

# Family and Medical Leave Act and Employee Relations Issues

Audrey Moore, Assistant Attorney General,  
Employment Litigation Bureau,  
Office of the Attorney General

## How Do I Know What To Do?

The statute sets out the requirements. 29 USC § 2611-19

The Code of Federal Regulations lists the rules in implementing and enforcing the requirements. 29 CFR § 825

Case law interprets how the requirements and implementation should *likely* be applied in the future based on prior specific circumstances.

Handbooks describe your agency's position on some matters.

But... at the end is a person who has to take all of that into consideration and apply it in real life with regard to real people.

## FMLA Paraphrased:

- Certain employees have the right to take 12 weeks of unpaid leave for specific reasons.
- Employees who request this leave have the right not to be terminated, disciplined, demoted, or suffer other “punishments” for having done so.

□

## Generally...

- FMLA is designed to help employees balance their work and family responsibilities by allowing them to take reasonable unpaid leave for certain family and medical reasons. It also seeks to accommodate the legitimate interests of employers and promote equal employment opportunity for men and women.

□ - Dept. of Labor

## What rights are granted?

□ Who?

□ An eligible employee

□ Gets what?

□ a total of 12 workweeks of leave during any 12-month period

□ If they request leave for one of the following:

- A) The **birth** of a son/daughter of the employee and in order to care for such son/daughter.
- B) The placement of a son/daughter with the employee for **adoption** or foster care.
- C) To **care for** the spouse, son/daughter, or parent, of the employee, if such spouse, son/daughter, or parent has a serious health condition.
- D) A **serious health condition** that makes the employee unable to perform the functions of the position of such employee.
- E) A qualifying exigency as determined by the Secretary of Labor arising out of the fact that the spouse, son/daughter, or parent of the employee is, or soon will be, on **covered active duty** in the Armed Forces.

□

29 USC § 2612(a)

## Important Terms

### □ Eligible employee

- 1. Has been an employee for 12 months, AND
  - a) USERRA leave does not count against
  - b) Does **not** have to be consecutive 12 months
- 2. Has *actually worked* at least 1,250 hours over the immediate prior (*i.e. consecutive*) 12 months, and
  - a) Assuming full time employment, an employee will reach this in less than 32 weeks, or 8 months.
  - b) Credited the hours which would have been accrued but for USERRA leave

□ Employed by a private employer with more than 50 employees within 75 miles of a Public agency (including a State, 29 CFR § 825.104(a))

□

29 USC § 2611

## Important Terms

- Serious health condition, 29 CFR § 825.113
  - an illness, injury, impairment, or physical or mental condition that involves--
    - a) inpatient care in a hospital, hospice, or residential medical care facility; or
    - b) continuing treatment by a health care provider.
      - “continuing treatment” does NOT include appointments made solely at the request of the employer for certification or return to work paperwork.
  - c) OR an “incapacity” related to pregnancy
    - No medical treatment is required to qualify, 29 CFR § 825.120(a)(4)

“Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.”

29 CFR § 825.113(d)

## Important Terms

### Qualifying Exigency

Listed in 29 CFR § 825.126(b)

- Generally, leave to take care of personal and family matters brought about by impending military leave.

Regarding leave for childcare activities:

- the child who needs the care only needs to be the military member's biological, adopted, foster, stepchild, or ward but need not be a child of the employee requesting leave. A qualifying child, etc. must be under 18 or incapable of self-care.

### Intermittent or continuous leave?

▫ An employee may take either continuous or intermittent leave for the serious health condition of themselves or their immediate family or for a qualifying exigency, 29 CFR § 825.202

▫ Leave for pregnancy conditions can be considered a serious health condition (if it meets the criteria) and intermittent leave is allowable. 29 CFR § 825.306(a)(7)

▫ Also consider accommodations for a disability wherein more than 12 weeks of total leave may or may not be a reasonable accommodation.

▫ An employee may only take intermittent leave for the birth or adoption of a child if the employer allows it.

## Paid Leave

- An employer may require an employee to exhaust their paid leave concurrent with FMLA leave
- BUT the availability of paid leave does not affect an employee's right to up to 12 weeks of leave.

## What FMLA is NOT:

- 1. Does not require an employee be **paid** during their protected leave.
  - If the employee does not have enough paid leave to cover the protected leave, they must take leave without pay.
  - The employers uniform restrictions on sick leave versus annual leave apply.
- 2. Does not exempt employee from any "**usual and customary**" requirements of the employer in requesting leave or returning after leave. 29 CFR § 825.302(d)
- 3. Does not exempt an employee from adverse employment actions taken on any basis **other than** the use, attempted use, or testimony about protected leave.

## What FMLA is NOT:

- Paid time off between jobs!
- The intent of FMLA leave is to help an employee stay employed while balancing life needs outside work.
- If the employee is clear that they do not intend to return-- employer obligations cease under the act.

□ 29 CFR § 825.311

## What Actions are Prohibited?

We must not:

1. “interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided” by the FMLA.
  - “No, you can't take leave.”
  - “You can only take 1 week because we're short staffed and this is a busy time of year.”
  - “I'm going to need 27 doctors notes first.”

## What Actions are Prohibited?

We must not:

2. “discharge or in any other manner discriminate against any individual for opposing any practice made unlawful” by the FMLA.
  - “You aren't being considered for the promotion/raise because you took too much leave last year.”
  - “You're being demoted because you told us you needed/wanted protected leave, even though you never actually took it.”

## What Actions are Prohibited?

We must not:

3. “discharge or in any other manner discriminate against any individual” who files a charge of discrimination or gives testimony in an FMLA proceeding.
  - “The witnesses supporting the employee are all fired.”
  - “We received your charge of discrimination-- so you're fired.”

