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Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) was enacted in 1993. This federal law allows eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons. The Act is administered and enforced by the U.S. Labor Department's Wage and Hour Division.

Overview

The FMLA requires covered employers to give an eligible employee up to a total of 12 work weeks of *unpaid* leave during any 12-month period for the birth or adoption of a child, to care for an immediate family member with a serious health condition, or if the employee has a serious health condition that prevents them from doing their job. After the leave time is done, the employee is entitled to return to their same position (or its equivalent), with similar benefits, working conditions, and the same pay.

Which employers are covered by the FMLA?

Private sector employers who employ 50 or more employees in 20 or more work weeks in the current or preceding year are covered by the FMLA.

All public agencies are covered, regardless of the number of employees. This includes federal, state, and local employers. It also includes schools, both public and private.

Which employees are eligible for leave under the FMLA?

To be eligible for unpaid leave under the FMLA, an employee must have worked for the employer for at least 12 months and worked for at least 1,250 hours during the previous 12 months. (1,250 hours is about 60% of full-time) You are only an eligible employee if your employer has 50 or more employees within 75 miles of your worksite.

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What are the reasons for which an eligible employee can take leave under the FMLA?

There are a number of circumstances for which you may take unpaid leave under the FMLA. Here is a list, followed by some special definitions and rules:

- Birth of your child, and care for your newborn child
- Adoption of a child
- Placement with you of a child for foster care or potential adoption
- To care for your spouse, son, daughter, or parent, if they have a serious health condition
- Your own serious health condition, which makes you unable to perform your job duties
- Certain circumstances that arise from military service of your spouse, son, daughter, or parent (*see the separate section on military-related leave near the end of this handout*)

Special definitions and rules:

- If you and your spouse work for the same employer, you can't each have 12 weeks of leave for the birth and care of your newborn child, the placement of a child for adoption or foster care, or the care of a parent with a serious health condition. The two of you are entitled to a combined total of 12 weeks during a 12-month period.
- A "child" includes your biological or adopted child, foster child, stepchild, ward (someone who is under your legal guardianship), or a child for whom you've acted as the parent (called "*in loco parentis*"). It is a broad definition. A child is someone who is under 18 years of age, or is 18 or older and incapable of caring for themselves due to a mental or physical disability.
- A "parent" includes not only the biological parent, but also the adoptive parent, stepparent, or an adult who has stood in the place of a parent by assuming responsibility for the child (*in loco parentis*), whether it was through formal legal guardianship or not. For example, if you are raising your grandchild, nephew, or niece, you are considered the parent for purposes of coverage under the FMLA. As you can see, both definitions for "child" and "parent" are quite broad under the FMLA.
- A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility. It also means conditions that require "continuing treatment" by a health care provider, which includes:
 - A period of incapacity lasting more than three consecutive full days, and any later treatment or period of incapacity relating to the same condition
 - Period of incapacity related to pregnancy or for prenatal care
 - Period of incapacity for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity
 - Period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective, or
 - Absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

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- Ordinary illnesses, such as flu, cold, upset stomach, and headaches, do not qualify under the FMLA.
- Substance abuse is covered if you are actually seeking treatment, and not just impaired by usage.

What am I entitled to under the FMLA?

As explained above, if you are an eligible employee working for a covered employer, you are entitled to up to 12 weeks of unpaid leave in a 12-month period for any of the circumstances listed.

You are also entitled to the following:

- Return to your job, or an equivalent job
- Pay equivalent to what you were getting before your leave
- Same benefits you had been getting
- Continued coverage, while you're on leave, under the employer's group health insurance plan on the same terms as if you were continuing to work. You will need to continue to pay whatever share of the premiums you are required to pay under the plan. If the employer changes health insurance plans while you're out on leave, you're entitled to coverage under the new plan, just as if you were actively on the job.

What kind of notice do I need to give my employer if I want to take FMLA leave?

If the reason you need to take leave is foreseeable, you're required to give at least 30 days advance notice to your employer. This would include such things as scheduled (non-emergency) surgery, adoption, or birth of a child without emergencies or unpredictable complications. If the need is foreseeable, but is less than 30 days away, then you're required to give notice as soon as practical under the circumstances.

If the reason you need to take leave is not foreseeable, such as an emergency, sudden illness, accidental injury, etc., then you're required to give notice to the employer as soon as practical.

Will my annual leave benefits be affected while I'm out on family and medical leave?

