

THE FAMILY AND MEDICAL LEAVE ACT

Introduction

The Family and Medical Leave Act, as amended, provides a means of balancing the demands of the workplace with the needs of families, and promoting the stability, integrity, and economic security of families in a manner that accommodates the legitimate interests of employers. The FMLA entitles "eligible" employees to take up to 12 workweeks of leave during a 12-month period for specified family and medical reasons.

Effective January 16, 2009, FMLA leave eligibility has been extended to include "Qualifying Exigency Leave," i.e., leave for employees to manage their affairs while a covered family member prepares for (or is on) active duty in the National Guard and Reserves. The FMLA now also provides for up to 26 workweeks of "Military Caregiver Leave," i.e., leave for employees during a single 12-month period to care for a covered military family member.

The FMLA maintains eligible employees' pre-existing group health insurance coverage during periods of FMLA leave and restores most eligible employees to their same or an equivalent position at the conclusion of their FMLA leave. The following is a brief summary of the major provisions of the federal law and its State application:

1. Eligibility

To be eligible for FMLA leave, employees must have one year of aggregate State service (employment time preceding breaks in service of seven years or greater is not counted toward aggregate service time), and have worked for at least 1250 hours during the prior 12 months. All State employment, for example, Merit and higher education, should be counted. One FMLA per 12-month period is allowed and the 12-month period eligibility is counted forward from the first date FMLA leave is taken.

2. Provisions

Eligible employees may take:

- a) Twelve-month employees - up to 12 workweeks FMLA leave for serious health conditions of themselves or specified family members. Ten-month employees – up to 60 work days FMLA leave for serious health conditions of themselves or specified family members. This includes "Qualifying Exigency Leave" for families of active duty National Guard and Reserve members to manage their affairs (the eligibility period for this type of leave begins on the first day of FMLA leave and runs for 12 months);
- b) Up to 26 workweeks Military Caregiver Leave to care for a qualified military family member (the eligibility period for this type of leave begins on the first day of Military Caregiver Leave and runs for a single 12-month period).

3. Reasons for Using FMLA

Leave shall be granted for any of the following reasons:

- a) To care for an employee's child after birth, or placement for adoption or foster care*; to care for an employee's spouse, son, daughter, or parent who has a serious health condition; or for a serious health condition that renders employees unable to perform their job. Under certain circumstances, FMLA leave may be taken on an intermittent basis, or employees may work a part-time schedule. Such accommodations shall be made only when medically necessary or when agencies agree to a reduced leave schedule.

***Employee FMLA leave entitlement for birth, adoption or placement for foster care expires one year following the date of birth, adoption or placement.**

- b) FMLA protection extends to eligible employees for "Military Caregiver Leave" to care for a parent, spouse, son, daughter, or as next of kin who is a covered military service member.
- c) FMLA protection extends to eligible employees for "Qualifying Exigency Leave" when a covered military family member is on active duty or called to active duty for the following "qualifying exigencies": (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities where the employer and employee agree to the leave.

4. Qualifying Conditions

Specific physical or mental conditions will determine what qualifies as a serious health condition. At least one of the following shall be satisfied: inpatient hospital care; absence from work or school for more than 3 consecutive calendar days that involves continuing treatment by a health care provider; continuing treatment for a chronic serious health condition; continuing treatment for a serious health condition that if not treated would result in incapacity for more than 3 days; and any period of incapacity for prenatal care. The 3-day requirement does not apply to pregnancy, chronic serious health conditions, or for multiple treatments.

Continuing treatment means treatment two or more visits to a health care provider. The two visits must occur within 30 days of the beginning of the period of incapacity, and the first visit must take place within seven days of the first day of incapacity. Continuing treatment may also mean one treatment resulting in a regimen of continuing treatment under the supervision of a health care provider, or continuing supervision but not necessarily being actively treated for a severe long-term or chronic condition. Continuing supervision for a severe long-term or chronic condition requires at least two visits to a health care provider per year.

Common maladies like colds, flu, earaches, headaches other than migraine, etc., are not considered to be serious health conditions. Plastic surgery after injury or removal of a cancerous growth would be considered a serious health condition. Cosmetic surgery is not considered a serious health condition unless in-patient hospital care is required.

5. Definitions

To determine who is covered under FMLA, the following definitions shall apply:

a) For Family Member's Serious Health Condition

"Spouse" means a husband or wife as defined or recognized under Delaware law for the purposes of marriage.

"Parent" means a biological parent adoptive, step or foster father or mother, or an individual who stands or stood "in loco parentis," meaning, "in place of parent," to the employee when the employee was a child. (This does not extend to a parent "in-law.") "Son" or "daughter" means a biological, adoptive, step, or foster child, a legal ward, or a child of a person standing "in loco parentis" under age 18 or age 18 or older and incapable of self-care because of a mental or physical disability.

b) For Military Caregiver Leave-For Family Member's Serious Health Condition

"Son" or "daughter" mean son or daughter on active duty or call to active duty status" as an employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or called to active duty status, and who is of any age.

c) For Exigency Leave for child care and school activities

"Son" or "daughter" means a biological, adoptive, step, or foster child, a legal ward, or a child of a person standing "in loco parentis" under age 18 or age 18 or older and incapable of self-care because of a mental or physical disability.

