



## FMLA Session

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2006 Texas Association of County Auditors'  
Conference

10/19/06

### Purposes of FMLA

FMLA allows employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. FMLA seeks to accomplish these purposes in a manner that accommodates the legitimate interests of employers, and minimizes the potential for employment discrimination on the basis of gender, while promoting equal employment opportunity for men and women.

### Employer Coverage

FMLA applies to governmental entities, including counties.

### Employee Eligibility

To be eligible for FMLA leave, an employee *must*:

1. have worked for that employer for at least 12 months; and
2. have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and,
3. have not used 12 or more weeks of family or medical leave in the previous 12 months.

### Leave Entitlement

A covered employer must grant an eligible employee up to a total of **12 workweeks of unpaid leave** in a 12 month period for one or more of the following reasons:

1. for the birth of a son or daughter, and to care for the newborn child;

2. for the placement with the employee of a child for adoption or foster care, and to care for the newly placed child;
3. to care for an immediate family member (spouse, child, or parent -- but not a parent "in-law") with a serious health condition; and
4. when the employee is unable to work because of a serious health condition.

Leave to care for a newborn child or for a newly placed child must conclude within 12 months after the birth or placement.

## FAQs

**Q.** Can an employer place an employee on FMLA leave whether or not the employee wants to be?

**A.** **Yes. If the employee is eligible for FMLA leave and the circumstances are in compliance with FMLA requirements, the employer can designate the leave as FMLA leave.**

**Q.** Is FMLA leave paid or unpaid? Does FMLA guarantee paid time off?

**A.** **FMLA does not guarantee paid time off. Generally, FMLA leave is unpaid. However, under certain circumstances an eligible employee can choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.**

**Where an employee has earned or accrued paid vacation, personal or sick leave, that paid leave may be substituted for all or part of any unpaid FMLA leave.**

**Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.**

**Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no**

**payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.**

**Q.** How much leave can a husband and wife take if they both work for the governmental entity?

**A.** **If it is for the birth, adoption, foster placement of a child or to take care of the same person (i.e. same child or parent), then they are entitled to 12 weeks combined between the two of them. If one spouse is not eligible for FMLA leave, the other spouse can take the whole 12 weeks (assuming they are otherwise eligible).**

**Q.** Can fathers take family leave for the birth, adoption or foster placement of a child?

**A.** **Yes. An employer cannot discriminate on the basis of gender in granting FMLA leave.**

## **DEFINITIONS**

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter. This term does not include parents "in law".

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 either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability." "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

The term "spouse" means a husband or wife, including common law marriages.

## **FAQs**

**Q.** Who is considered an immediate "family member" for the purposes of taking FMLA leave?

**A.** **A spouse, child or parent. The family member does not have to live with the employee. The parent can be a step-parent but not a parent-in-law. "Family Member" does not include brothers, sisters, aunts, uncles, grandparents, etc.,**

**although some of these relatives might qualify under the “loco parentis” definition.**

- Q.** Can the governmental entity require documentation of the family relationship?
- A.** **Yes. For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.**
- Q.** What does “caring for” a family member mean?
- A.** **The medical certification provision that an employee is “needed to care for” a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care. The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home. It means the employee is in close and continuing proximity to the ill family member. For example, a man who took a cross-country trip to collect a family car, was not “caring for” his pregnant wife, even though he telephoned her frequently during the trip.**

### **Intermittent/Reduced Schedule Leave**

The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances.

1. Intermittent/reduced schedule leave may be taken when [medically necessary](#) to care for a seriously ill family member, or because of the employee's serious health condition.
2. Intermittent/reduced schedule leave may be taken to care for a newborn or newly placed adopted or foster care child only with the employer's approval.

Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA leave. Employees may not be required to take more FMLA leave than necessary to address the circumstances that cause the need for leave. Employers may account for FMLA leave in the shortest period of time that their payroll systems use, provided it is one hour or less.

