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The Family and Medical Leave Act and Employee Benefits

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*Presented by the Regulatory and
Legislative Strategy Group*

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**Family and Medical
Leave Act (FMLA)**
(29 CFR Part 825)



FMLA Basics

INTRODUCTION

The Family and Medical Leave Act (FMLA) provides for unpaid, job-protected leave to qualified employees who work for qualifying employers.

- 12 workweeks per 12-month period
 - » Applies to leaves for the employee's own serious health condition, parental bonding, to care for a family member with a serious health condition and qualifying exigencies
- 26 workweeks per 12-month period
 - » Applies to military caregiver leave

Note: Many states have leave laws that run concurrently with FMLA or provide protections that are greater than FMLA. The general rule in such situations is to apply the greatest protection provided by the applicable laws.

FMLA Basics - Covered Employers

(29 CFR § 825.104)

Private Sector Employer

- Private employers that employ 50 or more employees for each working day in 20 or more calendar workweeks in the current or previous calendar year.
 - » Employee considered employed each working day of the calendar week if the employee works any part of the week
 - » Work weeks do not have to be consecutive
 - » Excluded employees

Public Employers

- Public agencies considered covered employers regardless of the number of employees
- Public agencies include:
 - » Federal, state and local governments
 - » Local educational agencies (public and private elementary and secondary schools)

FMLA Basics - Covered Employees

(29 CFR § 825.110)

Eligible Employees

- Works for covered employer
- Employed by the employer for at least 12 months,
 - » Not required to be consecutive (takes into account up to seven years)
- Worked for at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave (including absences due to military leave), *and*
- Are employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

Public agency and school employees must still meet eligibility requirements

FMLA Basics – Qualifying Reasons For Leave

(29 CFR § 825.112)

Circumstances for FMLA Leave

- Birth of a child and to bond with the newborn child within one year of birth
- Placement with the employee of a child for adoption or foster care and to bond with newly placed child within one year of placement
- Care for the employee's spouse, son, daughter or parent with a serious health condition
- A serious health condition that makes the employee unable to perform the functions of his/her job

Right to FMLA leave applies equally to male and female employees



FMLA Basics - Qualifying Reasons For Leave

(29 CFR § 825.124)

Circumstances for FMLA Leave (Cont.)

- Qualifying exigency arising out of the fact that the employee's spouse, child or parent is a covered military member on active duty or has been notified of an impending call or order to active duty
- Care for a covered service member with a serious injury or illness if the employee is the spouse, child, parent or next of kin of the service member



Serious Health Condition



Definition: An illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider (29 CFR § 825.113)

Types of Serious Health Conditions

- Inpatient care:
 - » An overnight stay in hospital, hospice or residential medical care facility
 - » Any period of incapacity or subsequent treatment in connection with overnight stay
- A period of incapacity of more than three consecutive days, and any subsequent period of incapacity involving treatment two or more times, or treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment
- Any period of incapacity due to pregnancy, or for prenatal care
- Any period of incapacity or treatment for such incapacity due to a chronic serious health condition
- A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective but requires continuing supervision of health care provider
- Treatment for restorative surgery or a condition that would likely result in a period of incapacity of more than three consecutive days in the absence of treatment

Military Leave

(29 CFR § 825.122)

- Eligible employees may take FMLA leave for:
 - » Any “qualifying exigency” arising from foreign deployment of employee’s son, daughter, spouse or parent with the Armed Forces, or
 - » To care for a covered service member with a serious injury or illness if the service member is the employee’s spouse, child, parent or next of kin
- Qualifying exigency leave includes when family member is on covered active duty or has been notified for impending call to covered active duty
 - » Covered active duty means deployment to a foreign country
- Covered service member includes both members of the National Guard and Reserves and the Regular Armed Forces
 - » Includes both current service members and veterans who are undergoing medical treatment, recuperation or therapy for a serious injury or illness and were discharged within previous five years



Employee Notice

- Employees must provide notice of their need for FMLA leave
- Based on employer's customary policy for requesting leave unless unusual circumstances apply
- Notice can be oral or written



Timing of Notice:

- Foreseeable – 30 days advance notice
- Unforeseeable – Provided as soon as possible and practical

Certification

- Employer may request employee certification to support need for FMLA leave
- Circumstances when certification may be required:
 - » Employee's own serious health condition
 - » Serious health condition of the employee's spouse, parent or child
 - » Military family leave
- Certification includes document or form completed by employee and health care provider if applicable
 - » Medical certification must be provided within 15 calendar days after employer's request unless unfeasible under circumstances

Certification may not be required for leave to bond with a healthy newborn child or child placed for adoption or foster care.