6. Application

Employees on FMLA shall use available accrued sick and/or accrued annual leave with the exception of one workweek of annual leave (12-month employees only) and one workweek of sick leave (10 & 12-month employees).

a) Employees may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave does run concurrently. If employees are offered a "light duty" assignment, they are permitted but not required to accept the position. FMLA leave taken on a part-time or intermittent basis is charged on a pro-rated basis.

b) Employees who exhaust their 26-week Military Caregiver Leave during the single 12-month period are not eligible for additional FMLA leave during that period for themselves or a family member. NOTE: Employees using annual or sick leave concurrently with FMLA leave must follow the same policy and procedural requirements that apply to other employees using such leave.

7. Notice and Medical Certification

Employees are required to provide advanced leave notice and certification whenever practical. Ordinarily, 30 days advance notice shall be given when leave is "foreseeable."

a) Medical certification to support a request for FMLA leave is required and the employer may also require second or third opinions (at the employer's expense) and a "fitness-for-duty" report to return to work.

b) Military Caregiver certification is required to support a request for leave to care for a covered family service member. Employers may not request second opinions.

c) Exigency Leave certification is required to support a request for leave for one of the seven qualified reasons for exigency or for other related reasons not specified by mutual agreement of the employee and employer. Employers may only request verification of military status once per active duty or call to active duty event.

Employees are responsible for providing the qualifying reason. Employers are required to send the employee a written Notice of Eligibility and Employee Rights and Responsibilities within 5 business days. Failure of the employee to provide completed certifications within 15 calendar days may result in the delay or denial of FMLA. Employers should avoid any retroactive designation of FMLA leave. Medical certification is valid for the time specified by the health care provider.

Re-certification may be required in all cases:

Every six months, in all cases of absence for a medical condition; If an extension of the leave is requested; If the circumstances in the last certification have changed; If information has been received casting doubt on the stated reason or continued validity.

8. Job Benefits and Protection

The FMLA maintains employee health care coverage for the duration of the leave period. Employees who fail to return to work after their FMLA leave entitlement has been exhausted shall be responsible for their State share under their existing "group health plan" unless they fail to return to work due to their own or eligible family member's serious health condition, or for some other reason beyond their control. Employees are responsible for re-payment of State and District contributions toward coverage for any unpaid leave. The premiums may be paid by the employee each month by submitting a check to the Employee Benefits Office or repayment of premiums will be collected from the employee's pay when they return to the payroll. Coverage will be reinstated upon an employee's return without waiting until the next open enrollment period. It is unlawful for an employer to interfere with, restrain, or deny the exercise of any right provided under FMLA. Additionally, an employer cannot discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for their involvement in any proceeding under or relating to FMLA. The U.S. Department of Labor is authorized to investigate and resolve complaints of FMLA violations and an eligible employee may bring a civil action against an employer for violations. FMLA does not affect any federal or state law prohibiting discrimination, or supersede any state or local law or collective bargaining agreement which provides greater family or medical leave rights.

SPECIAL RULES CONCERNING EMPLOYEES OF LOCAL EDUCATIONAL AGENCIES.

(a) APPLICATION.--

(1) **IN GENERAL.--**Except as otherwise provided in this section, the rights (including the rights under section 104, which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this title shall apply to--

(A) any "local educational agency" (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2891(12))) and an eligible employee of the agency; and

(B) any private elementary or secondary school and an eligible employee of the school.

(2) **DEFINITIONS.--**For purposes of the application described in paragraph (1):

(A) **ELIGIBLE EMPLOYEE.--**The term "eligible employee" means an eligible employee of an agency or school described in paragraph (1).

(B) **EMPLOYER.--**The term "employer" means an agency or school described in paragraph (1).

(b) **LEAVE DOES NOT VIOLATE CERTAIN OTHER FEDERAL LAWS.--** A local educational agency and a private elementary or secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this title.

(c) **INTERMITTENT LEAVE OR LEAVE ON A REDUCED SCHEDULE FOR INSTRUCTIONAL EMPLOYEES.--**

(1) **IN GENERAL.--**Subject to paragraph (2), in any case in which an eligible employee employed principally in an instructional capacity by any such educational agency or school requests leave under subparagraph (C) or (D) of section 102(a)(1) or under section 102(a)(3) that is foreseeable based on planned medical treatment and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either--

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that--

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) **APPLICATION.--**The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an eligible employee who complies with section 102(e)(2).

(d) **RULES APPLICABLE TO PERIODS NEAR THE CONCLUSION OF AN ACADEMIC TERM.--**The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any eligible employee employed principally in an instructional capacity by any such educational agency or school:

(1) **LEAVE MORE THAN 5 WEEKS PRIOR TO END OF TERM.--**If the eligible employee begins leave under section 102 more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if--

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) **LEAVE LESS THAN 5 WEEKS PRIOR TO END OF TERM.--**If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 102(a)(1) or under section 102(a)(3) during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if--

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) **LEAVE LESS THAN 3 WEEKS PRIOR TO END OF TERM.--**If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 102(a)(1) or under section 102(a)(3) during the period that commences 3 weeks prior to the end of the academic term and the duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) **RESTORATION TO EQUIVALENT EMPLOYMENT POSITION.--**For purposes of determinations under section 104(a)(1)(B) (relating to the restoration of an eligible employee to an equivalent position), in the case of a local educational agency or a private elementary or secondary school, such determination shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements.