

## QUESTIONS AND ANSWERS FOR SEPTEMBER 30, 2014, FMLA PRESENTATION

*[Disclaimer: The responses to questions below are provided as a courtesy to guide you in finding your answers in the resources. The Family and Medical Leave Act itself and the Regulations (at 29 CFR 825) are the official sources for compliance.]*

There are many online resources available to help answer questions which may arise in administering your FMLA policy.

**Website:** [www.dol.gov/whd](http://www.dol.gov/whd)

1. On that website, under RESOURCES, select 'Fact Sheets' and find your topic. The Fact Sheets provide a quick, easy to read explanation on various topics.
2. On that same website, under INTERPRETIVE GUIDANCE you can find links to the regulations, opinion letters – even the very Field Handbook that the investigators use for guidance.
3. Also on the website, top of page, select Topics and find the FMLA link (<http://www.dol.gov/whd/fmla/index.htm>)- great page with vast resources for your use. Even FAQs.
4. You should rely on the regulations for compliance:

Go to [www.ecfr.gov](http://www.ecfr.gov) ; select Title 29. Next, select 500-899. Next, select 825- these are the FMLA regs. Use the index to quickly find your topic.

Q.1 -- In our office, employees are allowed to make up any sick or annual leave they put in for by taking 30 minutes lunches that week. Is an employee able to make up time they take off that is designated FMLA?

A.1 – Sick Leave and Annual Leave may be restored in this way, however, only FMLA leave is protected leave, and when used is counted towards the annual 12 weeks and may not be restored. (It is perfectly OK to be more generous with leave, just remember Wage Hour only enforces what is specified in the Act.)

Q. 2 -- When does FMLA become ADA and what should an employer do?

A. 2—read 825.123 and then go to: <http://www.eeoc.gov/policy/docs/fmlaada.html>

An FMLA "serious health condition" is not necessarily an ADA "disability." An ADA "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. Some FMLA "serious health conditions" may be ADA disabilities, for example, most cancers and serious strokes. Other "serious health conditions" may not be ADA disabilities, for example, pregnancy or a routine broken leg or hernia. This is because the condition is not an impairment (e.g., pregnancy), or because the impairment is not substantially limiting (e.g., a routine broken leg or hernia).

Q. 3 -- If an employee transfers to SAO 13 from another SAO with no break in service, should time worked at transferring agency be considered towards the 1,250 hours worked to qualify for FMLA? We have not been counting prior service towards FMLA eligibility. I was wondering if other circuits offer reciprocity for hours worked.

A. 3 – Yes if for the same employer (public agency)– Joint Employment: See 29CFR 825.106; 108

Q. 4 -- Is it okay to fill someone's position that has not been on a FMLA leave of absence for 480 hours? What if we filled their position and when they are ready to return to work we do not have a position available? Are we obligated to keep a position vacant for them?

A. 4 – 29CFR825.215: On return from FMLA leave (whether after a block of leave or an instance of intermittent leave), the FMLA requires that the employer return the employee to the same job, or one

that is nearly identical (equivalent). If not returned to the same job, a nearly identical job must: offer the same shift or general work schedule, and be at a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance); involve the same or substantially similar duties, responsibilities, and status; include the same general level of skill, effort, responsibility and authority; offer identical pay, including equivalent premium pay, overtime and bonus opportunities, profit-sharing, or other payments, and any unconditional pay increases that occurred during FMLA leave; and offer identical benefits (such as life insurance, health insurance, disability insurance, sick leave, vacation, educational benefits, pensions, etc.).

Q. 5 -- Even though the Act indicates a married couple's 480 hours is shared, can the employer still choose to give each couple FMLA 480 hours?

A.5 – The FMLA establishes minimum guidelines, but an employer may be more generous. However, only FMLA leave is protected leave for enforcement purposes.

Q. 6 -- My understanding of the Act is that a married couple that works for the same agency has to share 480 hours for the birth/care of a child (including foster and adoptive children) and to care for parents. However, what if each of the spouses has a serious health condition? How is their time out to care for themselves calculated?

A. 6 – 825.201: Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a parent, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

Q. 7 -- Can an agency grant FMLA to a domestic partner when Florida law does not recognize common law marriage?

### **A.7 Notice of Proposed Rulemaking to Revise the Definition of “Spouse” Under the FMLA**

The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. The FMLA also includes certain military family leave provisions.

The Department of Labor has published a Notice of Proposed Rulemaking (NPRM) to revise the definition of spouse under the FMLA in light of the United States Supreme Court's decision in *United States v. Windsor*, which found section 3 of the Defense of Marriage Act (DOMA) to be unconstitutional.

#### **Major features of the NPRM**

The Department is proposing to move from a “state of residence” rule to a rule based on where the marriage was entered into (sometimes referred to as “place of celebration”).

The proposed definition of spouse expressly references the inclusion of same-sex marriages in addition to common law marriages, and will encompass same-sex marriages entered into abroad that could have been entered into in at least one State.