Model Forms, Fact Sheets and Notices

FMLA Forms

1. WH-1420 FMLA Poster
2. WH-380E Certification of Health Care Provider – Employee
3. WH-380F Certification of Health Care Provider – Family member
4. WH-381 Notice of Eligibility, Rights & Responsibilities
5. WH-382 Designation Notice
6. WH-384 Certification of Qualifying Exigency
7. WH-385 Certification of Serious Injury/Illness – Military
8. WH-385V Certification of Serious Injury/Illness – Veteran

<https://www.dol.gov/agencies/whd/fmla/forms>



FMLA Basics – Duration of Leave

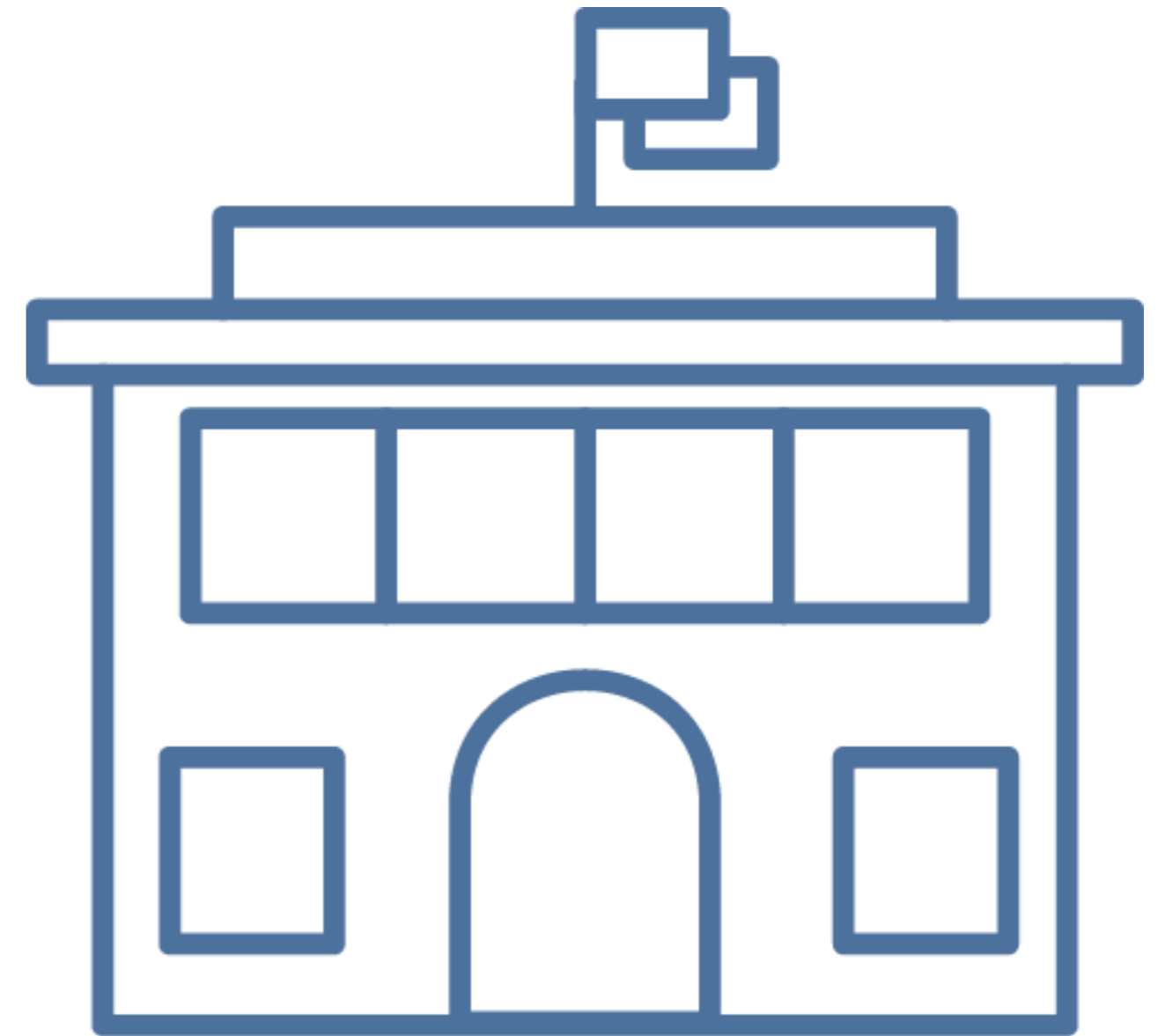
- Based on defined 12-month period or “leave year”
 - Methods for determining 12-month leave year:
 - » Calendar year or any other fixed period of 12 months
 - » Rolling forward – 12-month period measured from first date of leave
 - » Rolling backward – 12-month period measured backward from date employee uses FMLA leave
 - Intermittent or reduced scheduled leave permitted under certain circumstances
- Length of Leave:**
- Up to 12 weeks for qualifying leave
 - Qualifying exigency leave
 - » Up to 15 days to spend time with an active service member on rest and recuperation leave
 - Up to 26-weeks for military caregiver leave

