COMPLIANCE OVERVIEW

Provided by Better Business Planning, Inc.

The Family and Medical Leave Act (FMLA)

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. Under the FMLA, eligible employees may take leave for their own serious health conditions, for the serious health conditions of family members, to bond with newborns or newly adopted children or for certain military family reasons.

In addition to providing eligible employees with an entitlement to leave, the FMLA requires that employers maintain employees' health benefits during leave and restore employees to their same or equivalent job positions after leave ends. The FMLA also sets requirements for notices, 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 FMLA is enforced by the Department of Labor's (DOL) Wage and Hour Division.

LINKS AND RESOURCES

- The DOL's FMLA webpage, which includes links to the DOL's model FMLA forms and poster
- The Employer's Guide to the FMLA, a publication of the DOL's Wage and Hour Division

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HIGHLIGHTS

COVERED EMPLOYERS

The FMLA applies to:

- Private-sector employers with 50 or more employees;
- Public agencies, including state and federal employers; and
- Local educational agencies.

ELIGIBLE EMPLOYEES

An eligible employee is one who:

- Works for a covered employer;
- Has worked for the employer for at least 12 months;
- Has at least 1,250 hours of service for the employer during the 12-month period immediately before the FMLA leave; and
- Works at a location where the employer has at least 50 employees within a 75-mile radius.

COVERED EMPLOYERS

The FMLA applies to all:

- Public agencies, including state and federal employers;
- Public and private elementary and secondary schools; and
- Private-sector employers with **50 or more employees** during 20 or more calendar workweeks in the current or previous calendar year.

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 that 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.

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.

EXAMPLE: Last year during its busy season from June 1 to October 31, 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 he or she is eligible.

ELIGIBLE EMPLOYEES

Employees are eligible for FMLA leave if they:

- ✓ Currently work for a covered employer;
- ✓ Have worked for this employer for a total of 12 months (need not be consecutive, and can look back up to several years);

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- ✓ Have worked at least 1,250 hours over the previous 12 months (however, special hours of service rules apply to airline flight crew members);
- ✓ Work in the United States or any territory or possession of the United States; and
- ✓ Work at a location where the employer has 50 or more employees within a 75-mile radius at the time the employee requests leave.

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.

> ***EXAMPLE***: A pregnant employee has been with the company for 11 months as of Dec. 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 Dec. 1. One month later, on Jan. 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.

Special Rules for Airline Flight Crew Members

Whether an employee who is an **airline flight crew member** meets the 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 member will be considered to meet the hours of service requirement if he or she has:

- Worked or been paid for not less than 60 percent of the employee's applicable total monthly guarantee during the previous 12-month period; and
- Worked or been paid for not less than 504 hours during the previous 12-month period.

LEAVE ENTITLEMENT

12 WORKWEEKS IN ANY 12-MONTH PERIOD

Eligible employees may take up to **12 weeks** of leave during any 12-month period for any 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;

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- For a serious health condition that makes the employee unable to perform the essential function of his or her job, including incapacity due to pregnancy and for prenatal medical care; and
- 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 has been notified of an impending call or order to covered active duty.

26 WORKWEEKS DURING A SINGLE 12-MONTH PERIOD

Covered employers must grant eligible employees up to a total of **26 weeks** of unpaid leave during a single 12-month period to care for a covered service member with a serious injury or illness who is their spouse, son, daughter, parent or next of kin.

SPECIAL RULES FOR ELIGIBLE AIRLINE FLIGHT CREW MEMBERS

Eligible airline flight crew employees are entitled to:

- 72 days of leave during any 12-month period for FMLA-qualifying reasons other than military caregiver leave; and
- 156 days of leave during any single 12-month period for military caregiver leave.

Family Members

Employees can take FMLA leave due to a serious health condition of these family members—a spouse, parent, son or daughter.

- ✓ A **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.
- ✓ A **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."
- ✓ A **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.

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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.

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. The chart below describes the different types of conditions that are serious health conditions under the FMLA.

Inpatient Care
• An overnight stay in a hospital, hospice or residential medical care facility • Includes any period of incapacity or 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 or 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 an episodic rather than a continuing period of incapacity.

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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.

Covered Service Member Leave

A covered service member is:

- A **current member of the Armed Forces** (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation or therapy, is in outpatient status, or is on the temporary disability retired list, for a serious injury or illness; or
- 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.

For a current service member, a "serious injury or illness" is an injury or illness that was incurred by the service member in the line of duty on active duty (or one that existed before the beginning of active duty and was aggravated by service in the line of duty on active duty) and that may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating.