Employees needing intermittent/reduced schedule leave for foreseeable medical treatment must work with their employers to schedule the leave so as not to unduly disrupt the employer's operations, subject to the approval of the employee's health care provider. In such cases, the

employer may transfer the employee temporarily to an [alternative job](#) with equivalent pay and benefits that accommodates recurring periods of leave better than the employee's regular job.

## FAQs

**Q.** When should you allow an employee to take intermittent FMLA leave? What about a reduced schedule?

**A.** **An employee may take intermittent leave or a reduced leave schedule to care for themselves or a family member if there is a medical need for leave. This includes the situations in which the employees or the family member's medical condition is intermittent, such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.**

**Q.** Under what circumstances can an employee be transferred to an alternative job?

**A.** **If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member. The employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required to a position that will better accommodate recurring periods of leave.**

**Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.**

**The alternative position must have the equivalent pay and benefits but is not required to have the equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees. However, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.**

**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. For example, a white collar employee may not be assigned to perform laborer work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location.**

**When an employee is able to return to their full-time schedule, the employee must be placed in the same or equivalent job they had prior to them taking intermittent leave or working a reduced leave schedule.**

## Substitution of Paid Leave

Employees may choose to use, or employers may require the employee to use, accrued paid leave to cover some or all of the FMLA leave taken. Employees may choose, or employers may require, the substitution of accrued paid vacation or personal leave for any of the situations covered by FMLA. The substitution of accrued sick or family leave is limited by the employer's policies governing the use of such leave.

### FAQs

- Q.** What about vacation time or comp time?
- A.** **If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.**

- Q.** What about the employee who is out on Workers Compensation?
- A.** **FMLA provides that a serious health condition may result from injury to the employee "on or off" the job. If the employer designates the leave as FMLA leave, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. Since workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable.**

**However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job". As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave.**

### Serious Health Condition

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

1. any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or
2. a period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
3. any period of incapacity due to pregnancy, or for prenatal care; or

4. any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
5. a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,
6. any absences to receive multiple treatments (including any period of recovery there from) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

### **Health Care Provider**

Health care providers who may provide certification of a serious health condition include:

1. doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
2. podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice under State law;
3. nurse practitioners, nurse-midwives, and clinical social workers authorized to practice under State law and performing within the scope of their practice as defined under State law;
4. Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
5. any health care provider recognized by the employer or the employer's group health plan's benefits manager; and,
6. a health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country.

### **Medical Certification**

An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must allow the employee at least **15 calendar days** to obtain the medical certification.

An employer may, at its own expense, require the employee to obtain a second medical certification from a health care provider.

- a. The employer may choose the health care provider for the second opinion, except;
  - i. that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider.

- b. If the opinions of the employee's and the employer's designated health care providers differ;
  - i. the employer may require the employee to obtain certification from a third health care provider, at the employer's expense.
  - ii. The third health care provider must be approved jointly by the employer and the employee.
  - iii. This third opinion shall be final and binding.

## FAQs

**Q.** What information does the medical certificate have to contain?

**A.** **A certification must contain what serious health condition the employee suffer and medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of a series health condition.**

**The approximate date the serious health condition commenced, and its probable duration.**

**Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (i.e., part-time) as a result of the serious health condition, and if so, the probable duration of such leave or reduced schedule.**

**If additional treatments will be required for the condition, an estimate of the probable number of such treatments.**

**If any of the treatments will be provided by another provider of health services (e.g., physical therapist), the nature of the treatments.**

**If a regimen of continuing treatment by the patient is required under the supervision of the health care provider and a general description of the regimen.**

**If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee:**

- (i) **Is unable to perform work of any kind;**
- (ii) **Is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform, based on either information provided on a statement from the employer of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or**
- (iii) **Must be absent from work for treatment.**

**If leave is required to care for a family member of the employee with a serious health condition a brief description of the assistance the family member requires for basic medical or personal needs or safety, or for transportation; or**

if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the request for leave the care he or she will provide and an estimate of the time period.