School Instructional Employees

(29 CFR § 825.600-§ 825.604)

Special rules apply for instructional employees of elementary and secondary schools (public and private) for purposes of intermittent or reduced scheduled leave

- Includes teachers, athletic coaches, driving instructors and special education assistants
- Special rules do not apply to teaching assistants and aides, or other auxiliary workers whose primary duties are not instructional

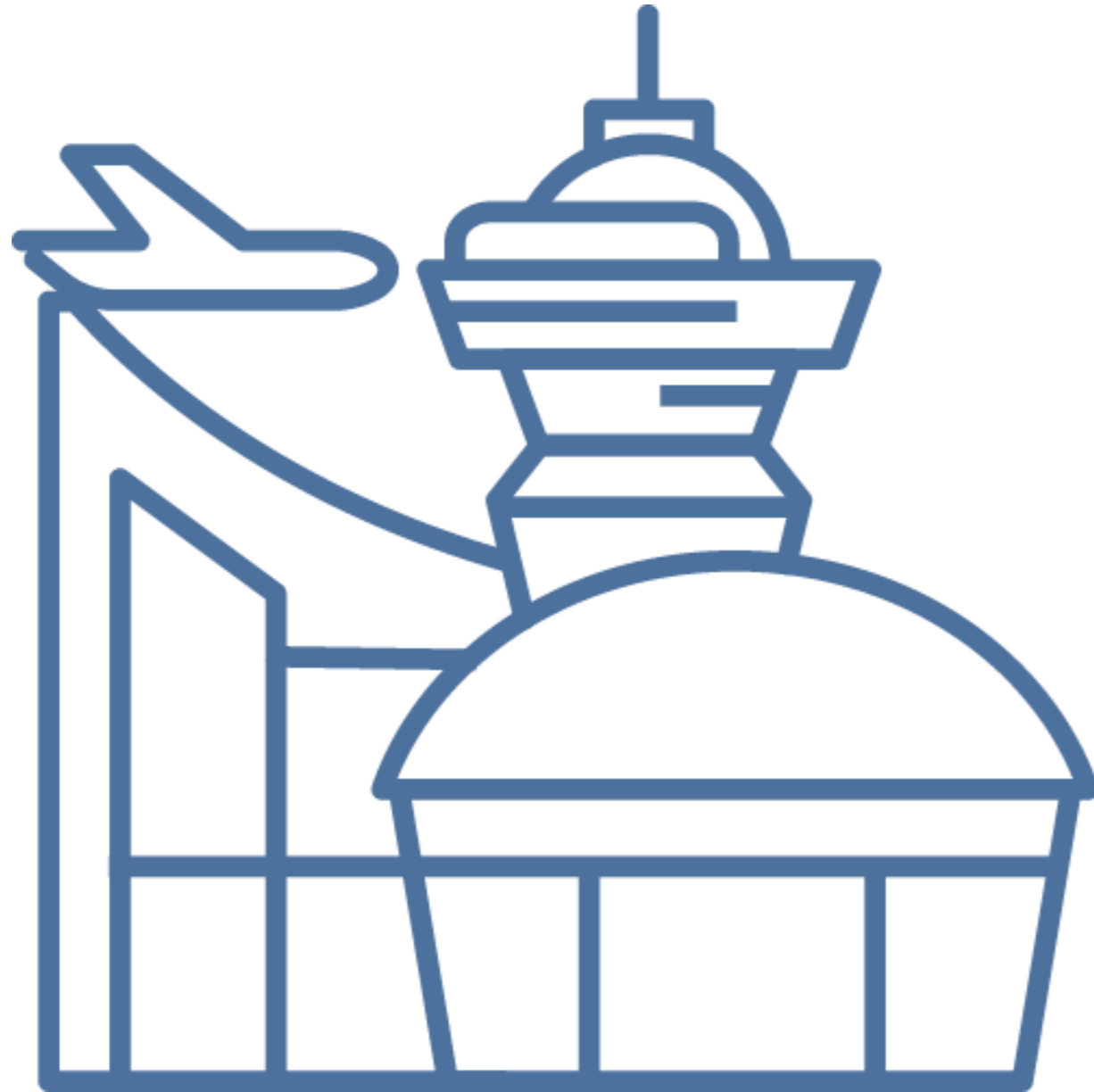


School Instructional Employees

- If intermittent leave or reduced schedule is needed, employer may require the employee to choose between:
 - » Leave for a period of a duration no greater than the planned treatment, or
 - » Transfer to an available alternative position with equivalent pay and benefits **(29 CFR § 825.601)**
- Employees on leave at the end of the school year must be provided benefits if they were working at the end of the school year. Leave periods during summer vacations do not count against the employee's FMLA entitlement **(29 CFR § 825.602)**
- In certain cases, for leaves commencing at the end of the academic term the employer may require the employee to remain out on leave through the end of the term
 - » Such periods are not counted against FMLA entitlement **(29 CFR § 825.603)**
- Restoration to an equivalent position **(29 CFR § 825.604)**

Airline Flight Crew Employees

(29 CFR § 825.802)



Special rules apply to airline flight crew members for calculating leave and leave entitlement

- Hours of service criteria – Employee must have worked or been paid during the previous 12 months for:
 - » Not less than 60% of applicable monthly guarantee, and
 - » Not less than 504 hours
- Duration of FMLA-qualified leave during 12-month period
 - » 156 days for military caregiver leave
 - » 72 days for other leave

Employee Protections

- It is unlawful for an employer to discharge or discriminate against any employee for opposing any practice, or because of involvement in any proceeding, related to the FMLA