For a veteran, a "serious injury or illness" means a qualifying injury or illness that was incurred by the service member in the line of duty on active duty (or existed before the beginning of active duty and was aggravated by service in the line of duty on active duty) and that manifested itself either before or after the service member became a veteran.

Qualifying Exigency Leave

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

- Issues arising from the military member's **short-notice deployment** (that is, deployment with seven or fewer days of notice);
- **Military events and related activities**, such as attendance at official ceremonies, programs/events, family support or assistance programs and informational briefings;
- **Childcare and school activities**, such as arranging for alternative childcare when the active duty requires a change to the existing childcare, providing childcare on an urgent, immediate need basis, enrolling in or transferring to a new school or day care or attending school meetings;

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- **Financial and legal arrangements**, such as addressing or updating financial and health care powers of attorney and wills or appearing before agencies regarding military benefits;
- Attending **counseling**, arising from the active duty status;
- **Rest and recuperation**. This leave can be used for up to 15 days for each instance of rest and recuperation to spend time with a covered military member on short-term leave;
- **Parental care**. Under this type of leave, an eligible employee may take qualifying exigency leave to care for the parent of a military member, or someone who stood *in loco parentis* to the military member, when the parent is incapable of self-care and the need for leave arises out of the military member's covered active duty or call to covered active duty status;
- **Post-deployment activities**, such as attending arrival ceremonies or any other official ceremony or program for a period of 90 days following the termination of active duty status, and addressing issues that arise from the death of a covered military member; and
- **Additional activities**, such as to address other events that the employer and employee agree qualify as an exigency.

RULES FOR TAKING FMLA LEAVE

Limits on Taking Leave

Covered spouses of the same employer may be limited to a combined total of:

- **12 weeks of family leave**, if the leave is taken for the birth or placement of a child, or for the serious health condition of an employee's parent.
- **26 weeks of leave during a single 12-month period**, if the leave is taken to care for a covered service member or a combination of leave is taken to care for a covered service member and for the birth or placement of a child or for the serious health condition of an employee's parent.

In addition, leave for a child's birth or placement for adoption or foster care must be concluded within **12 months** of the birth or placement.

Intermittent Leave or Reduced Schedule Leave

In some cases, employees may take FMLA leave intermittently. When leave is taken after a child's birth or after the placement of a child for adoption or foster care, an employee may take intermittent leave only if the employer agrees. However, an employee is entitled to take leave because of a serious health condition or to care for a covered service member on an intermittent or reduced leave schedule when medically necessary. An employee is also entitled to use intermittent or reduced schedule leave for qualifying exigencies.

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.

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Also, if intermittent leave is taken, the employee may be transferred to an alternative position (with equal pay and benefits) that better accommodates the intermittent periods of leave. 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.

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.

Holidays occurring during FMLA leave do not extend the leave. However, if the workplace shuts down temporarily for one or two weeks (for example, for a summer vacation or a plant closing for retooling or repairs), this period does not count against the FMLA leave entitlement.

> 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.

Maintenance of Health Benefits

While an employee is on FMLA leave, the employer must maintain the employee's coverage under any group health plan on the same terms as if the employee continued to work. An employee, while on leave, is required to pay the employer his or her portion of the group health benefit premiums.

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.

In the absence of an established employer policy providing a longer grace period, an employer's obligation to maintain health coverage ceases under the FMLA if an employee's premium is more than 30 days late. The employer must provide written notice to the employee at least 15 days before coverage will terminate. The employer should also inform the employee that coverage will expire 15 days after the date of the letter unless payment is received.

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.

In addition, except as required by COBRA and for "key employees," an employer's obligation to maintain health benefits during leave ceases when:

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- ✓ The employment relationship would have terminated if the employee had not taken FMLA leave (for example, 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.

LEAVE CERTIFICATION

An employer may require an employee to provide a certification if the employee requests FMLA leave:

- To care for a family member with a serious health condition;
- Due to the employee's own serious health condition;
- To care for a covered service member with a serious injury or illness; or
- Because of a qualifying exigency.

The DOL has provided several sample certification forms for this purpose. The employer may require the certification to be returned within 15 days, unless it is not practicable for the employee to meet this deadline despite his or her diligent, good faith efforts.

If an employer has reason to doubt the validity of the certification of the health care provider, it may require the employee to obtain a second (or third) opinion at the employer's expense. The employee is entitled to continue leave while the employer seeks this information. In addition, the employee may request a copy of the second or third medical opinion. If the additional certifications do not establish the employee's entitlement to leave, the leave may be retroactively designated as non-FMLA leave.