Your employer is not required to allow you to accrue vacation or sick time while you're out on family and medical leave, but the employer may choose to do so if they wish. When you return to work, you are entitled to have at least the same amount of accrued leave time as you had when you went out on leave.

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How do my regular paid sick leave and vacation benefits work in connection with FMLA leave?

Remember that FMLA leave is unpaid. What if you want to be paid for some of the time you're out? You and your employer may agree to substitute your accrued paid leave to cover some or all of the FMLA leave, so you can get paid for part of the time out. In that case, your paid leave and your FMLA leave run concurrently, meaning that your employer is not required to give you more than the 12 weeks required by law. Your employer *may* choose to do that, but is not required to. This depends on your employer's leave policies.

Do I have to take all my allowable leave at one time, or can I take it a little at a time if necessary?

You can take it at separate times, but you're only entitled to a total of no more than 12 weeks in a 12-month period. For example, you may need to take off four weeks at a time at three different times during the 12 months, and that is permissible. This is called "intermittent leave." You may also take leave by working on a reduced daily or weekly schedule, if that better suits your circumstances.

What happens if I take leave, with the intention to come back to work, but then do not return to work for my employer?

If, before your leave time is done, you tell your employer that you don't intend to return to work, your employer can terminate you and end the FMLA leave time at that point.

If you don't return to work, the employer can terminate your employment, and require you to repay any amounts the employer paid for health insurance premiums while you were out. However, your employer can't make you repay if the reason you don't return is due to the continuation or recurrence of the serious health condition that entitled you to FMLA leave, or other circumstances beyond your control.

What happens if I'm laid off while I'm on FMLA leave?

If you're laid off while on FMLA leave, your employer cannot require you to repay health insurance premiums. The employer does not have to continue the FMLA leave or maintain benefits for you if you're laid off while out.

You should apply for unemployment compensation benefits if you're laid off while on FMLA leave. There may, however, be an issue of whether you're able and available to work, which is a condition of receiving unemployment compensation. If you are denied, you should call Virginia Legal Aid Society for advice and possible representation.

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Are there special rules about what happens with my job when I return to work?

Upon return from FMLA leave, you are entitled to be returned to the same position you held when your leave began **or** to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. This is true even if someone else took your place while you were out, and even if your job was restructured to accommodate your absence.

If you are taking intermittent leave or working on a reduced schedule, your employer may require you to transfer to another position that can better accommodate the adjusted schedule.

What kind of documentation or certification can my employer require of me?

Your employer can require proof from a medical provider that you have a need to take the leave for yourself or a family member. If you don't give proper advance notice, as explained earlier, or if you don't provide proof from a provider, then the employer can delay the start of your leave until you get it.

Your employer can ask that you get a second (and third) opinion on the medical diagnosis in order to determine if you really are entitled to FMLA leave. Your employer needs to pay for those opinions if they want them.

Your employer can require you to provide proof from your medical provider that you are fit to return to your job when your leave time is complete, as a condition of restoring you to your position.

What are the employer's responsibilities?

In addition to the things discussed elsewhere in this handout, an employer who is covered by the FMLA is required to post a notice at the worksite, explaining the rights and responsibilities under the Act. The employer must include information in employee handbooks or other written materials about employee benefits. The employer may fulfill this obligation by giving each employee a copy of a notice concerning FMLA at the time of hiring.

Are there special rules for military-related leave?

Yes. A covered employer must give a total of 26 workweeks of unpaid leave during a 12-month period to an eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered service member who needs care due to a serious injury or illness. A covered service member is a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. A serious injury or illness is one that was incurred by a service member in the line of duty that may render them medically unfit to perform the duties of their office, grade, rank, or rating.

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There is another type of military-related leave provided for under the FMLA. A covered employer must give an eligible employee up to a total of 12 workweeks of unpaid leave for a “qualified 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 duty. A “qualified exigency” includes such things as:

- Short notice of deployment (seven or fewer days notice)
- Military events and related activities, such as ceremonies, programs, or support and assistance programs
- Childcare and related activities that must be arranged for
- Making financial and legal arrangements
- Up to five days of leave time for rest and recuperation
- Post-deployment activities

Whom can I contact if I have problems or questions concerning the FMLA?

You can call Virginia Legal Aid Society, a private attorney, or the U.S. Department of Labor. You can learn more about the FMLA, and find contact information for the Labor Department at <http://www.dol.gov/dol/topic/benefits-leave/fmla.htm>

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**Free Legal information by Web and Phone: www.vlas.org and
1-866-LegalAid (534-5243)**

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