any injury or illness that resulted from the aggravation of a preexisting condition in the line of duty on active duty. The injury or illness may manifest itself during active duty or may develop after the servicemember becomes a veteran.

A serious injury or illness of a veteran must be either:

- 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
- A physical or mental condition for which the veteran has received a United States Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50% or more and the need for care is related to that condition, or
- A physical or mental condition because of a disability or disabilities related to military service that substantially impairs the veteran's ability to work, or would do so absent treatment; or
- An injury for which the veteran is enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

A "Single 12-Month Period"

The "single 12-month period" for military caregiver leave begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12-month period established by the employer for other types of FMLA leave. An eligible employee is limited to a ***combined*** total of 26 workweeks of leave for **any** FMLA-qualifying reason during the "single 12-month period." Up to 12 of the 26 workweeks may be for an FMLA-qualifying reason other than to care for a covered servicemember.

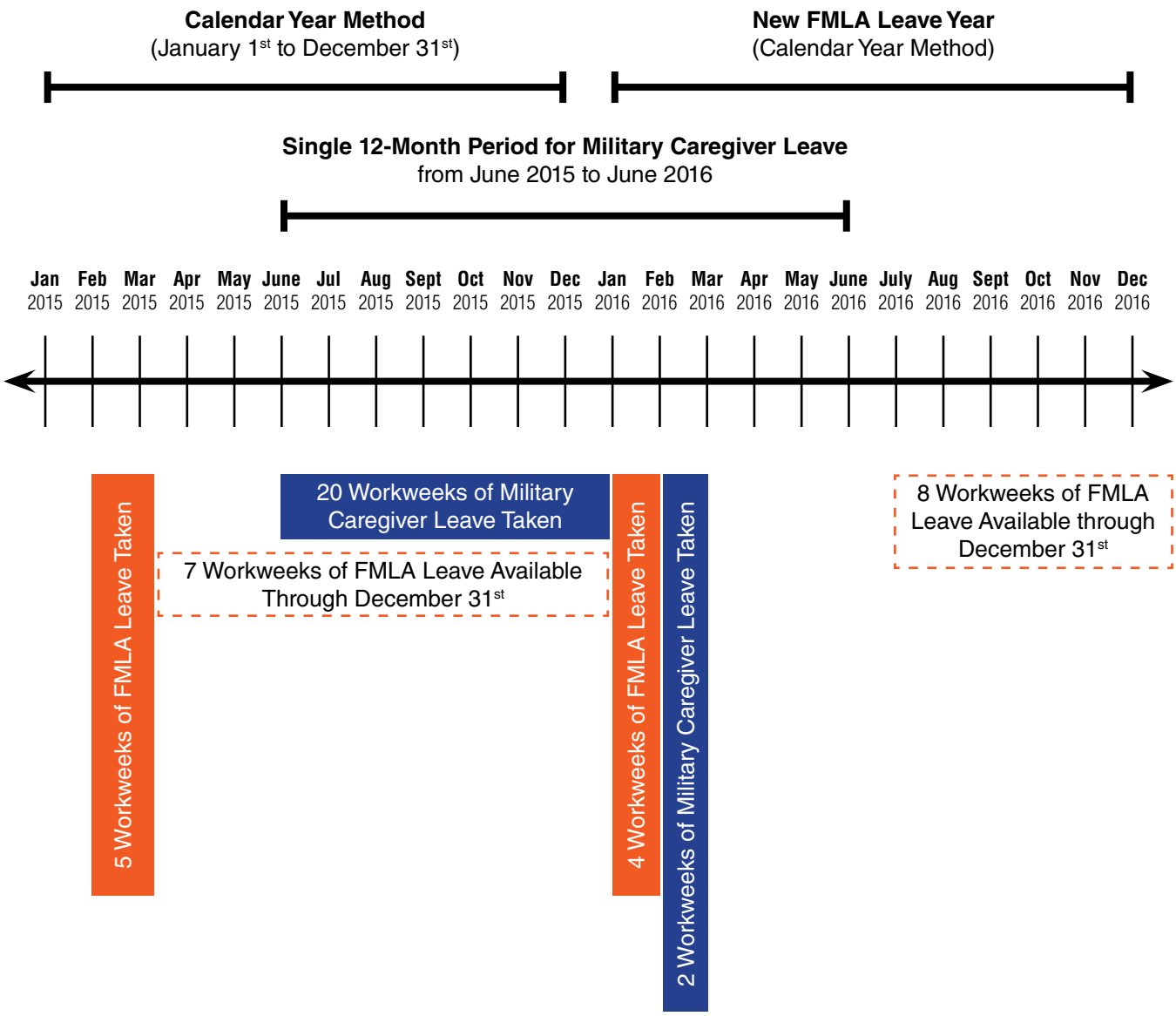
For example, the employer uses the calendar year method (January 1st to December 31st) for determining an employee's leave balance for FMLA leave taken for all qualifying reasons other than military caregiver leave. An employee first takes military caregiver leave in June 2015. Between June 2015 and June 2016 (the "single 12-month period" for military caregiver leave), the employee can take a combined total of 26 workweeks of leave, including up to 12 workweeks for any other qualifying FMLA reason if he has not yet taken any FMLA leave in 2015.

If, however, the employee had already taken five workweeks of FMLA leave for his own serious health condition when he began taking military caregiver leave in June 2015, he would then be entitled to no more than seven workweeks of FMLA leave for reasons other than to care for a covered servicemember during the remainder of the 2015 calendar year (i.e., the 12 workweeks yearly entitlement minus the five workweeks already taken). Although his entitlement to FMLA leave for reasons other than military caregiver leave is limited by his prior use of FMLA leave during the calendar year, the employee is still entitled to take up to 26 workweeks of FMLA leave to care for a covered servicemember from June to December 2015.

Beginning in January 2016, the employee is entitled to an additional 12 workweeks of FMLA leave for reasons other than to care for a covered servicemember. If the employee takes four workweeks of FMLA leave for his own serious health condition in January 2016, this would reduce both the number of available workweeks of FMLA leave remaining in calendar year 2016 (i.e., the 12 workweeks yearly entitlement minus the four workweeks already taken) and the number of workweeks of FMLA leave available for either military caregiver leave or other FMLA qualifying reasons during the "single 12-month period" of June 2015 to June 2016.