An employer may directly contact the employee's health care provider to seek clarification or authentication of the medical certification, but only after the employer has given the employee seven days to cure any deficiency. To make such contact, the employer may use a health care provider representing the employer, a human resources professional, a leave administrator or a management official. If the FMLA leave and workers' compensation leave run concurrently, the employer may contact the employee's workers' compensation health care provider if the state worker's compensation law allows employers to contact the employee's workers' compensation health care provider.

An employer may request recertification every 30 days in connection with an absence unless the medical certification indicates that the minimum duration is more than 30 days. If a longer period is provided, certification cannot occur before the time period expires, unless circumstances change, or an employer has reason to doubt the validity of the initial certification. In all cases, however, employers can request recertification every six months, even where the certification states a longer period. Each new

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leave year gives the employer the opportunity to obtain a new "initial" certification, and thus obtain second and third opinions.

EMPLOYEE'S NOTICE TO EMPLOYER

If leave is foreseeable, the employee must provide the employer with at least 30 days' advance notice whenever practicable. If a 30-day notice is not possible or if leave is not foreseeable, notice must be given as soon as practicable. As soon as practicable ordinarily means an employee would provide verbal notice to his or her employer within one or two business days of when the need for leave becomes known to the employee. When the need for leave is unexpected, the employee must provide notice as soon as possible and practical.

An employer may also require that an employee needing FMLA leave follow the employer's usual and customary notice and procedural requirements for requesting leave (for example, call-in procedures), absent unusual circumstances.

When the leave is due to the active duty of a family member in the Armed Forces and the leave is foreseeable, the employee must provide notice to the employer as soon as reasonable and practicable.

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.

DESIGNATING FMLA LEAVE

Employers are responsible for designating any leave taken as FMLA leave and for notifying an employee of the designation. This should take place within five business days of an employer learning that the leave is being taken for an FMLA purpose, absent extenuating circumstances. The designation notice to the employee must be in writing. The DOL has provided a sample form for this purpose. Only one notice is required in the case of intermittent leave or leave on a reduced schedule for each FMLA-qualifying reason per applicable 12-month period.

When an employer wants to substitute an employee's paid leave for unpaid FMLA leave or count paid leave under an existing leave plan as FMLA leave, the decision must be made within five business days of the time an employee gives notice of a need for leave, unless the employer does not have sufficient information to determine that the paid leave qualifies as FMLA leave.

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If the employer learns that leave is for an FMLA purpose after leave has begun, the paid leave may be retroactively counted to the extent it qualifies as FMLA leave, provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

Any dispute over whether paid leave qualifies as FMLA leave should be resolved through discussions between the employer and the employee. Documentation of those discussions and the decision is required by the FMLA.

EFFECT ON OTHER LAWS

FMLA and COBRA
A COBRA qualifying event occurs on the last day of FMLA leave if the employee on leave does not return to work. Additionally, cancellation of group health coverage for nonpayment of premiums during an FMLA leave, regardless of whether the employee returns to work, is not a qualifying event under COBRA. If group health coverage is maintained by the employer during FMLA leave despite nonpayment of premiums, the employer may seek recovery for the premiums paid even if the employee later states that coverage was not desired. Employers cannot condition COBRA continuation coverage upon repayment of group health premiums if employees default on premium payments while on FMLA leave.
FMLA and ADA
Employers must comply with both the FMLA and the Americans with Disabilities Act (ADA). Employee rights under the (ADA) are cumulative with the employee’s rights under the FMLA. For example, an employee whose health condition qualifies as a disability under the ADA may also be entitled to leave benefits and protection under the FMLA.
FMLA/Worker’s Compensation Coverage
Employee rights under the FMLA and workers’ compensation plans are cumulative. Therefore, an employee with an on-the-job injury that also qualifies as a serious health condition may receive benefits under the FMLA and state workers’ compensation laws. However, employees cannot receive workers’ compensation benefits and paid FMLA leave concurrently. For example, if an employee receives workers’ compensation benefits, neither the employee nor employer can require substitution of paid leave for unpaid leave. An employer or employee may, however, substitute paid leave for unpaid leave when workers’ compensation benefits cease. Further, an employer and employee may agree, where state law permits, to have paid leave supplement the disability plan or workers’ compensation benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee’s salary.

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FMLA and State Leave Laws
The federal FMLA does not supersede any state or local law that provides greater family or medical leave rights. Not all employers will be "covered employers" under both state and federal law. A thorough review of both laws should be made. Where both laws apply, the employee is entitled to the greater of the two benefits.

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