## The Consequences:

Employees, who become Plaintiffs, who successfully sue their employers for violation of their FMLA rights can recover:

1. Lost wages: The money they lost because of the violation plus interest
2. Reinstatement: The job or promotion lost because of the violation
3. Additional money as liquidated damages equal to the money lost and interest (doubles section 1) unless good faith is shown
4. Attorney's fees

29 USC § 2617

## Requirements on the Employee

The employee *must* make the employer aware of the need for leave, but:

- *On the first request for protected leave* they do not need to say “FMLA”
- There is a reasonable responsibility on the supervisor/HR personnel to connect the request to a potential FMLA circumstance
- *On a subsequent request or leave for the same reason* as a prior FMLA circumstance, the employee may be required to identify the leave as FMLA

## Timing of Employee's Request

### ▫ Foreseeable Leave, 29 CFR § 825.302

- An employee must request at least 30 days before the requested leave would begin
- If the employee does not do so, the employer may delay the leave so there is 30 days notice. 29 CFR §825.304
- \*\*Planned Leave: if the leave is for a reason in which timing is up to the patient, the employee must discuss the leave with the employer and attempt to schedule with the employers needs in mind. 29 CFR §825.302(e)

### ▫ Unforeseeable Leave, 29 CFR § 825.303

- An employee must give notice as soon as possible and practical

## Medical Certification

▫ Employer should request it when the employee makes the need for leave based on their own or a family members serious medical condition known, or within 5 days of notice and renewed no more often than every 30 days

- The certification must be complete and sufficient or the employer can require the certification be supplemented.
- Incomplete = some questions not answered
- Insufficient = language is “vague, ambiguous, or non-responsive”
- Content of certification is in 29 CFR § 825.306, or Form WH-380E and Form WH-380F
- An employee should be given 7 days to correct the certification unless not possible and practical with good faith efforts

▫ 29 CFR § 825.305

## Medical Certification

- An employer may request to contact the doctor or family member directly and an employee *may* allow it-- but the employee does not have to allow it, 29 CFR § 825.306(e)
  - If this is allowed, an HR professional or administrator should do so and NOT the direct supervisor. 29 CFR § 825.307

## Medical Certification

- If the certification is complete and sufficient, employer cannot request anything more.
  - But, if the employer doubts the certification, a second (or third) opinion may be required *at the employer's cost*
    - The second opinion may come from a medical professional of the *employer's choosing*
    - The third opinion, available only if the first and second disagree, must come from a medical professional agreed upon by both parties.
  - While waiting the second or third opinion, the employee is authorized for leave

## Fitness to Return to Work

- Employer may require certification, based on a “uniformly-applied policy or practice that requires all similarly-situated employees” to do so.
  - Initial notice of eligibility shall notify the employee whether this will be required.
  - Only allowed for serious health conditions
  - Allowed for intermittent leave but ONLY if there are reasonable safety concerns and limited to no more than once every 30 days.
  - Completeness and sufficiency rules are the same as for the initial medical certification.
    - But no second or third opinions allowed.

29 CFR § 825.312

## Substance Abuse

- Treatment for substance abuse may meet the elements of a serious health condition.
- For the employee or family member
  - An employer make not take action *because of* the leave for treatment.
  - BUT- if an employer has a previous, non-discriminatory policy, of which employees are made aware, regarding employees with substance abuse concerns, the policy may be applied to the employee.
  - Will invoke disability law with regard to former users, but current users are not protected

29 CFR § 825.119

## Pregnancy Leave

Pregnancy can invoke both the serious health condition and care of a child categories of protected leave:

- Conditions related to pregnancy can be serious health conditions invoking protected leave.
- These conditions can occur before or after the birth of the child and the leave is available to both parents.
- Protected leave for incapacity due to pregnancy does not require the employee receive medical treatment during the absence
- 

29 CFR § 825.120

## Parents Who Work for the Same Employer

If **both “spouses”** work for the same employer, the total leave FOR THE BIRTH OR PLACEMENT of a child may be capped at 12 weeks total for both parents.

- “Spouse” is defined as a married couple, including same-sex. Not the same as both “parents” of a child.
- May also be capped for the serious health condition of a parent of the employee.

It may NOT be capped for the care of a child with a serious health condition

29 CFR § 825.120

## FMLA isn't the only law applicable

Americans with Disabilities Act:

An employee requesting leave under FMLA for their own *or a family member's* serious health condition may also be considered, whether they are an eligible employee or not, may be a "qualified person with a disability" who needs must be reasonably accommodated.

## ADA Overlap

The ADA requires an employer to enter into an "interactive process" with a potentially disabled employee to determine whether accommodations may be reasonable.

Unpaid leave time, over and above 12 weeks, may be reasonable dependent on the circumstances.

\*employees of the State can't sue for money damages under the Federal ADA, but State civil rights laws cover the same incidents.

## State and Federal Civil Rights Acts

Title VII of the Federal Civil Rights Act prohibits discrimination in employment on the basis of gender-- including pregnancy.

Similarly, the Florida Civil Rights Act, since 2014, conclusively includes pregnancy under its gender discrimination prohibitions.

An employee, whether eligible for FMLA leave or not, may have a cause of action if they are, or believe they are, discriminated against on the basis of requesting maternity leave.

## Resources

Dept. of Labor website

Wage and Hour Division, FMLA:

<https://www.dol.gov/whd/regs/statutes/fmla.htm>

Employer Guide:

<https://www.dol.gov/whd/fmla/employerguide.pdf>

ECFR:

Code of Federal Regulations, 29 CFR § 825

[www.ecfr.gov](http://www.ecfr.gov)

*“What do I do if”...*

### Decision Making Continuum

*What's Probably a Good Practice*



□ What Makes a Legally Defensible Case



□ What's Minimally Required by Law

**Questions?**