Once the employee exhausts his or her 26-workweek entitlement, he or she may not take any additional FMLA leave for any reason until the "single 12-month period" ends. Thus, for example, if the employee took 20 workweeks of military caregiver leave from June to December 2015, four workweeks of leave in January 2016 for his or her own serious health condition, and another two workweeks of military caregiver leave in March 2016, the employee will have exhausted his or her 26-workweek entitlement for the "single 12-month period" of June 2015 to June 2016. While the employee would still have eight workweeks of FMLA leave available in calendar year 2016, the employee could not take such leave until after June 2016, when the "single 12-month period" ends.

MILITARY FAMILY LEAVE



Review **section 825.127 of the FMLA regulations** for more information about military caregiver leave and **section 825.200** for more information about 12-month periods. See **chapter 6** for more information about a 12-month leave year.

Certification for Military Caregiver Leave

An employer may require that a request for military caregiver leave be supported by a certification. The certification may be completed by a Department of Defense (DOD), Veterans Affairs (VA), or TRICARE health care provider, or by a private health care provider.

- Second and third opinions and recertifications are not permitted for certification of a serious injury or illness of a covered servicemember when the servicemember is treated by a DOD, VA, or TRICARE health care provider. However, if the covered servicemember is seeking care from a private (non-DOD) health care provider, the employer may request a second or third opinion.
- The employee may not be held liable for administrative delays in the issuance of military documents, where the employee has exercised diligent, good-faith efforts to obtain such documents.

An employer may choose to use the Wage and Hour Division prototype Military Caregiver Leave certification forms. Form WH-385, **Certification for Serious Injury or Illness of a Covered Servicemember - Military Family Leave** and form WH-385-V **Certification for Serious Illness or Injury of a Veteran for Military Caregiver Leave**, are available on the Department's website at **dol.gov/whd/fmla** or from **the nearest Wage and Hour Division office**. An employer may create its own version of the certification containing the same information; however, no additional information can be requested.

DID YOU KNOW?

For leave to care for a covered servicemember (military caregiver leave), an employer may contact the health care provider to authenticate or clarify a certification, but cannot require a recertification.

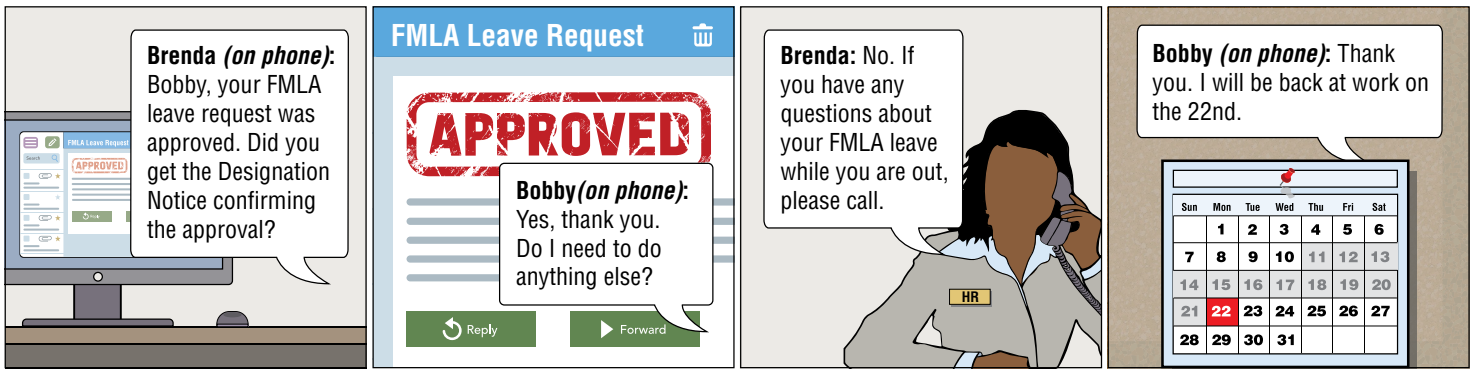
Review **section 825.310 of the FMLA regulations** for more information about certification for leave taken to care for a covered servicemember.

DURING AN EMPLOYEE'S FMLA LEAVE

An eligible employee is entitled to up to 12 workweeks of FMLA leave in a 12-month leave year for qualifying reasons or up to 26 workweeks in a single 12-month period for military caregiver leave. Airline flight crew employees are entitled to a different amount of FMLA leave, as discussed below.

FMLA leave can be taken for more than one qualifying reason in the same 12-month leave year. However, multiple serious health conditions or qualifying reasons for leave do not increase the total FMLA leave entitlement available.

Designation of FMLA Leave and an Employer's Obligation to Provide Employees with a Designation Notice



The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving a Designation Notice to the employee. The Designation Notice informs the employee that the requested leave will be designated as FMLA leave and sets out the requirements applicable while the employee is on leave.

The determination of whether leave is FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson. If the employer does not have enough information to determine whether an employee's reason for leave qualifies for FMLA protections, the employer may ask the employee or his or her spokesperson to provide more information about the reason for leave. If an employer is unable to determine whether a leave request should be designated as FMLA-protected because a submitted certification is incomplete or insufficient, the employer is required to state in writing what additional information is needed. The employer may use the Designation Notice to inform the employee that the certification is incomplete or insufficient and identify what information is needed to make the certification complete and sufficient. See **chapter 4** for more information on the certification process.

Once the employer has enough information to determine that the employee's requested leave qualifies as FMLA leave, the employer must provide the employee with a written Designation Notice within no more than five business days, absent extenuating circumstances. If the leave does not qualify as FMLA leave, the employer must notify the employee in writing that the leave is not FMLA-protected. Such notice can be a simple written statement.

DURING AN EMPLOYEE'S FMLA LEAVE

The employer needs to provide the employee with only one Designation Notice for each FMLA-qualifying reason for leave in the 12-month leave year, regardless of whether the leave is taken in a continuous block or intermittently or on a reduced schedule. If the employee requests leave and the information provided in the Designation Notice changes (for example, the employee exhausts his or her FMLA entitlement), the employer must provide the employee written notice of the change within five business days of receiving the employee's leave request subsequent to any change.

Although a medical certification will often provide the information needed to determine that the leave is FMLA-qualifying, if the 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 the Designation Notice at that time.

Failure to provide a timely Designation Notice to an employee may be considered interference with, restraint, or denial of the exercise of the employee's FMLA rights.

DID YOU KNOW?