- Employers may not discriminate against or interfere with employees who attempt to exercise their rights to take FMLA leave
 - » However, an employer is not prohibited from taking action against an employee for violating company policy when the employee is on FMLA leave



FMLA Impact on Benefits



Group Health Plans

(29 CFR § 825.209)

Maintenance of Health Coverage during leave

- “Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees.”
- Same coverage and contributions as actively at work (for employee and dependents)



Group Health Plans

A covered employer may:

- Allow an employee going on FMLA leave to either revoke or continue health coverage during the FMLA leave, or
- Require that the employee continue coverage but allow the employee to discontinue contributions (the employer may recoup the employee's share of premiums when the employee returns to work), but only if they treat other non-FMLA leaves in the same manner

Employee must pay employee portion of premium during the leave

- Foreseeable leave – May collect premiums “in advance” on pre-tax basis at employee’s option
- Unforeseeable leave – Periodic post-tax payments sent to employer or collected on return to active work

Open enrollment rights apply during FMLA leave

Group Health Plans

Employer's obligation to offer health coverage stops when:

- Employee notifies employer of intention to not return to work;
 - Employment relationship would have terminated if employee had not taken FMLA leave (e.g., position is eliminated);
 - Employee fails to return to work at end of FMLA leave;
 - Employee exhausts FMLA leave entitlement and continues on non-FMLA leave;
 - » Coverage will depend on plan's eligibility provision
- Employee fails to pay premium within 30 days of due date – 15 day advance written notice of late payment required
 - » Notice may be provided within the grace period



