

## Rights and Responsibilities under FMLA

The Family and Medical Leave Act (FMLA) entitles eligible employees who work for covered employers to take unpaid, job-protected leave for specified family and medical reasons. Eligible employees may take up to 12 workweeks of leave during any 12-month period for certain family and medical reasons and up to 26 workweeks of leave during a single 12-month period for military caregiver leave.

## Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least 12 months (which do not have to be consecutive), have 1,250 hours of service during the 12 months immediately before the date FMLA leave begins, and if at least 50 employees are employed by the employer within 75 miles.

\*The law also covers all public agencies (state and local governments) and local education agencies (schools, whether public or private). These employers do not need to meet the "50 employee" test.

## Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 or 26 (military) weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- Incapacity due to pregnancy, prenatal medical care or child birth
- Care for the employee's child after birth, or placement for adoption or foster care
- Care for the employee's spouse, son, daughter or parent, who has a serious health condition
- A serious health condition that makes the employee unable to perform the employee's job
- Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in the U.S. National Guard or Reserves in support of a contingency operation.
- Twenty-six workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the service member (Military Caregiver Leave).

## Employee Rights and Responsibilities

If an employee is provided group health insurance, the employee is entitled to the continuation of the group health insurance coverage during FMLA leave on the same terms as if he or she had continued to work. The employee must continue to make any normal contributions to the cost of the health insurance premiums. The employee has the right to be restored to the same or an equivalent position at the end of the FMLA leave. Employees must provide 30 days' advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days' notice is not possible, the employee must provide notice as soon as practicable and generally

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Page 1 of 7

must comply with an employer's normal call-in procedures. Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave.

### Employer Notice and Recordkeeping

1. All covered employers are required to display and keep on display a poster explaining the provisions of the FMLA. The poster must be displayed prominently where employees and applicants for employment can see it.
2. If a covered employer has any eligible employees, it must provide general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning benefits or leave rights upon hire.
3. Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities.
4. Employers are required to make, keep, and preserve records pertaining to their obligations under FMLA in accordance with the recordkeeping requirements of the Fair Labor Standards Act (FLSA).
  - a. Employers must keep the records for no less than three years and make them available for inspection, copying, and transcription by Department of Labor representatives upon request.
  - b. Records and documents relating to medical certifications, re-certifications or medical histories of employees or employees' family members, created for purposes of FMLA, are required to be maintained as confidential medical records in separate files/records from the usual personnel files.

**Step 1. The employee must notify the employer of the need for leave. The employer may request this notification via a "Family and Medical Leave Act (FMLA) Request Form."**

**Step 2. The employer must notify the employee as to whether they are eligible for FMLA leave within five (5) business days after an employee has informed you of the need for leave. If this employee is eligible for leave, the employer must provide the employee with his or her FMLA rights and responsibilities, as well as any requests for certification. If employee is NOT eligible for leave, stop process and inform employee that he or she is not eligible.**

Employer must determine eligibility and designate leave as FMLA within five business days of the employee's first notification.

Employer completes Form WH-381 Notice of Eligibility and Rights and Responsibilities in its entirety. This document can be accessed [here](#).

Employer completes Section I of the appropriate "Certification of Health Care Provider" before giving it to employee. These forms can be found on the DOL website [here](#).

During the leave determination period, employees are required to comply with the company's usual procedures for reporting absences from work. Therefore, the employer

must clearly communicate the employee's obligations, and specify what needs to be done and who to contact should they need FMLA leave.

**Step 3. Employee completes Section II of the Certification before giving it to his/her medical provider. This form must be returned to the Employer within 15 calendar days.**

The employee is responsible for returning the completed medical certification and any costs associated with getting the certification completed by his or her health care provider.

The employee is responsible for ensuring the medical certification is completed fully. If the employer finds information missing he or she must notify the employee in writing of what additional information is needed to make certification complete. The employee has 7 calendar days to provide the missing information.

Employee is required to submit a timely and sufficient certification form. Terms such as "unknown" or "indeterminate" may not be sufficient enough to determine FMLA coverage.

The employer has the right to obtain a 2nd medical opinion if they doubt the validity of the first certification; employer may also obtain a 3rd medical opinion if the 1st and 2nd opinions differ.

**Step 4. Employer must give written designation that leave qualifies (or not) as FMLA leave within five business days after acquiring enough information to determine if it qualifies.**

Employer must complete Form WH-382-Designation Notice and provide to employee within 5 days. DOL template form can be found [here](#).

If employee is eligible:

- When employee is on FMLA leave the entire week in which a holiday falls, it is counted against FMLA.
- Special provision for schools: school vacation periods do NOT count against FMLA 12 weeks; this does not apply to year-round staff only teachers.
- Provide number of hours, days, or weeks to be counted against leave entitlement.

**Step 5. While employee is on protected FMLA leave employer shall continue health and/or other benefits.**

The employer is required to continue its same portion of premiums as it paid during active employment.

If an employee premium contribution is required, explain to the employee in writing how he or she is expected to continue to pay the contribution while on FMLA leave.

- If the employee's premium payment is more than 30 days late, the employee's coverage may be dropped unless the employer has a policy of allowing a longer grace period. The employer must provide written notice to the employee that the payment has not been received and allow at least 15 days after the date of the letter before coverage stops.

All related FMLA leave is to be tracked via time and attendance tracking systems.