FMLA leave and workers' compensation or short-term or long-term disability can run concurrently,provided the reason for the absence is due to an FMLA-qualifying serious health condition and the employer properly notified the employee that the leave would be counted as FMLA leave.

Contents of the Designation Notice

In addition to designating leave as FMLA qualifying, the written Designation Notice must include all of the following:

- The amount of leave that will count against the employee's FMLA leave entitlement, if known;
  - If the exact amount of leave is not known at the time of the designation (for example, when the employee needs unforeseeable intermittent leave), the employer must provide this information in writing upon the employee's request, but no more often than once in a 30-day period and only if leave was taken.
- Whether the employee is required to substitute paid leave for unpaid FMLA leave, and
- Whether the employee will be required to submit a fitness-for-duty certification to return to work.

Employers may use Wage and Hour Division prototype form WH-382, **Designation Notice**, which is available on the Department's website at **dol.gov/whd/fmla** or from **the nearest Wage and Hour Division office**, or may create their own Designation Notice or use, as long as it meets the Designation Notice requirements.

Review **sections 825.300(d)** and **825.301 of the FMLA regulations** for more information about designating leave and the Designation Notice.

Fitness-for-Duty Certification

- An employer may have a uniformly-applied policy or practice that requires all similarly-situated employees who take leave for their own serious health condition to obtain and present certification from the employee's health care provider that the employee is able to resume work as a condition of restoring an employee.
- This fitness-for-duty certification can be requested only for the health condition that caused the employee's need for FMLA leave. Certain limitations apply to the frequency with which an employer may require a fitness-for-duty certification for absences taken on an intermittent or reduced schedule basis.
- If the employer requires that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must indicate this in the Designation Notice and must provide the employee a list of the essential functions of the employee's position.
- The employee is responsible for the cost of the fitness-for-duty certification.
- The employer may delay restoration of the employee until the employee submits a required fitness-for-duty certification.
- The employer may contact the employee's health care provider to authenticate or clarify the fitness-for-duty certification. The employer may not delay the employee's return to work while contacting the health care provider. The employer may not require second or third opinions.

DID YOU KNOW?

Separately from the employer's ability to request that the employee provide a fitness-for-duty certification, employers may also require an employee to submit to an examination at the employer's expense by the employer's medical staff provided the examination by the employer's medical staff is job-related and consistent with business necessity. An employer may not deny or delay reinstating an employee who has been absent on FMLA leave pending an examination by the employer's medical staff. The employer may require the employee to submit to examination after reinstatement, including the first day of the employee's reinstatement.

Review **section 825.312 of the FMLA regulations** for more information about fitness-for-duty certifications.

Retroactive Designation of FMLA Leave

If an employer does not timely designate FMLA leave, the employer may retroactively designate the absence as FMLA leave if the employer provides appropriate notice to the employee and the retroactive designation does not cause harm or injury to the employee.

> *For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously ill son or daughter if the leave had been designated timely.*

In all cases where leave would qualify for FMLA protections, the employer and employee can mutually agree that leave be retroactively designated as FMLA leave.

If an employer fails to timely designate FMLA leave and that failure causes the employee to suffer harm, the employer may be liable for damages or be required to take other remedial actions.

Review **sections 825.301(d) and (e) of the FMLA regulations** for more information about retroactive designation.

RULES FOR SCHEDULING AND TAKING FMLA LEAVE

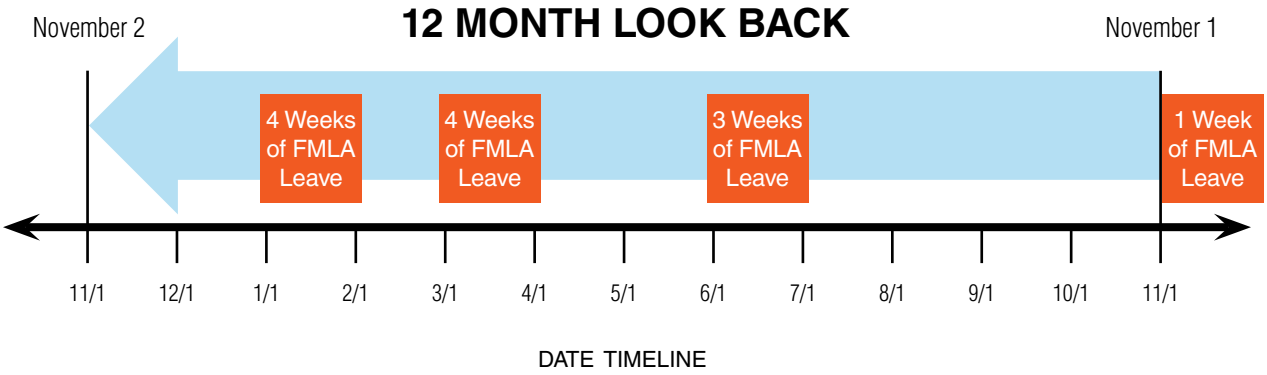
A 12-Month Leave Year

Employees take FMLA leave in a defined 12-month period or "leave year." When an employee's need for FMLA leave extends beyond the 12-month leave year, any additional time the employee requests counts against his or entitlement for the next leave year.

The employer may select any one of the following four methods for determining the 12-month period during which eligible employees may take up to 12 workweeks of leave:

1. The calendar year (January 1st through December 31st),
2. Any fixed 12 months, such as a fiscal year or a leave year beginning on the first day of an employee's employment,
3. A 12-month period measured forward from the first date an employee takes FMLA leave (the next 12-month period would begin the first time the employee takes FMLA leave after the completion of the prior 12-month period), or
4. A rolling 12-month period measured backward from the date an employee uses FMLA leave (each time an employee takes FMLA leave, the remaining leave is the balance of the 12 weeks not used during the immediately preceding 12 months).

> *For example, an eligible employee requests two weeks of FMLA leave to begin on November 1st. The employer looks back 12 months (from November 1st back to the previous November 2nd) and sees that the employee had taken four weeks of FMLA leave beginning January 1st, four weeks beginning March 1st, and three weeks beginning June 1st. The employee has taken 11 weeks of FMLA leave in the 12-month period and only has one week of FMLA-protected leave available. After the employee takes the one week in November, the employee can next take FMLA leave beginning January 1st as the days of the previous January leave "roll off" the leave year.*



Whichever method an employer chooses the employer must apply it uniformly and consistently to all employees. The only exception is for a multi-state employer who has eligible employees in a state with a state family and medical leave statute that requires a specific method for determining the leave period. The employer may comply with the state provision for all employees within that state, and uniformly use one of the four methods described above for all other employees.