If the employee's family member will need care only intermittently or on a reduced leave schedule basis (i.e., part-time), the probable duration of the leave is needed.

- Q. What is meant by the term "incapacity"?
- A. **Incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, including treatment or recovery from the serious health condition.**
- Q. Can the employee submit a medical certification from a Mexican doctor? What about a doctor from New Mexico, Louisiana or Oklahoma?
- A. **As long as the out-of-state or out-of-country health care provider is licensed to practice by the state or country, the employee is entitled to have them provide the medical certification.**
- Q. Whose responsibility is it to get the necessary medical certification? What happens if the medical form is only partially filled out? What happens if nothing is returned to the governmental entity by the doctor's office?
- A. **It is the employee's responsibility to see that the forms are submitted by the health care provider. The employee has to be given at least 15 days to file the medical certification. If an employer requests such documentation, it is required to notify the employee of the consequences for failing to provide an adequate certification. If the employer finds the certification form incomplete, the employer must advise the employee of the deficiency and provide the employee a reasonable opportunity to cure any such deficiency. However, if no certification at all is returned to the employer, the employer may deny FMLA leave to the employee.**

If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

- Q. Can the governmental entity require recertification of the serious health condition?
- A. **For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:**
- (1) **Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or**
  - (2) **The employer receives information that casts doubt upon the employee's stated reason for the absence.**

**If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed.**

- Q. What happens if an employee fails to satisfy the medical certification and/or recertification requirements?
- A. **If the certification is incomplete, the employer has to give the employee notice and a reasonable time to comply. If the employee does not comply or if the employee fails to provide the certification in the first place, then the employee can be denied FMLA leave.**

## Notice

Eligible employees seeking to use FMLA leave **may** be required to provide:

1. 30-day advance notice of the need to take FMLA leave when the need is foreseeable;
2. notice "as soon as practicable" when the need to take FMLA leave is not foreseeable ("as soon as practicable" generally means at least verbal notice to the employer within **one or two business days** of learning of the need to take FMLA leave);
3. sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons (the employee need not mention FMLA when requesting leave to meet this requirement, but may only explain why the leave is needed); and,
4. where the employer was not made aware that an employee was absent for FMLA reasons and the employee wants the leave counted as FMLA leave, timely notice (generally within **two business days** of returning to work) that leave was taken for an FMLA-qualifying reason.

## FAQs

- Q.** Is it sufficient for the employee to merely ask for FMLA leave?
- A.** **The notice requirement is not met by the employee by simply asking for FMLA leave, the employee must provide the employer a reason to believe the employee is entitled to such leave.**
- Q.** What do I do if I think my employee may be covered by FMLA but they don't ask me for FMLA leave or use the magic words "FMLA leave"?
- A.** **Let the employee know of their right to FMLA leave. Contact HR and give the employee a FMLA packet of forms. Let HR know if you think it should be designated as FMLA leave but the employee does not want to do so.**
- Q.** What does a governmental entity need to do after the employee gives notice of their need for FMLA leave?
- A.** **In all circumstances, it is the employer's responsibility to appropriately designate leave if it qualifies under FMLA and provide notice to the employee of the designation of the leave.**

The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. If the employer does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

Once the employer has acquired knowledge that the leave is being taken for a FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented. The

**employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.**

**Q.** Who determines whether or not leave is counted as FMLA leave, the governmental entity or the employee? Can this determination be made retroactively (i.e. after the fact)?

**A.** **It is always the employer who makes the decision to designate leave as FMLA leave.**

**Q.** Can a governmental entity ever refuse to grant FMLA leave?

**A.** **Only if the employee is not eligible, the employee doesn't submit the proper certification or the circumstances don't comply with the FMLA requirements. If all the requirements are met, the employer must grant FMLA leave. Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave.**

**Employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated "12 month period" no longer have FMLA protections of leave or job restoration.**

## **Maintenance of Health Benefits**

A covered employer is required to maintain group health insurance coverage, including family coverage, for an employee on FMLA leave on the same terms as if the employee continued to work.