FMLA & COBRA

COBRA continuation rights apply at the end of FMLA

- Regardless of whether employee's premiums are kept current during the job-protected leave

A COBRA qualifying event occurs if the following three circumstances exist:

- The employee, spouse or a dependent child is covered on the day before the first day of FMLA (or becomes covered during the FMLA leave);
- The employee does not return to employment at the end of the FMLA leave; and

- The individual would, in the absence of COBRA continuation coverage, lose coverage under the group health plan before the end of the maximum coverage period.

FMLA & Cafeteria Plan Elections

(26 CFR § 1.125-3)

If paid leave is run concurrently with FMLA, the employer can require that the employee continue paying his or her share of premiums if:

- The employee has made a pre-tax salary election for health insurance premiums;
- The employee takes a “paid” FMLA leave (the leave runs concurrently with a paid leave benefit); and
- The employer mandates that employees continue group health plan coverage during any other non-FMLA paid leave.



Special Rule: Cafeteria Plan Elections

Reinstatement of election on return from leave (if benefits have been dropped):

- Safe Harbor:
 - » Leaves shorter than 30 days – Reinstatement prior election (unless intervening status change)
 - » Leaves greater than 30 days – May reinstate prior election or make new election for remainder of plan year

Unpaid FMLA: Employers can require reinstatement of coverage upon return from FMLA leave if this is required for all unpaid leaves.



FMLA & Health FSA Elections

The employer must permit an employee taking FMLA leave to continue the coverage under the HFSA while on FMLA leave

If an employee is on an unpaid FMLA leave, the employee can either:

- Revoke coverage during the FMLA leave period, or
- Continue coverage during the FMLA leave period but may pay his or her share of the premium for the HFSA during unpaid FMLA
 - » Pre-pay,
 - » Pay-as-you-go, or
 - » Catch-up methods to pay for the required HFSA premium

Unpaid FMLA: Employers can require reinstatement of coverage upon return from FMLA leave if this is required for all unpaid leaves.

Special Rule: Dependent Care FSAs

Eligibility to Participate:

- Determined by cafeteria plan's eligibility language
- FMLA leave eligibility must be maintained if employees on non-FMLA leaves remain eligible

Reinstatement:

- Employees may reinstate elections on return to active employment following FMLA

Dependent Care claims eligibility:

If daycare costs continue to accrue, are they to enable employee and spouse to work or seek work?

- Is employee able to care for children during leave?
- Is the leave of short duration? If so, employee may continue to receive full reimbursement. For example:
 - » 2-weeks for vacation or minor illness, if employee must pay for care anyway
 - » Periods of part-time employment when employee is charged weekly regardless of the number of days care is needed

Other Benefits

Benefit Coverage

Requirements

Cash Payments (in lieu of health coverage)

Not required

Seniority Benefits (e.g., vacation/sick pay accrual)

Not required during unpaid FMLA leave

Non-Health Benefits (Life, Disability, etc.)

May be maintained during the term of the FMLA leave **if permitted by contract**

- Helps preserve reinstatement right on return to active status
- Employer may require employee to pay employee portion of any premiums during the term of the leave or recover employee contributions on employee's return to active status

Reinstatement Rights

Employee has right to reinstatement of benefits upon return to active employment following FMLA leave

FMLA Leaves Due to a Disability

Life Insurance:

- Life waiver of premium – If included in the contract
 - » May apply different waiting periods for qualifying for disability waiver than LTD or STD plans
 - » Premiums must be paid during the waiting period
- Definition of disability may be more restrictive than LTD or STD contracts. For example, inability to perform “any gainful occupation” for a disability beginning prior to a certain age
 - » Typical waiting periods: 6 months or 9 months
 - » Typical Age Limit: 60 or 65
- May require separate claim submission
- In some cases, premium waiver is automatic with approval of a disability claim

Summary

- FMLA provides specific job and benefit protections
- Reinstatement to employee welfare benefits is required upon return from FMLA
- Make sure non-health benefit contracts allow for immediate reinstatement



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