An employer may change methods to use a different 12-month period only after providing 60 days' notice of the intended change to all employees. During the transition, employees must retain the full benefit of 12 workweeks of leave under whichever method provides the most benefit to the employee. If an employer fails to select a 12-month period, the employer must use the method that is most beneficial to the employee.

Special rules apply for employees using military caregiver leave, which permits leave to be taken during a single 12-month leave period. The single 12-month leave period for military caregiver leave will not necessarily overlap with the 12-month period that the employer chooses to use for all other types of FMLA leave. See **chapter 5** for more information about military caregiver leave.

Review **section 825.200 of the FMLA regulations** for more information about the 12-month leave period.

Intermittent Leave or Reduced Schedule Leave

Under certain circumstances, an employee is entitled to take FMLA leave on an intermittent or reduced schedule basis. Employers must permit employees to take intermittent or reduced schedule leave when there is a medical need for such leave for an employee's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness. An employee is also entitled to use intermittent or reduced schedule leave for qualifying exigencies. An employee is not entitled to take intermittent leave for the birth and care of a newborn child or for the placement with the employee of a child for adoption or foster care unless the employer agrees to the arrangement.

If an employee needs leave intermittently or on a reduced schedule for planned medical treatment for their own serious health condition or for that of a qualifying family member, the employee must make a reasonable effort to schedule the treatment so as to not unduly disrupt the employer's operations.

Review **sections 825.202** and **825.203 of the FMLA regulations** for more information about intermittent and reduced schedule leave.

Transfer to an Alternative Position

If an employee needs intermittent or reduced schedule leave that is foreseeable based on planned medical treatment, he or she may be temporarily transferred to an alternative position that better accommodates recurring periods of leave.

The employee must be provided pay and benefits equivalent to those the employee had in the position prior to the transfer; however, the position does not have to have equivalent duties.

When the employee no longer needs to continue on intermittent or reduced schedule leave, the employee must be restored to the same or equivalent job as the job that the employee left when the leave started. An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee.

Review **section 825.204 of the FMLA regulations** for more information about transferring an employee to an alternative position.

Spouses Working for the Same Employer

Eligible spouses who work for the same employer are limited to a combined total of 12 workweeks of leave in a 12-month period to share for the following FMLA-qualifying reasons:

- The birth of a son or daughter and bonding with the newborn child,
- The placement of a son or daughter with the employee for adoption or foster care, and bonding with the newly-placed child, and
- The care of a parent with a serious health condition.

Eligible spouses who work for the same employer are also limited to a combined total of 26 workweeks in a single 12-month period to care for a covered servicemember with a serious injury or illness if each spouse is a parent, spouse, son or daughter, or next of kin of the servicemember (commonly referred to as "military caregiver leave"). This limitation also applies to a combination of military caregiver leave and leave for the other qualifying reasons listed above.

These limitations apply even if the spouses are employed at different locations that are more than 75 miles apart.

These limitations do not apply to two employees working for the same employer who are not legally married, even if they are living together or have a child or children together, or to siblings or other relatives who are working for the same employer.

If only one of the spouses is eligible for FMLA leave, that individual is entitled to the full 12 workweeks of leave.

This limitation does not apply to leave:

- For one's own serious health condition, such as with the recovery period following the birth of a child;
- To care for a spouse, son, or daughter with a serious health condition; or
- For any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on "covered active duty."

Where a spouse uses a portion of his or her leave for an FMLA-qualifying reason that is subject to the combined 12-workweek limit, that employee has the remainder of his or her 12 workweeks of entitlement for leave for an FMLA-qualifying reason that is not subject to the combined limit.

> *For example, Mary and Juan are married, FMLA-eligible employees, who work for the same employer. After Mary gives birth to their daughter, she uses six workweeks of FMLA for her own serious health condition and two workweeks of FMLA leave for bonding with her newborn baby, Anna. In the same 12-month period, Juan also wishes to use leave to bond with his infant daughter. Birth and bonding with a child is a combined leave category for spouses who work for the same employer. Juan and Mary are limited to a combined total of 12 workweeks in a 12-month period for the birth of their daughter and for bonding with their child, and Mary has used two of the 12 workweeks of leave available to the couple for this leave reason. Juan may take up to 10 workweeks of FMLA leave for the birth of his daughter and to bond with his child. If Juan uses ten workweeks of FMLA leave available to bond with Anna, he may use up to two workweeks of leave for non-combined FMLA-qualifying leave reasons, such as caring for Mary if she has a serious health condition. Mary may also use up to 4 workweeks of leave for non-combined FMLA qualifying leave reasons.*

Review **sections 825.120(a)(3)**, **825.121(a)(3)**, and **825.201(b) of the FMLA regulations** for more information on spouses working for the same employer.

Special Rules for School Instructional Employees

Special rules for taking leave on an intermittent or reduced schedule basis apply to school instructional employees. There are also special rules when a school instructional employee takes leave near the end of an academic term.

DID YOU KNOW?

Leave taken by an instructional employee for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation, when the employee would not have been required to report for duty, is not counted against an employee's FMLA leave entitlement.

Review **sections 825.600 to 825.604 of the FMLA regulations** for more information about special rules for school employees.

Calculating FMLA Leave

Time that an employee is not scheduled to report for work may not be counted as FMLA leave. Only the amount of leave actually taken may be counted against the employee's leave entitlement.

When a holiday falls during a week in which an employee is taking the full week of FMLA leave, the entire week is counted as FMLA leave. However, when a holiday falls during a week when an employee is taking less than the full week of FMLA leave, the holiday is not counted as FMLA leave, unless the employee was scheduled and expected to work on the holiday and used FMLA leave for that day.

An employee does not accrue FMLA leave at any particular hourly rate.

DID YOU KNOW?

If an employer temporarily stops business activity and employees are not expected to report for work for one or more weeks (e.g., a school that closes two weeks for the winter holiday, or a plant that closes for a week for repairs), the period of time that the employer's business activities have stopped does not count against an employee's FMLA leave entitlement.

Increments of FMLA Leave for Intermittent or Reduced Schedule Leave

Eligible employees are entitled to up to 12 workweeks of leave or 26 workweeks of military caregiver leave. An employee may take FMLA leave in periods of weeks, days, hours, and in some cases even less than an hour. The total number of hours in those workweeks that an eligible employee is entitled to take on an intermittent or reduced schedule basis depends on the specific hours the employee would have worked had the employee not taken FMLA leave.

When an employee takes leave for less than one full workweek, the amount of FMLA leave used is determined as a proportion of the employee's actual workweek. An employer may convert fractions of a workweek to their hourly equivalent as long as the conversion fairly reflects the employee's total hours.

> *For example, an eligible employee whose actual workweek is always 32 hours per week is entitled to 384 hours (12 workweeks x 32 hours per week) of FMLA leave in a 12-month period. An eligible employee whose actual workweek is always 48 hours per week is entitled to 576 hours (12 workweeks x 48 hours per week) of FMLA leave in a 12-month period.*

When an employee's schedule varies from week to week so much that it is not possible to determine how many hours the employee would have worked during the week had he or she not taken FMLA leave, an employer may use a weekly average to calculate the employee's FMLA leave entitlement. The weekly average is determined by the hours scheduled over the 12 months prior to the beginning of the leave and includes any hours for which the employee took any type of leave.
Employees may use FMLA leave in the smallest increment of time the employer allows for the use of other

forms of leave, as long as the smallest increment is no more than one hour. If an employer uses different increments for different types of leave (for example, accounting for sick leave in 15-minute increments and vacation leave in one-day increments), the employer must allow FMLA leave to be used in the smallest increment used for any type of leave. If an employer permits or requires employees to use leave in different increments during specific times of the day (for example, requiring a one-hour increment of leave at the start of the shift and using 15-minute increments for leave at other times), the same increment may be used for FMLA leave at those specific times of the day. The employer may always allow FMLA leave in shorter increments than used for other forms of leave; however, no work may be performed during any period of time counted as FMLA leave.

Where it is physically impossible for an employee using intermittent leave or working a reduced schedule to begin or end work mid-way through a shift, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's entitlement. This "physical impossibility" rule may be used only when it is truly physically impossible to return the employee to work after an FMLA absence.

> *For example, if a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, it would be physically impossible for the employee to start or end work mid-way through a shift.*

DID YOU KNOW?

If an employee would normally be required to work overtime, but is unable to do so because of an FMLA-qualifying reason, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. However, voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement.

Review **sections 825.200** and **825.205 of the FMLA regulations** for more information about the calculation of leave.

Special Rules for Airline Flight Crew Employees

Special rules apply to airline flight crew employees regarding their FMLA leave entitlement and calculation of FMLA leave. An eligible airline flight crew employee is entitled to 72 days of FMLA leave during any 12-month period for one or more FMLA-qualifying reasons, and 156 days of military caregiver leave during a single 12-month period to care for a covered servicemember with a serious injury or illness. This entitlement is based on a uniform six-day workweek for all airline flight crew employees, regardless of time actually worked or paid.

Review **section 825.802 of the FMLA regulations** for more information about special rules for airline flight crew employees.

Substitution of Paid Leave

An eligible employee may choose, or an employer may require the employee, to substitute accrued paid leave for FMLA leave. Substitute means that the accrued paid leave will run concurrently with the unpaid FMLA leave. When paid leave is used for an FMLA-covered reason, the leave is FMLA-protected.

For the purpose of substituting accrued paid leave, the employee must have both earned the leave and be able to use that leave during the FMLA leave period. The employer may not require the employee to substitute leave that is not yet available to the employee to use under the terms of the employer's leave plan. However, an employer may voluntarily advance paid leave to an employee and an employee may voluntarily accept such leave during an FMLA absence.

The employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.

> *For example, an employer is not obligated to allow an employee to substitute paid sick leave for unpaid FMLA leave in order to care for a child with a serious health condition if the employer's normal sick leave rules allow such leave only for the employee's illness.*

When an employee chooses, or an employer requires, substitution of paid leave, the employer must inform the employee (in the Rights and Responsibilities Notice) of any procedural requirements of the employer's paid leave policy that the employee must satisfy. If the employee does not comply with those procedural requirements, the employee is no longer entitled to substitute accrued paid leave, but remains entitled to take unpaid FMLA leave.

When the employer has a uniformly applied policy to require a doctor's note for each absence for all employees using paid leave (non-FMLA leave as well as FMLA leave) the employee who is using paid sick leave concurrently with unpaid FMLA leave must also provide a doctor's note for each absence in order to receive the paid sick leave. However, if the employee does not provide the doctor's note, he or she would still be entitled to take unpaid FMLA leave.

Review **section 825.207 of the FMLA regulations** for more information about the substitution of leave.

FMLA and Other Paid Leaves

Leave taken under a disability leave plan or as a workers' compensation absence that also qualifies as FMLA leave due to the employee's own a serious health condition may be designated by the employer as FMLA leave and counted against the employee's FMLA leave entitlement.

Because leave under a disability benefit plan or workers' compensation program is not unpaid, the provision for substitution of accrued paid leave does not apply. However, employers and employees may agree, where state law permits, to have accrued paid leave supplement the paid plan benefits, such as in a case where a plan only provides replacement income for two-thirds of an employee's salary.

Public employers, under certain conditions, may substitute compensatory time off at one and a half hours for each overtime hour worked in lieu of paying cash to employees who work overtime. A public employee may request and be permitted to use, or an employer may require that the public employee use, accrued compensatory time concurrently with FMLA leave, in which case the time is FMLA-protected and counts against the employee's FMLA entitlement.

Review **section 825.207 of the FMLA regulations** for more information about how the FMLA interacts with other leave policies.

Effect of Unpaid Leave for Salaried Employees under the Fair Labor Standards Act

An employee who is exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee does not lose the FLSA exemption by receiving unpaid FMLA leave. The employer may make deductions from the employee's salary for any hours taken as intermittent or reduced schedule FMLA leave within a workweek without affecting the exempt status of the employee.

For employees paid according to the fluctuating workweek method of payment for overtime under the FLSA, the employer, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may pay the employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for any overtime hours worked. This change in payment to an hourly basis must include the entire period during which the employee is taking intermittent leave including the weeks in which no FMLA leave is taken.

Review **section 825.206 of the FMLA regulations** for more information about special circumstances for salaried employees.