While on FMLA leave, ongoing communication between the employee and the employer will make the FMLA process run much more smoothly.

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All FMLA related records are to be kept confidential and should be accessed by Human Resources only.

**Step 6. When the employee returns to work, the employer must return the employee to the same or nearly identical position.**

Employee must notify Human Resources of his/her return-to-work date.

After employee submits fitness-for-duty note (if applicable), restore the returning employee to the same or equivalent position and resume all health and/or other benefits.

Special circumstances:

- **Key Employees:** Certain key employees may not be guaranteed reinstatement to their positions following FMLA leave. A key employee is defined as a salaried, FMLA-eligible employee who is among the highest paid 10 percent of all the employees working.
- **Teachers:** Special rules apply to employees of local education agencies. Generally, these rules apply when employees need intermittent leave or when they need leave near the end of a school term.

**Note:** If the employee fails to return to work at the end of their FMLA leave, and has not communicated with the employer of a possible future anticipated return to work date then the employer may send a letter to the employee. The letter should state that due to their failure to return or contact the company, the company considers this to be a voluntary resignation effective the anticipated return to work date and that all benefits will be terminated as of this same date.

**Note:** HR Knowledge strongly recommends that the employer sends any FMLA documentation using certified mail or some delivery method that requires the employee's signature and not just through regular US mail.

<b>Special Rules for School Employees</b>	
Instruction employees are those whose principal function is to teach and instruct students in a class, small group, or an individual setting and ARE covered by special rules:	<ul style="list-style-type: none"> <li>• Teachers</li> <li>• Athletic coaches</li> <li>• Driving instructors</li> <li>• Special education teachers and assistants</li> </ul>
Non-Instruction employees who are NOT covered by the special rules include:	<ul style="list-style-type: none"> <li>• Teacher assistants or aides (who do not instruct as their principal responsibility)</li> <li>• Counselors</li> <li>• Psychologists</li> <li>• Curriculum specialists</li> <li>• Cafeteria workers</li> <li>• Maintenance workers</li> <li>• Bus drivers</li> </ul>
<b>Special Rules for Intermittent Leave</b>	
Intermittent Leave	<ul style="list-style-type: none"> <li>• Leave that ends with the school year and begins the next semester is considered consecutive, not intermittent.</li> <li>• Summer vacation, when employee would not have worked anyway, does not count against his/her FMLA leave entitlement.</li> <li>• If employee needs intermittent leave, and the employee would be on leave for more than 20% of the total number of working days over the period the leave would extend, school may require him/her either to:               <ul style="list-style-type: none"> <li>• Take leave for a period of periods of a particular duration, not greater than the duration of the treatment; or</li> <li>• Transfer temporarily to an available alternative position for which he/she is qualified, with equivalent pay and benefits, which better accommodates recurring periods of leave.</li> </ul> </li> </ul>
When special rules on intermittent leave apply	<ul style="list-style-type: none"> <li>• Transfer rule above does not apply to leave of more than 20% of working days               <ul style="list-style-type: none"> <li>• e.g., employee works five days/week &amp; needs to take two days' FMLA leave per week over several weeks = 20%.</li> <li>• Transfer rule above does not apply if employee needs one day/week FMLA leave.</li> </ul> </li> </ul>

Periods of particular durations	<ul style="list-style-type: none"> <li>Block(s) of time beginning no earlier than the first day for which leave is needed and ending no later than the last day leave is needed.</li> </ul>
If required notice not given	<ul style="list-style-type: none"> <li>School may require the employee to take leave of a particular duration or to transfer temporarily to alternative positions, OR</li> <li>School may require employee to delay taking leave until notice provision is met.</li> </ul>
<b>Special Rules on Leave Near End of Term (term is school semester)</b>	
Begins leave more than five weeks before the end of the term	<ul style="list-style-type: none"> <li>School may require employee to continue taking leave until the end of the term if               <ul style="list-style-type: none"> <li>The leave will last at least three weeks; and</li> <li>The employee would return to work during the three-week period before end of term.</li> </ul> </li> </ul>
Begins leave during the three weeks before the end of the term due to birth; adoption; caring for family member or covered service member:	<ul style="list-style-type: none"> <li>School may require employee to continue taking leave until end of the term if leave will last more than five working days.</li> </ul>
<b>Special Rules on Duration of Leave for School Employees</b>	
Charging Leave	<ul style="list-style-type: none"> <li>If an employee chooses to take leave for "periods of a particular duration" in the case of intermittent or reduced schedule leave, entire period of leave will count as FMLA leave.               <ul style="list-style-type: none"> <li>In the case where an employee is required to take leave until the end of an academic term, only the period until the employee is ready and able to return to work is counted as FMLA. Any additional leave required to the end of the school term cannot be charged against FMLA leave entitlement. School is still required to maintain group health coverage and return employee to equivalent position, however.</li> </ul> </li> </ul>

<b>Special Rules on Restoration to "An Equivalent Position"</b>	
How	<ul style="list-style-type: none"><li>• Determination must be<ul style="list-style-type: none"><li>• Made on the basis of "established . . . private school policies";</li><li>• Made known to employee prior to taking FMLA leave; and</li><li>• Must clearly explain employee's restoration rights.</li></ul></li></ul>
What	<ul style="list-style-type: none"><li>• Same benefits, pay and other terms of employment.</li></ul>