

Your Leave Is Giving Me A Migraine!

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It's Just the Family and Medical Leave Act, People, What's So Complicated?



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Family And Medical Leave Act (FMLA)

- **Covers**
  - Private employers
    - **50 employees within 75-mile radius**
  - Public agencies
  - Public or private elementary or secondary schools regardless of number of employees



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Family And Medical Leave Act (FMLA)

- **Overview**
  - Affords eligible employees unpaid leave of absence—with benefits—for certain qualifying events
  - **12 weeks** of unpaid job-protected leave in any **12-month period**
  - Up to 26 weeks of unpaid military caregiver leave
  - 15 days for "rest and recuperation"



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Family And Medical Leave Act (FMLA)

- **Overview**
  - Must maintain health benefits on same terms
  - Reinstatement to same or substantially equivalent job, with equal pay and benefits
    - **Exception for certain "key" employees**
  - Must maintain benefits (e.g., unpaid leave of absence)
    - **Includes eligibility for production and other bonuses**

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Employee Eligibility

- **Employee Eligibility**
  - 1 year of service; AND
  - 1,250 hours worked in the preceding 12 months; AND
    - **Apply FLSA principles**
  - Qualifying event



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Qualifying Events

- **Qualifying Events**
  - Birth or placement for adoption of a child (mother *and* father eligible)
  - Serious health condition of an immediate family member
  - Employee's own serious health condition
- **Military-Related Leave**
  - Military qualifying exigency leave
  - Military caregiver leave



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Scenario – If Not Now, When?

- Jen started work at ABC Packing thirty-nine weeks ago (9 months) on a part-time basis. She works 20 hours per week, so by her 39-week anniversary, she's got about 780 hours of work in.
- Jen comes to HR to report that she's pregnant and she'll need maternity leave in approximately 6 months. Is she eligible?



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Scenario – If Not Now, When?

- **What if, at the same time Jen reported her need for leave, ABC Packing had notified all part-time employees that their hours were going to increase due to customer demands and they were expected to put in at least 30 hours per week?**



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Qualifying Family Members

- **Qualifying family members include an eligible employee's parent, spouse, son or daughter**
  - For military caregiver leave, employee must be the military service member's parent, spouse, son, daughter, or next of kin
- **Parent** - A biological, adoptive, step or foster father or mother, or someone who stood *in loco parentis* to the employee when the employee was a son or daughter (does not include in-laws).



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How Extended Is Your Family?

- **Business Manager Kate submits two requests for FMLA leave:**
  - The first is to take her step-father to chemotherapy and related visits with his physician over the next several weeks.
  - The second is a request for intermittent leave to check in on her mother-in-law that is recovering from surgery.
  - Are either of these requests legit?

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What Is A Serious Health Condition?



- **Serious Health Condition**
  - Incapacity of more than three calendar days AND
    - **Two+ treatments by health care provider OR**
    - **One treatment followed by continuing treatment (e.g., Rx medication, physical therapy)**
  - Any condition requiring overnight stay
  - Any period of incapacity due to pregnancy or prenatal care
  - Chronic conditions
    - **Conditions (e.g., asthma, diabetes, mental illness or migraines) that may cause incapacity for only a few days at a time**

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No Cold is Common Anymore

- Steve submits an FMLA request and certification following a bout of bronchitis accented with a hint of asthma.
- Steve missed work on Thursday and Friday. He also was unable to leave the house all weekend, which caused him to miss all meetings of his Dungeons and Dragons group.
- Steve was admitted to the hospital for several hours on Saturday for observation and had a follow-up visit with his doctor on Monday. His doctor prescribed antibiotics.

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No Cold is Common Anymore

- **Steve's FMLA request is to cover the days of missed work, a series of follow-up treatments lasting 6-8 weeks and any intermittent absences associated with flare-ups during that period.**
- **This just sounds like a bad cold, right?**



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Recognizing Potential FMLA Situations & Requests

- **Employees must notify Employer of qualifying events (30 days' notice if foreseeable)…**
- **When is Employer on notice to make inquiries?**
  - No "magic" words - the employee must only provide sufficient information for you to understand that he/she needs leave for what may be FMLA-qualifying reasons
- ***Remember:*** **Whenever an Employee presents information indicating that an absence may qualify, the process must be started**

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I “Noticed” Something Was Wrong

- **HR knows about Carl's chronic arthritis and has granted FMLA for it previously;**
- **Carl's face looks like he is in constant pain and he complains about his inability to sleep and do his job due to the constant pain he suffers;**



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I “Noticed” Something Was Wrong

- **Carl has filed a Workers' Compensation claim and has also filed for temporary disability due to his inability to work, at least for the next 30 days;**
- **Carl is given FMLA paperwork but fails to return it because he “wants to save it for later.”**

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The FMLA: Seeking Medical Certifications

- **Medical certification may be required for medical leave, family care leave or covered service member leave**
  - Must notify employee of requirement within 5 days of leave request – and give 15 days to produce completed certification.
  - Must provide notice of consequences of failure to provide adequate certification.
- **Incomplete or insufficient certifications must be cured by the employee/doctor within 7 days of notice of insufficiency by employer**
- **Second and third opinions may be required (at employer's expense)**
- ***Visit www.dol.gov for model forms***

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The Chiropractor's Certification

- **Under the regulations, a chiropractor is considered a healthcare provider, but only to the extent that their work with the patient involves "treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist." 29 C.F.R. 825.125(b)(1).**
- **This means:**
  - The chiropractor must have taken an X-Ray of the back; and
  - The X-ray and treatment relate to misalignment of the spine.