Maintenance of Benefits

Group Health Plan

During any FMLA leave, an employer must maintain the employee's coverage under any group health plan on the same basis as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by the FMLA, including public agencies, are subject to this requirement.

What is a "Group Health Plan"?

Group health plan means any plan (including a self-insured plan) of, or contributed to by, an employer to provide health care (directly or otherwise) to employees, former employees, or the families of employees or former employees.

For purposes of the FMLA, the term "group health plan" does not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

- No contributions are made by the employer,
- Participation in the program is completely voluntary for employees,
- The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions, and to remit them to the insurer;
- The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,
- The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

DURING AN EMPLOYEE'S FMLA LEAVE

Employer Responsibilities

An employee is entitled to the continuation of group health insurance coverage during FMLA leave on the same terms as if he or she had continued to work.

> *For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave.*

Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employer's group health plan. This rule also applies to benefits provided in a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

If an employer provides a new health plan or benefits, or the health benefits or plans change while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave.

> *For example, if a group health plan changes so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all employees of the workforce would also apply to an employee on FMLA leave.*

Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave.

> *For example, if the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.*

An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc.

Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for "key employees," an employer's obligation to maintain health benefits during leave ceases only if and when:

- The employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as part of a non-discriminatory reduction in force and the employee would not have been transferred to another position),
- The employee informs the employer of his or her intent not to return to work,

- The employee fails to return from leave, or
- The employee continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

Review **section 825.209 of the FMLA regulations** for more information about maintenance of employee benefits and **sections 825.217 -825.219 of the FMLA regulations** for more information about key employees.

Multi-Employer Health Plans

A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers. An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had not taken leave (unless the plan contains an explicit FMLA provision for maintaining coverage, such as through pooled contributions by all employers party to the plan).

During the duration of an employee's FMLA leave, coverage by the group health plan and benefits provided pursuant to the plan must be maintained at the level of coverage and benefits applicable to the employee at the time the leave began. An employee using FMLA leave cannot be required to pay a greater premium than if he or she had not taken leave.

Review **section 825.211 of the FMLA regulations** for more information about multi-employer health plans.

Employee Responsibilities

During the FMLA leave period, an employee must continue to pay whatever share of group health plan premiums that the employee paid prior to FMLA leave. The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. If premiums are raised or lowered, the employee would be required to pay the new premium rates.

Maintenance of health insurance policies which are not a part of the employer's group health plan are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

If the employee is substituting accrued paid leave for the unpaid FMLA leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

If FMLA leave is unpaid, the employer may require employees to pay their share of premium payments in any of the following ways:

- Payment would be due at the same time as it would be made if by payroll deduction,
- Payment would be due on the same schedule as payments are made under COBRA,
- Payment would be prepaid pursuant to a cafeteria plan at the employee's option,
- Existing rules for payment by employees on "leave without pay" may be followed, provided that such rules do not require prepayment of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had not taken leave; or
- Another system voluntarily agreed to by the employer and the employee.

The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses.

Employee Failure to Pay Health Plan Premium Payment

If an employee's premium payment is more than 30 days late, an employer may drop the employee's health insurance coverage unless the employer has a policy of allowing a longer grace period.

In order to drop insurance coverage for an employee whose premium payment is late, an employer must provide written notice to the employee that the payment has not been received, and that his or her insurance coverage will end at a specified date at least 15 days after the date of the written notice unless payment is received by that date. This notice must be mailed to the employee at least 15 days before coverage is to cease.

Even when an employer ceases health insurance coverage due to an employee's failure to pay his or her premium payments, all other obligations under the FMLA would continue, including the obligation to reinstate the employee upon return from leave to their original position or to an equivalent position, with equivalent pay, benefits, terms, and conditions of employment. Equivalent benefits include the same level of group health insurance benefits as prior to the leave without any qualifying period, physical examination, and the exclusion of pre-existing conditions. If an employer terminates an employee's health insurance in accordance with the FMLA and the employer fails to restore the employee's health insurance upon the employee's return, the employer may be liable for:

- Benefits lost by reason of the violation,
- Actual monetary losses sustained as a direct result of the violation, and
- Appropriate equitable relief tailored to the harm suffered.

DID YOU KNOW?

If the employer chooses to maintain health benefits during the leave by paying an employee's share of premiums during the employee's unpaid FMLA leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

Review **section 825.212 of the FMLA regulations** for more information about an employee's failure to pay health premium payments.

When an Employee Fails to Return to Work

The employer may recover from an employee its share of health plan premiums paid during the employee's unpaid FMLA leave if the employee fails to return to work after his or her FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

- The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember that would otherwise entitle the employee to leave under FMLA; or
- Other circumstances beyond the employee's control.

An employer may require supporting medical certification to confirm the continuation, recurrence, or onset of the employee's or the employee's family member's serious health condition. If the employee does not provide such certification in a timely manner (within 30 days of the employer's request) and the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover all of the health benefit premiums it paid during the period of unpaid FMLA leave.

Other circumstances beyond the employee's control that prevent an employee from returning to work after FMLA leave are necessarily broad. They include such situations as:

- Where a parent chooses to stay home with a newborn child who has a serious health condition,
- An employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite,
- A relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care,
- The employee is laid off while on leave, or
- The employee is a key employee who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to its operations and is not reinstated.

Circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

Under some circumstances, the employer may elect to maintain other benefits (for example, life insurance, disability insurance, etc.) by paying the employee's share of premiums during periods of unpaid FMLA leave. At the conclusion of the leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums, regardless of whether the employee returns to work.

When paid leave is substituted for FMLA leave, the employer may not recover its share of health insurance premiums or other non-health benefit premiums for the period covered by paid leave. Additionally, recovery

of health insurance premiums does not apply to paid leave provided under a plan covering temporary disabilities, including workers' compensation.

When an employee fails to return to work, any health and non-health benefit premiums that the FMLA permits the employer to recover are a debt owed by the non-returning employee. The existence of this debt does not alter an employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave.

To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee, provided such deductions do not otherwise violate applicable federal or state wage payment or other laws. Alternatively, legal action may be initiated against the employee to recover such costs.

An employee who returns to work for at least 30 calendar days is considered to have "returned" to work for the purposes of the FMLA. In addition, an employee who transfers directly from taking FMLA leave to retirement, or retires during the first 30 days after returning to work is considered to have returned to work.

Review **section 825.213 of the FMLA regulations** for more information about when an employee fails to return to work and an employer's recovery of benefits costs.

Restoration

When an employee returns from FMLA leave, he or she must be restored to the same job that the employee held when the leave began or to an "equivalent job." The employee is not guaranteed the actual job he or she held prior to the leave. An "equivalent job" means a job that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location).

Equivalent pay includes the same or equivalent pay premiums, such as a shift differential, and the same opportunity for overtime premium pay as the job held prior to FMLA leave. An employee is entitled to any unconditional pay increases that occurred while he or she was on FMLA leave, such as cost of living increases. In addition, an employer must grant pay increases conditioned upon seniority, length of service, or work performed if employees taking the same type of leave (i.e., paid or unpaid leave) for non-FMLA reasons receive the increases. Equivalent pay also includes any unconditional bonuses or payments. If a bonus is conditioned on achieving a specified goal, such as hours worked or products sold, and the employee does not meet the goal due to FMLA leave, payment of the bonus is not required, unless the employer pays it to employees taking the same type of leave for a non-FMLA reason. If the employer pays the bonus to such employees taking leave for a non-FMLA reason, it must also pay the bonus to an employee taking FMLA leave.

> *For example, if an employee is substituting accrued paid sick leave for unpaid FMLA leave and other employees on paid sick leave are entitled to the bonus, then the employee taking FMLA-protected leave concurrently with sick leave must also receive the bonus.*

Any benefits an employee accrues prior to a period of FMLA leave must be available to the employee when he or she returns from leave. These benefits provided to employees must be resumed in the same manner and at the same level as when the leave began, subject to any changes in benefit levels affecting the entire workforce. An employee returning from FMLA leave cannot be required to requalify for any benefits the employee enjoyed before the leave began.

DID YOU KNOW?

An employer may offer the employee a light duty position; however, the FMLA does not require the employee to accept the light duty position rather than take FMLA leave. The employee may decline the light duty position and continue on FMLA-protected leave until able to return to the same or equivalent job he or she left or until his or her FMLA leave entitlement is exhausted.

When an employee voluntarily accepts a light duty assignment rather than taking FMLA leave, the time the employee works in the light duty assignment does not count as FMLA leave. Additionally, the employee has the right to be restored to the same or an equivalent position that the employee held at the time the employee's FMLA leave commenced, provided that the employee is able to perform the essential functions of the position. However, an employee's right to restoration while in a light duty assignment expires at the end of the 12-month leave year that the employer uses to calculate FMLA leave.

If an employee has used his or her full 12 workweeks of FMLA leave in a 12-month period and then voluntarily accepts a light duty position because the employee is unable to resume working in his or her original position, the employee no longer has a right under the FMLA to restoration.

Review **sections 825.214 and 825.215 of the FMLA regulations** for more information about the right to reinstatement and **section 825.220(d)** for more information about light duty assignments.

Limitations on an Employee's Right to Return to Work

An employee on FMLA leave is not protected from actions that would have affected him or her if the employee was not on FMLA leave.

> *For example, if a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours. If an employee is laid off during the period of FMLA leave, the employer must be able to show that the employee would have been laid off during the FMLA leave period.*

A covered employer may also deny restoration to a "key employee" if necessary to prevent substantial and grievous economic injury to its operations. A key employee is a salaried FMLA-eligible employee who is among the highest paid 10% of all employees, both eligible and not eligible, within 75 miles of the worksite.

Review **section 825.216 of the FMLA regulations** for more information about limitations on an employee's right to reinstatement and **section 825.219** for more information about the rights of key employees.

Recordkeeping Requirements and Other Laws

Recordkeeping Requirements

Covered employers subject to the FMLA are required to make, keep, and preserve certain records. An employer need not retain the records in any particular form; an employer may maintain the records electronically or in any other computer format, as long as all of the required information is included.

A covered employer must keep records for no less than three years. Employers are not required to submit records to the Department of Labor unless specifically requested by a Department official. Employers must make records available for inspection, copying, and transcription by representatives of the Department upon request.

Content of Records

Covered employers who employ FMLA-eligible employees must maintain records that include the following:

- 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 each pay period,
  - Additions to and deductions from wages, and
  - Total compensation paid.
- Dates FMLA leave is taken (which must be designated in the records as FMLA leave),
- Hours of FMLA leave used if leave is taken in increments of less than a day,
- Copies of FMLA notices provided by an employee to the employer and by the employer to its employees concerning the FMLA (including any written request for leave from the employee as well as any required notice provided to the employee concerning FMLA leave),
- Any documents, including electronic records, describing employee benefits or employer policies and practices regarding the taking of paid or unpaid leave;
- Premium payments for employee benefits, and
- Records of any dispute between the employer and an employee regarding the designation of leave as FMLA leave, such as emails or other written statements regarding a disagreement on the designation of the employee's FMLA leave request.

Review **section 825.500 of the FMLA regulations** for more information about the content of records required under the FMLA.

Covered employers with FMLA-eligible employees who are not subject to the FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance do not need to keep a record of actual hours worked provided that:

- Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months, and
- With respect to employees who take FMLA leave intermittently or on a reduced schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce that agreement to a written record maintained in the manner required for other FMLA-related records.

Covered employers with no eligible employees need only maintain the basic payroll records and identifying employee data.

Confidentiality of Records

Covered employers are required to maintain records and documents relating to FMLA medical certifications and recertifications of employees or their family members as confidential medical records. Such records are to be maintained in separate files from the usual personnel files. An employer must maintain records in conformance with the confidentiality requirements of the Americans with Disabilities Act (ADA), as amended, if applicable, and the Genetic Information Nondiscrimination Act, if applicable.

Supervisors and managers may be informed of necessary restrictions on work duties and necessary accommodations. First aid and safety personnel may be informed, as appropriate, if the employee's condition might require emergency treatment. Government officials investigating compliance with the FMLA (or other pertinent law) shall be provided relevant information upon request.

Review **section 825.500(g) of the FMLA regulations** for more information about the confidentiality of records.

Airline Flight Crew Employees

There are additional recordkeeping requirements for covered employers of airline flight crew employees.

Covered employers of airline flight crew employees must meet the general FMLA recordkeeping requirements. In addition, they are required to maintain records and documents containing information specifying the applicable monthly guarantee for each category of employee, including copies of any relevant collective bargaining agreements or employer policy documents. They must also maintain records of hours worked and hours paid for those employees.

Review **section 825.803 of the FMLA regulations** for more information about the recordkeeping requirements for employers of airline flight crew employees.

Interaction with Other Federal and State Laws, and an Employer's Policies

The FMLA may apply in addition to or along with other federal laws, state laws, an employer's policies, or a collective bargaining agreement.

The purpose of the FMLA is to make leave available to eligible employees and not to limit already existing rights and protections. If an employer is found in violation of both the FMLA and a state or federal anti-discrimination law, it may be subject to remedies under either or both statutes. Double relief may not be awarded for the same loss. However, when remedies overlap, a claimant may be allowed to utilize whichever avenue of relief is desired.

Americans with Disabilities Act (ADA)

The ADA is a civil rights law that prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. If an employee is a qualified individual with a disability within the meaning of the ADA, the ADA requires his or her employer to make reasonable accommodations, barring undue hardship.

Leave provided as an accommodation under the ADA may run concurrently with FMLA-protected leave. However, the FMLA's leave provisions are very different from the ADA's reasonable accommodation obligations. For example, "disability" under the ADA and "serious health condition" under the FMLA are different concepts and must be analyzed separately. An employer must provide leave under whichever statutory provision provides the employee with greater rights and protection.

Pregnancy Discrimination Act (PDA)

The PDA forbids employment discrimination based on pregnancy, including by requiring employers to provide the same benefits for women who are pregnant as are provided to other employees with short-term disabilities. Unlike the FMLA, the PDA does not require employees to be employed for a certain period of time to be protected. An employee employed for less than 12 months by the employer (and, therefore, not an "eligible" employee under FMLA) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

Consolidated Omnibus Budget Reconciliation Act (COBRA)

The COBRA provides for employees who would lose health care coverage because of reduced work hours or job termination to continue group health coverage for themselves and their families for limited periods of time. Such coverage may become applicable when it becomes known that an employee is not returning to employment and ceases to be entitled to FMLA leave.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

The USERRA requires that returning servicemembers are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed.

Under the USERRA, the months and hours the returning servicemember would have worked during the USERRA-covered absence must be combined with the servicemember's months employed and the hours actually worked to determine FMLA eligibility.

Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule

The HIPAA Privacy Rule governs the privacy of individually-identifiable health information. HIPAA places restrictions on the use and disclosure of an individual's protected health information by covered entities.

The requirements of HIPAA must be satisfied for a HIPAA-covered health care provider to share individually-identifiable health information with an employer.

Review **section 825.702 of the FMLA regulations** for more information about the FMLA's interaction with federal anti-discrimination and other laws.

Workers' Compensation

An employee's workers' compensation absence may be due to an on-the-job injury or illness that also qualifies as a serious health condition under the FMLA. In this scenario, the workers' compensation absence and FMLA leave may run concurrently. Although an employer may offer the employee a light duty position under workers' compensation rules, the FMLA does not require the employee to accept the light duty position. The employee may decline the light duty position and continue on FMLA-protected leave until able to return to the same or equivalent job he or she left. If the employee does not accept the light duty position, however, he or she may lose workers' compensation benefits.

Review **sections 825.207(e) of the FMLA regulations** for more information about the FMLA's interaction with workers' compensation.

DURING AN EMPLOYEE'S FMLA LEAVE

Interaction with State Family and Medical Leave Laws

State or local governments may have family and medical leave laws that provide different or more expansive rights than the FMLA. Nothing in the FMLA supersedes any provision of state or local law that provides greater family or medical leave rights than those provided by the FMLA.

Employees who are eligible for the FMLA are not required to indicate whether the leave they are taking is FMLA leave or leave provided under state law. Employers must comply with the applicable provisions under both laws.

If an employee's absence qualifies for FMLA leave and leave under state law, the leave counts against the employee's entitlement under both laws. If leave qualifies under state law but not the FMLA, it does not count against the employee's FMLA entitlement.

For example, if a state law provides 6 weeks of leave to care for a seriously ill parent-in-law, and the leave was used for that purpose, the employee is still entitled to the full federal FMLA leave entitlement because the leave used was provided for a purpose not protected by the FMLA.

The Wage and Hour Division does not enforce state family and medical leave laws and states do not enforce the federal FMLA.

Review **section 825.701 of the FMLA regulations** for more information about and examples of the FMLA's interaction with state laws.

Interaction with an Employer's Policies

Employers may adopt, retain, or amend leave policies, including policies that provide more generous leave, as long as they comply with the FMLA. The terms of any employment practice, policy, benefit program, or plan, including a collective bargaining agreement (CBA), may not reduce or deny FMLA benefits and protections. Employers must ensure that they provide FMLA-eligible employees with the benefits and protections afforded them under the FMLA.

Review **section 825.700 of the FMLA regulations** for more information about the FMLA's interaction with an employer's policies.

FMLA PROHIBITIONS

Employers are prohibited from interfering with, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right.

Any violations of the FMLA or the Department's regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA. Examples include:

- Refusing to authorize FMLA leave, or
- Discouraging an employee from using such leave

Interference also includes manipulation to avoid responsibilities under the FMLA. Examples include:

- Transferring employees from one worksite to another for the purpose of keeping a worksite below the 50-employee threshold for employee eligibility under the Act,
- Changing the essential functions of the job in order to preclude the taking of leave, or
- Manipulating an employee's work hours to avoid employee eligibility under the FMLA.

Employers are prohibited from discriminating or retaliating against an employee or prospective employee for having exercised or attempting to exercise any FMLA right. Examples include:

- Using the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions;
- Counting FMLA leave under "no fault" attendance policies, or
- Failing to provide benefits to an employee on unpaid FMLA leave if the employer provides those benefits to employees who use other types of unpaid leave.

Employers are prohibited from discharging or in any other way discriminating against any person, whether or not an employee, for opposing or complaining about any unlawful practice under the FMLA.

All persons, whether or not employers, are prohibited from discharging or in any other way discriminating against any person, whether or not an employee, because that person has:

- Filed any charge, has instituted, or caused to be instituted, any proceeding under or related to the FMLA;
- Given, or is about to give, any information in connection with an inquiry or proceeding relating to any right under the FMLA; or
- Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA.

To contact the nearest Wage and Hour Division office, visit **dol.gov/whd/america2.htm**

Review **section 825.220 of the FMLA regulations** for more information about prohibited acts under the FMLA.

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