Where appropriate, arrangements will need to be made for employees taking unpaid FMLA leave to pay their share of health insurance premiums. For example, if the group health plan involves co-payments by the employer and the employee, an employee on unpaid FMLA leave must make arrangements to pay his or her normal portion of the insurance premiums to maintain insurance coverage, as must the employer. Such payments may be made under any arrangement voluntarily agreed to by the employer and employee.

An employer's obligation to maintain health benefits under FMLA stops if and when an employee informs the employer of an intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is exhausted. The employer's obligation also stops if the employee's premium payment is more than 30 days late and the employer has given the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received.

In some circumstances, the employer may recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave.

## Other Benefits

Other benefits, including cash payments chosen by the employee instead of group health insurance coverage, need not be maintained during periods of unpaid FMLA leave.

Certain types of earned benefits, such as seniority or paid leave, need not continue to accrue during periods of unpaid FMLA leave provided that such benefits do not accrue for employees on other types of unpaid leave. For other benefits, such as elected life insurance coverage, the employer and the employee may make arrangements to continue benefits during periods of unpaid FMLA leave. An employer may elect to continue such benefits to ensure that the employee will be eligible to be restored to the same benefits upon returning to work. At the conclusion of the leave, the employer may recover only the employee's share of premiums it paid to maintain other "non-health" benefits during unpaid FMLA leave.

## Job Restoration

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an **"equivalent"** job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using (but not necessarily during) FMLA leave.

## "Key" Employee Exception

Under limited circumstances where restoration to employment will cause "substantial and grievous economic injury" to its operations, an employer may refuse to reinstate certain highly-paid, salaried "key" employees. In order to do so, the employer must notify the employee in writing of his/her status as a "key" employee (as defined by FMLA), the reasons for denying job restoration, and provide the employee a reasonable opportunity to return to work after so notifying the employee.

## FAQs

- Q.** What factors go into determining what is an "equivalent" job?
- A.** **FMLA entitles employees who have returned from FMLA to be reinstated to the position they held before leave, or to an equivalent one. An equivalent position is one that is virtually identical to the former position in terms of pay, benefits, and working conditions. It must involve the same or substantially equivalent skill, effort, responsibility, and authority. This equivalency requirement does not extend to de minimus or intangible, unmeasurable aspects of the job. For example, when an assembly line position changed while the employee was out on FMLA leave and the employee now had to spend 10-15 minutes an hour doing different tasks and had to use a few new tools, the court ruled that wasn't enough to make the new work unequivalent. An administrative aide who was reassigned as a secretary, did not have a valid FMLA claim. Her complaint focused on precisely the sorts of de minimis, intangible, and unmeasurable aspects of a job that the regulations specifically exclude. For example, she contends that her duties formerly were "truly administrative," but now are "the simplest, most menial of clerical functions: answering the phone, taking messages, typing simple correspondence, and the like." Moreover, she claims that while she used to have "her own work area," now she must work in a "room shared with another employee." Finally, she contends that she has**

diminished job security. However, she had the same job classification, pay grade, etc. as before.

**If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.**

- Q.** Can a governmental entity require an employee to return to work before they exhaust their FMLA leave?
- A.** **No, unless the circumstances have changed and the employee is no longer entitled to FMLA leave. For example, they are taking care of an ill parent and the parent dies.**
- Q.** Are there any restrictions on how the employee spends their time while on FMLA leave?
- A.** **Employers with established policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. Otherwise, the employer may not restrict the employee's activities. The protections of FMLA will not, however, cover situations where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.**
- Q.** Can a governmental entity require fitness to work documentation before the employee comes back to work?
- A.** **An employer can require the employee to provide them documentation indicating the employee is fit to return to work, if the leave was due to the employees own serious health condition. The employer should have a uniformly-applied policy or practice that requires all similarly situated employees providing such documentation at the time an employee returns to work.**
- Q.** How much notice does the employee have to give that they want to come back to work? How soon do they need to be put back to work?
- A.** **An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation. If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.**

- Q. Can the employee come back early?
- A. **Yes, if the reason for the FMLA leave no longer exists. An employer cannot force an employee to take more FMLA leave than is necessary.**
- Q. Can a governmental entity force the employee to come back to work once their leave expires, even if they are too sick to work?
- A. **No. If an employee's serious health condition requires them to stop working altogether, an employee cannot be forced to return to work. But note that once an employee ends their employment, the former employer has no obligation to provide health benefits. An employee may be eligible, however, to continue their health benefits for 18 months under the Consolidated Omnibus Budget Reconciliation Act of 1986, or "COBRA," provided they pay the full cost.**

**Subject to certain limitations, an employer may deny the continuation of FMLA leave due to a serious health condition if the employee fails to fulfill any obligations to provide supporting medical certification. An employer may not, however, require the employee to return to work early by offering the employee a light duty assignment.**

## **Employer Notices**

Covered employers must take the following steps to provide information to employees about FMLA:

1. post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA;
2. include information about employee rights and obligations under FMLA in employee handbooks or other written material, including Collective Bargaining Agreements (CBAs); or
3. if handbooks or other written material do not exist, provide general written guidance about employee rights and obligations under FMLA whenever an employee requests leave; and
4. provide a written notice designating the leave as FMLA leave and detailing specific expectations and obligations of an employee who is exercising his/her FMLA entitlements. The employer may use the "Employer Response to Employee Request for Family or Medical Leave" to meet this requirement. This employer notice should be provided to the employee within **one or two business days** after receiving the employee's notice of need for leave and include the following:
  5. that the leave will be counted against the employee's annual FMLA leave entitlement;
  6. any requirements for the employee to furnish medical certification and the consequences of failing to do so;

7. the employee's right to elect to use accrued paid leave for unpaid FMLA leave and whether the employer will require the use of paid leave, and the conditions related to using paid leave;
8. any requirement for the employee to make co-premium payments for maintaining group health insurance and the arrangement for making such payments;
9. any requirement to present a fitness-for-duty certification before being restored to his/her job;
10. rights to job restoration upon return from leave;
11. employee's potential liability for reimbursement of health insurance premiums paid by the employer during the leave if the employee fails to return to work after taking FMLA leave; and
12. whether the employee qualifies as a "key" employee and the circumstances under which the employee may not be restored to his or her job following leave.

## **Unlawful Acts**

FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by this law. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

## **Enforcement**

FMLA is enforced by the Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration. This agency investigates complaints of violations. If violations cannot be satisfactorily resolved, the Department may bring action in court to compel compliance.

An eligible employee may bring a private civil action against an employer for violations. An employee is not required to file a complaint with the Wage and Hour Division prior to bringing such action.

## **FAQs**

- Q.** What damages can the employee recover in a FMLA suit?
- A.** **If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following:**
1. **wages,**
  2. **employment benefits,**
  3. **other compensation denied or lost to such employee by reason of the violation,**
  4. **where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost**

**of providing care, up to a sum equal to 12 weeks of wages for the employee,**

- 5. liquidated damages,**
- 6. employment reinstatement,**
- 7. reasonable attorney's fee,**
- 8. reasonable expert witness fees, and**
- 9. other costs of the action from the employer in addition to any judgment awarded by the court.**

**Q. What are the best practices to stay out of the courtroom?**

- A.**
- 1. Check immediately with HR if you have any question whether leave is covered by FMLA.**
  - 2. Document, document, document!**
  - 3. DO NOT RETALIATE, DO NOT DISCRIMINATE.**