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## Checklist

# Family and Medical Leave (FMLA)

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**Important Notice:**

*The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.*

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# I. Considerations

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## EMPLOYERS

- A private employer is covered under the FMLA if it is engaged in commerce or any industry or activity affecting commerce and employs 50 or more employees (count full, part-time, and employees on leaves of absence, with few exceptions) for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year at a single work site or 50 or more employees at multiple worksites within a 75-mile radius.
- A public employer is covered even if it has less than 50 employees and there should be a policy in the handbook to reflect this. Employees, however, are only eligible if there are 50 or more employees in a 75 mile radius
- Covered employers must have written FMLA policy indicating how 12-month leave period is measured (calendar year, fixed 12-month period, 12-month period rolling forward, or 12-month period rolling backward from date of leave).

## EMPLOYEES

- Employed by employers for at least 12 months, which do not have to be consecutive.
- Employees have been employed for at least 1,250 hours during the 12 month period immediately preceding the date leave commences.
- Military leave counts as time worked in determining employees' eligibility

## Reasons for Leave

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- Childbirth and to care for newborn
- Placement of newly adopted or foster child
- Care for spouse, child, or parent with serious health condition
- Employee's own serious health condition that prevents them from performing job duties
- Covered active duty (qualifying exigency) leave due to a spouse, child or parent being deployed to a foreign country as a member of the regular Armed Forces or as a member of the Armed Forces reserves or National Guard under a certain call or order to active duty (or has been notified of an impending call or order to covered active duty)
- Military caregiver leave to care for spouse, child, parent, or next of kin with serious injury or illness due to active duty service in Armed Forces

## Amount and Type of Leave

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- 12 workweeks in any 12-month period for all reasons, except 26 workweeks during single 12-month period for military caregiver leave
- Intermittent leave or reduced leave schedule
  - Shortest period of time payroll system uses; i.e. 15 minutes, hourly, etc.
- Consecutive or continuous leave
  - Days
  - Weeks
  - Months

## Request for Leave

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### NOTICE

- If foreseeable leave:
  - employees provide 30 days' advance notice before FMLA leave is to begin. Generally occurs when leave is foreseeable based on:
    - an expected birth,
    - placement for adoption or foster care,
    - or planned medical treatment for a serious health condition of the employee or family member (as provided for under the statute).
- If unforeseeable leave:
  - If leave is necessary and giving 30 days' notice is not practicable, employees notify employers as soon as practicable under the facts and circumstances of the particular case. Generally expected that employee will give notice to employer within no more than one or two working days of learning of the need for leave except for in extraordinary circumstances.
  - The employee's representative (i.e., spouse, family member, etc.) may give notice on behalf of the employee if employee is unable to do so personally.

### EMPLOYERS MAY:

- Designate leave as FMLA
- Employers can require employees to submit request form to confirm reason for leave
- Employers can require employees to submit medical certification to confirm employees' or family members' serious health condition

- Employers can require employees to submit active duty certification to confirm spouse, parent, or child is called up for or is on active duty in Armed Forces
- Employees return necessary forms within 15 days of receipt
- Employers notify employees within two business days after receipt of completed forms whether leave is designated as FMLA
- If employees do not return forms, forms are incomplete, or employers cannot determine FMLA leave entitlement, employers can delay start of leave

## SALARY AND BENEFITS DURING LEAVE

- Generally, FMLA leave is unpaid. Employees may substitute paid leave for FMLA leave. Employers can require employees to substitute accrued or earned paid leave for unpaid FMLA leave
- Vacation or personal leave: employees can elect or employers can require substitution of paid leave during FMLA leave
- Medical or sick leave: employees can elect substitution of such paid leave only if reason for FMLA leave also qualifies as permitted reason to take medical/sick leave under employers' uniform policy
- Employees taking unpaid FMLA leave remain entitled to paid leave benefits accrued or earned before FMLA leave began
- Employees do not have right to accrue additional leave benefits or seniority during unpaid FMLA leave, unless the employer's policy states otherwise
- Employers must maintain group health, life insurance, and other benefits at same level and on same terms as if employees were continuously working during FMLA leave
- Employers can require employees to continue to pay their group health premiums while on FMLA leave
- FMLA leave can run concurrently with short-term disability and workers' compensation
- No substitution of paid leave while employees are receiving short-term disability or workers' compensation benefits