The Department proposes to define spouse as follows:

Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either (1) was entered into in a State that recognizes such marriages or, (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

### Comment Period

The NPRM published on June 27, 2014 (79 FR 36445) in the Federal Register and invited interested parties to submit written comments on the proposed rule at [www.regulations.gov](http://www.regulations.gov) on or before August 11, 2014. The comment period is now closed. Only comments received during the comment period identified in the Federal Register published version of the Notice of Proposed Rulemaking are considered part of the rulemaking record, and may be viewed at [www.regulations.gov](http://www.regulations.gov).

Q. 8 -- Is it ever okay for an employer to involuntarily transfer an employee to another unit where their FMLA would have a lesser impact, if it is the same pay level?

A. 8 - §825.204 the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position

Q. 9 -- What if they are transferred to a lower level position and their pay is not affected?

A. 9 --§825.215 (a) *Equivalent position*. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. (see also A.4)

Q. 10 -- How can an employer limit the use/abuse of intermittent leave?

Q. 11 -- What can an employer do if an employee is suspected of abusing FMLA? For example, an employee has diabetes and they have a tardiness issue and indicate their tardiness is related to their diabetes.

A.10&11 – Proper administration, good records, count all FMLA leave as time used;  
§825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

Q. 12 -- Can an employee ever be granted FMLA to care for their grandparents, if loco parentis does not apply?

A.12 – No, (unless §825.122-next of kin of a covered service member)

Q. 13 -- Can an employee use FMLA to care for their adult child that is temporarily disabled?

A.13 – <http://www.dol.gov/whd/fmla/AdultChildFAQs.htm>.

Q. 14 -- Can an employer force an employee to go on a leave of absence if they are not performing the essential functions of the job?

A. 14—825.216(3) (c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. See §825.702, state leave laws, or workers' compensation laws.

Q. 15 -- An employee calls out sick with their daytime employer due to their FMLA, however, it was discovered that they went to work to their part time employer at night. What can the daytime employer do about that?

A. 15 - 825.216 - (e) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

Q. 16 -- If we have to terminate someone that has exhausted their FMLA are we violating any of their rights?

A.16 – Job protection under the FMLA ends when leave is exhausted. However, other Acts may play a role in your decision.

Q. 17 – Please discuss handling intermittent use of FMLA time and what qualifies as intermittent usage. We had one person that was putting down half-hour periods in the morning and claimed medication reactions caused her to sleep a little late, etc. We counted it just so it would use up the time.

A.17 - §825.202 Intermittent leave or reduced leave schedule.

(a) *Definition.* FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. *Intermittent leave* is FMLA leave taken in separate blocks of time due to a single qualifying reason. A *reduced leave schedule* is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

§825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) *Minimum increment.* (1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.

Q. 18 -- Background:

A Legal Assistant who began FMLA with a 3 week treatment in-patient plan for pain management returned with a doctor's note stating that she was not ready for full time work. She was supposed to build up her stamina for a couple of weeks until she could return to a full 40 hours. This has stretched on to 5 additional months of shortened days--she comes in 1/2 hour later than everyone and leaves an hour earlier. Although she is using FMLA leave, she has a large amount of sick leave and, using it in small increments daily, the FMLA seems to be infinite.

In addition, she is out frequently with "other medical issues" that she is adamant are not FMLA and therefore should not be coded as such. After noticing that she had several recurring doctor's appointments, I recently determined that one of the medical issues was a specific sinus issue with out-patient surgery included. Based on my discussion with an employment lawyer, I provided her with FMLA paperwork for that and told her that this FMLA would run concurrently with the other pain

issue. She disagreed. This situation is a huge hardship for the division she works in as the other Legal Assistants continuously have to make up the slack for her.

Questions:

1. If she does not return the second set of FMLA paperwork from the Doctor, can the employer designate it as such?

A.1- read 825.112 Qualifying reasons for leave, general rule.

§825.301 Designation of FMLA leave.

(a) *Employer responsibilities.* The employer's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee as provided in §825.300(d).

2. When she calls out for the day and mentions to her supervisor that she doesn't feel well because she didn't sleep due to pain, can the employer designate that time as FMLA, even if the employee does not think it is?

A.2- 825.301 Designation of FMLA leave.

3. Can the employer designate ALL sick leave taken during FMLA as FMLA leave, regardless of the reason?

A.3 – No, read 825.112-127

4. Is it up to the employee to determine which sick leave taken is designated FMLA? The issue in this case is that with such a large amount of sick leave in her leave bank, the employee can basically use a little FMLA each day until she qualifies for another 480 hours. This could go on for several years. Meanwhile, she is regularly utilizing sick leave she designates as non-FMLA as well as taking annual leave, leaving the office without a Legal Assistant in this division much of the time.

A.4. - See A.2

5. Any other suggestions to help us handle this situation appropriately?

§825.112 Qualifying reasons for leave, general rule.

(a) *Circumstances qualifying for leave.* Employers covered by FMLA are required to grant leave to eligible employees: (4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (see §§825.113 and 825.123);

§825.113 Serious health condition.