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Getting Disciplined Stressed Me Out

- Pamela is an employee in a job that requires her to work with children in need. The company is required to visit with families in very defined time periods and can be barred permanently from providing these services if they fail to meet these standards.
- Pamela submits medical documentation from her primary care doctor indicating that she had been treated for "severe" anxiety and depression by a psychiatrist and therapist. These conditions would exist for an "unknown duration", and she requested continuous FMLA leave for a period of two weeks.
- Has the employee satisfied the requirement to submit medical certification of the need for leave?
- Can we require a certification from the psychiatrist rather than the primary care physician?

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Getting Disciplined Stressed Me Out

- Upon her return from continuous leave, a subsequent medical certification stated that she would be limited to 8 hours per day, five days per week, and noting that she would have flare-ups of the condition that would cause her to be absent. The certification did not indicate for how long the 8 hour per day limitation would apply, how often flare ups would occur, and how long absences connected with the flare ups would last.
- Is the documentation sufficient?



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Intermittent FMLA Leave

- **Employee entitled to take intermittent/reduced schedule leave for**
  - Employee's or qualifying family member's serious health condition when leave is medically necessary
  - Covered service member's serious injury or illness when leave is medically necessary
  - Qualifying exigency arising out of military member's covered active duty status



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The 8 Hour Limitation



- **Denny works for a company that often mandates 4 hours of overtime. He brings in a doctor's certification that says that his serious health condition prevents him from being able to work more than 8 hours a day.**
  - Can we deduct the 4 hours of overtime he misses when assigned from his FMLA?
  - Can we make him take continuous leave?
  - If employees mandated expect to work 4 hours of OT, but one day actually work only 3, how many hours should be deducted?

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The FMLA: When Can You Seek Recertification?

- **If minimum duration of condition is more than 30 days, you must wait until that time passes.**
- **Cannot request recertification within 30 days, unless:**
  - A leave extension is requested;
  - Circumstances in the prior certification have changed significantly; or
  - Employer receives information to cast doubt on validity of the certification
- **For longer-term conditions, may request recertification once every 6 months in connection with an absence.**
- **Employee must be given 15 days to provide recertification.**

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Is FMLA Fatigue a Serious Health Condition?

- **Sarah has requested intermittent FMLA leave due to anxiety and depression, but the stated duration of the condition is "unknown/long-term". The certification states that she will be unable to work when an unforeseeable onset of the conditions happens.**
- **Sarah generally works three 12 hour shifts over weekends for a healthcare facility. However, each of the past three weekends Sarah has called off for her shift on Sunday resulting in short staffing in her area.**

How can you manage this?

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Can’t Keep A Good Man Down

- Heavy equipment operator Bill has a current FMLA certification for migraine headaches;
- He calls of work Thursday for that reason and uses FMLA leave;
- He calls off again on Friday saying only that he is “sick”;



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Can’t Keep A Good Man Down

- He call off again on Saturday for the same reason and submits a note from his doctor saying that he is too sick to operate heavy equipment;
- All of Bill’s absences are paid under the company’s sick leave policy;
- On Saturday, Bill is spotted supervising at a work site for the landscaping service he operates on the side.

What do we do with this mess?

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The Disappearing Hyphen

- **Gabe submits an FMLA certification for 1-2 days per month of intermittent leave related to chronic disease, with the certification good for 6 months.**
- **During the first month following the submission of the certification, Gabe calls off for 12 days related to his illness.**

What to do?



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Okay, So There IS a Hyphen

- **The doctor really did mean “1 to 2 days per month”, but the employee’s been out for 12 days straight. What do you do?**



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Call In Policies



- **Under the regulations, employees on unforeseeable leave are still required to follow company policies regarding call offs…absent unusual circumstances. 29 CFR 825.303(c).**

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What Happens in Vegas…



- In Ballard v. Chicago Park District, Seventh Circuit said that leave to care for a sick parent during an end of life trip to Las Vegas was appropriate under the Law.
- "…the FMLA's text does not restrict care to a particular place or geographic location."
- "…so long as the employee attends to a family member's basic medical, hygienic, or nutritional needs, that employee is caring for the family member is caring for the family member, even if that care is not part of ongoing treatment…"

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End Of Leave & Return To Work

- **May require periodic updates on "employee's status and intent to return to work" if consistent with non-discriminatory policy.**
- **May have a uniformly-applied policy requiring all similarly situated employees to present fitness for duty certification ("FFD").**
  - Must be limited to condition for which leave was taken.
  - Initial leave designation notice must advise employee of FFD requirement (and whether essential functions checklist will be required).
  - May be required once every 30 days if justified by reasonable safety concerns.

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The FMLA: End Of Leave & Return To Work

- **Return To Work Reminder/Fitness For Duty Certification:**
  - Employees are expected to return to work in accordance with prior notification – address promptly if the employee does not return as expected, indicates a later return date or is unable to return to work at the end of the leave
  - If employee has restrictions, Company may have accommodation obligations under the ADA
- ***Remember:*** **Must Consider Interaction Between FMLA And ADA, Workers' Compensation, And Leave And Disability Benefit Policies.**

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Won't Someone Please Think of the Managers???!!!???

- **We train managers/supervisors on harassment and discrimination, but having them involved in FMLA issues can be just as bad:**
  - In an email recommending Debby's termination, her manager outlined the legitimate performance issues with her job, but added that the termination was also justified because she submitted a request for medical leave.
  - In the subsequent litigation, the manager admits he was "not really familiar with FMLA leave" because he was "on the front line".

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Whatchoo Talkin' 'Bout, Willis?



- Don’t forget the importance of confidentiality of FMLA certifications/leave/etc.
- There are some Courts who have taken the position that confidentiality of medical information is an employee right under the FMLA, and employer violations of that right can "materially affect" the working conditions, thereby interfering with his rights under the FMLA.

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