## KEY EMPLOYEES

### CRITERIA FOR DESIGNATING KEY EMPLOYEES:

- Salaried employees eligible for FMLA leave
- Earnings in highest-paid 10 percent of employees working within 75 miles of employer's work site (includes both salaried and nonsalaried employees). Earnings include wages, premium pay, incentive pay, and nondiscretionary and discretionary bonuses.

- Employer can only deny to reinstate eligible employee after FMLA absence if restoration of that key employee will cause substantial and grievous economic injury to operations of employer.

#### CRITERIA FOR HANDLING FMLA LEAVE REQUEST FROM KEY EMPLOYEES:

- Key employees entitled to FMLA leave, but employers can deny reinstatement on completion of leave
- Key employees receive written notice explaining key employee designation, reasons for loss of reinstatement rights after FMLA leave, and impact on health benefits as soon possible after employers receive notice of FMLA leave. Can also provide notice at the time FMLA leave is requested by the key employee.
- Notice must be given in person or by certified mail
- Key employees whose FMLA leave have begun have reasonable time after receipt of notice to curtail leave and return to work
- Key employees who do not curtail leave retain same rights as other employees for duration of FMLA leave, including right to request reinstatement on completion of leave

#### LOSS OF EMPLOYMENT AND BENEFITS OCCURS ONLY WHEN:

- key employees notify employers of intent not to return from FMLA leave, or
- employers formally deny reinstatement due to threatened substantial grievous economic injury to employer after FMLA leave ends

## **Reinstatement Rights on Return from FMLA Leave**

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- Employees must be restored to same position employee held when leave commenced or position equivalent in:
  - salary, grade, benefits, and responsibilities
  - geographical area
  - work schedule
  - opportunities for advancement and compensation
- Benefits must be restored to level attained when leave began
- FMLA leave not counted in determining employees' eligibility for attendance rewards
- FMLA leave not counted as break in service for pension eligibility or vesting
- Employer may generally deny reinstatement to employee to former position if it can show that it would have discharged the employee had employee not been on FMLA leave. For example, employee has no right to reinstatement or to other benefits or conditions of

employment where an employee was hired for a specific term or project and that specific term or project has ended.

## Effect of Employees' Failure to Return From FMLA Leave

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- If employee does not return to work on or before the date that FMLA leave expires, employee's right to reinstatement ends.
- Employers can require employee reimbursement of premium payments made by employers during FMLA leave unless employees' failure to return to work is due to either:
  - Serious, recurring illness
  - Employers can require medical certification or recertification of serious health condition
  - Employees remain liable for premium reimbursement if no medical certification provided within 30 days or condition fails to qualify as serious health condition
  - Circumstances beyond employees' control
- Employee may still be entitled to ADA accommodation; consider carefully before discharge

## Posting

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- Employers must post legible copy of Department of Labor's fact sheet "Employee Rights Under the Family and Medical Leave Act" even if no employees are eligible for FMLA leave
  - Post in English and foreign language if significant number of workforce is non-English speaking
  - Post in prominent place at each worksite
- Civil penalties for willful violations of posting requirement

## Recordkeeping

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- Records maintained for three years
- Print copy, microfilm, photocopy, or other legible format and must be available for inspection and copying
- Medical certifications and other medical information relating to employees or family members maintained in confidential files kept separate from personnel records
- Records for employees on FMLA leave:

- Dates of FMLA leave
- Number of FMLA hours taken if less than one-day increments
- Copies of employees' leave requests and employers' responses
- Documents describing employees' benefits and employers' policies regarding paid and unpaid leave
- Premium payments of employee benefits
- Records of disputes regarding FMLA leave