(a) For purposes of FMLA, *serious health condition* entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115.

§825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in §825.113(b), or any subsequent treatment in connection with such inpatient care

§825.115 (f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment

from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Q. 19 - What is the employer's obligation when you believe that FMLA is not going to be sufficient, that the employee has a physical or mental problem which is probably going to take longer than 12 weeks to overcome?

A.19 – Job protection under the FMLA ends when leave is exhausted. However, other Acts may play a role in your decision.

Q. 20 - If an employee is out of the office sick for three consecutive days, do you recommend that we automatically provide the employee with FMLA paperwork to see if they would like to apply? (After three consecutive sick days, we require a doctor's note.)

A. 20- see Employer Notice Requirements at 825.300(b); Designation of FMLA Leave at 825.301(a) Keep good records!

Q. 21 - If an employee is a 40 hour a week employee (FTE 1.0) then it is okay to use the 480 hours total working towards the 12 work weeks time, correct? The only time this would change is if the employee is a normal part-time worker -- then it is based on the number of hours worked in a week. Correct?

A. 21- Thinking simply of a 'flat 480' hours may lead to errors. Here's why: 825.205 (a, b & c)

Q. 22 - I was previously told that if an employee is on continuous FMLA and a holiday (that they are not scheduled to normally work) falls in that time, it is counted against the full 12 week time frame. But if the employee is on intermittent FMLA time and a holiday falls -- if they worked the day prior to or the day following the holiday -- that the holiday would then not count against the FLMA time. Can you please clarify this for me?

A. 22- see 825.200 (h)

Q. 23 - Are annual leave and sick leave considered "hours worked" in determining eligibility especially if there is a second event during the 12 month period?

A. 23 – just as 'actual hours worked' only counts towards computing overtime pay, so does this principal apply for employee meeting the 1250 'worked' hour eligibility requirements for FMLA. [See 825.110(a)(2)].

Q. 24 - We have an employee out on FMLA for their own medical condition. We use a 12 month rolling calendar going forward from 1st day out. The employee asked for FMLA for his/her son's serious condition but failed to meet the requirements (did not provide doctor's paperwork). We sent official notice to her that since she did not comply she was denied in writing on son's FMLA request. She then responded she was withdrawing request. She has now found a new doctor for son (same condition). Do we have to re-notice for FMLA on the son? Is the employee entitled to request it again for the same condition that was previously denied?

A. 24- Please review 825.301(a) -Designation of FMLA leave. Yes, very common for employee to re-submit proper paperwork. See 825.305 Certification, general rule. Keep good records!

Q. 25 - If an employee takes six (6) weeks of FMLA in a 12-month period, and then the next year has another FMLA event and needs to take more leave, do we count the previous six weeks when determining if they worked 1,250 hours in the year prior?

A. 25 – Leave time (whether paid or unpaid) does not count towards the 1250 hours. See answer #23.

Q. 26 - Some doctors are charging from \$25.00-\$75.00 for preparation of the medical certifications. Are there any regulations to avoid/waive these costs especially for employees who have budget constraints?

A. 26 – There's nothing to prevent MDs for charging for their time spent filling out forms.

Q. 27 - The FMLA Military Leave is different than the other Military Rules that we must follow (Florida Department of Management Services' program guidelines for active military leave under Title 10 or active/inactive duty for training), but can run concurrent with that leave, correct?

A. 27- FMLA is a federal law, but can interact with state laws. See §825.701 Interaction with State laws.

Q. 28 - Can an employee have both an FMLA (for their own serious health condition) and a separate FMLA Military Leave (for any covered service member) at the same time? And if so, how is the time counted -- as completely separate claims as if the other doesn't exist, even if running at the same time?

A. 28 – see 825.127(e)(3)

Q. 29 - Regarding the Nursing Mothers rules, all employees under Justice Administration are “at will” employees; not many are considered “included” under the FLSA. Do the Nursing Mothers rules apply to “excluded” employees such as attorneys?

A. 29- All state employees are covered by the FLSA- (see 825.108). However, some may be exempt from overtime, and therefore not eligible for the Nursing Mothers protections. Check out

<http://www.dol.gov/whd/nursingmothers/faqBTNM.htm> and

<http://www.dol.gov/whd/regs/compliance/whdfs73.htm>

Q. 30 - If an employer finds out about an employee having surgery, and notifies the employee they are eligible for FMLA, does the employee have to take it? There has been some confusion in the past whether an employee has to go on FMLA or not. Can the employer put the employee on FMLA without the employee's consent?

A. 30- see 825.301 Designation of FMLA leave. (c) *Disputes*. If there is a dispute between an employer and an employee as to whether 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. Keep good records!

Q. 31 - What does “return to work” mean practically? Is that one day? We had an employee come back for 2 days, resigned, and gave less than 2 weeks' notice to take another job.

A. 31- See 825.213(3)(c)

All things FMLA : <http://www.dol.gov/whd/fmla/index.htm>