

The Family and Medical Leave Act

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Twelve weeks of unpaid, job-protected leave during a single *twelve-month period* for a qualifying reason.

Eligible Employee:

- Must have at least 12 months of service
- Must have worked at least 1,250 hours during the last 12 months
- Must work at a worksite that has at least 50 (50) employees within a seventy-five (75) mile radius.

FMLA leave may only be granted for:

- birth/care of employee's newborn child
- placement of son or daughter with employee for adoption or foster care
- to care for an immediate family member (spouse, **child**, or **parent**) with a serious health condition;
or
- when the employee is unable to work because of his/her own serious health condition.

Serious health condition means

Inpatient care
(including recovery and subsequent treatment
after inpatient care)

Serious health condition means

A period of incapacity
necessitating absence from work
for more than 3 days
and
requiring treatment by health care provider
2 or more times

Serious health condition means

Includes chronic conditions such as asthma, diabetes, epilepsy that may cause episodic rather than continuing incapacity.

Serious Health Condition

Pregnancy even if no treatment and even if less than 3 days

8

How Does FMLA Leave Get Initiated?

- Request
- Employer Notification of Qualifying Condition

Notice Where Need for FMLA Leave is Foreseeable

- 30 days ahead where possible
- “As soon as practicable” where not possible
 - Not sure when leave will be necessary
 - Change of circumstance
 - Medical emergency

10

Need for Leave is Foreseeable

Planned medical treatment schedule

Employer and employee to work together to try to find mutually acceptable schedule

11

Notice When Need for Leave is Unforeseeable

“As soon as practicable”:

- Depends on circumstances
- “[I]t should be practicable for the employee to provide notice of the need for leave either the same day or the next business day.”

12

Notice When Need for Leave is Unforeseeable

“Calling in ‘sick’ without providing more information will not be considered sufficient notice to trigger an employer’s obligations.”

13

Notice When Need for Leave is Unforeseeable

**Normal policies apply
but employee is excused in emergency situation**

14

Employer Response #1

Notice of Eligibility and Rights and Responsibilities

- Respond orally w/in 5 business days
- Respond in writing by next payday.
 - Absences do not count against FMLA leave where the employer does not timely respond, although employee retains FMLA protections during those absences.

Medical Certification

Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division

WHD

OMB Control Number: 1215-0003
Expires: 2/28/2012

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

Check if job description is attached:

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization

(2) The approximate date on which the serious health condition commenced, and its probable duration;

22

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.

23

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability;

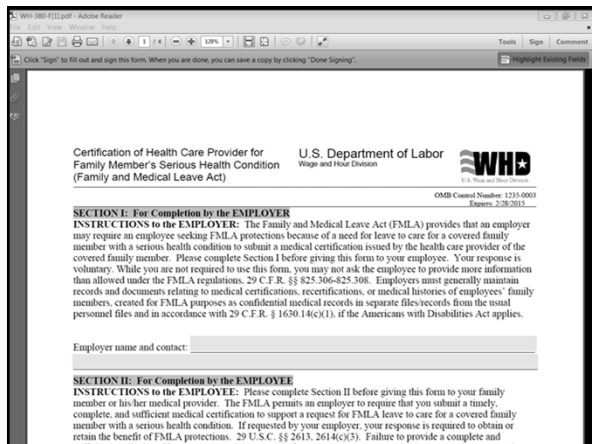
24

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

25

- Includes situations where the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor because of a serious health condition.
- Also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

26



Who is a Health Care Provider?

- Licensed M.Ds
- Licensed O.D.s
- Dentists
- Nurse practitioners
- Nurse midwives
- Clinical psychologists
- Clinical social workers
- Optometrists
- Podiatrists
- Chiropractors (for manipulation of demonstrated spine injuries)
- Christian Science practitioners

Second and Even Third Opinions

Certifications That Miss the Mark

- Remediating an insufficiency
- Authentication
- Clarification



What the "Employer" is Entitled to Know

- Info on health care provider
- Date condition began
- Probable duration
- Medical facts "sufficient to support the need for leave"
- Info sufficient to establish employee cannot perform essential duties of job; duration
- Info to establish necessity for intermittent or reduced schedule leave
- Other work restrictions; duration

CONFIDENTIALITY

Designation Notice (Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division



OMB Control Number: 1216-0001
FD-1020 (2/11)

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is complete or insufficient, the employer must give the employee that additional information necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WHD-1020 provides an easy method of providing employers with the written information required by 29 C.F.R. §§ 825.301(c), 825.301, and 825.309(c).

To: _____
Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on _____ and decided _____.

Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____.

Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

We are requiring you to substitute or use paid leave during your FMLA leave.

You will be required to present a fitness-for-duty certificate upon returned to employment. If such certification is not timely received, your return to work may be delayed until verification is provided. A list of the essential functions of your position is attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

All pertinent information is needed to determine if leave FMLA leave request can be approved.

Intermittent or Reduced Schedule Leave

- *Intermittent leave* is FMLA leave taken in separate blocks of time due to a single qualifying reason.
- *Reduced leave schedule* is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday.
- *Medical necessity.* The medical certification should address the medical necessity of intermittent leave or leave on a reduced leave schedule.

Examples of Intermittent or Reduced Schedule Leave

- Leave taken on an occasional basis for medical appts.
- Leave taken several days at a time spread over a period of six months, such as for chemotherapy.
- A pregnant employee may take intermittent leave for prenatal examinations or for conditions associated with pregnancy, such as morning sickness.
- An employee recovering from a serious health condition and not strong enough to work a full-time schedule.
- When leave is for the birth or adoption of a child, leave may only be taken intermittently or on a reduced leave schedule if the employer agrees.

Employer Call-in Notice Requirements

Transfer to Another Position

- Employees on intermittent leave or on a reduced leave schedule may be transferred **temporarily** to an different position that better accommodates recurring periods of leave than an employee's regular position.
- Equivalent pay and benefits.

Measuring Intermittent Leave Taken

1. Employer must use shortest period of time that it uses to account for other forms of leave, except that the period of time used to account for intermittent or reduced leave *cannot be greater than 1 hour increments.*
2. Employer may not require employee to take more time off than is necessary to accommodate the need for the intermittent or reduced-schedule leave.

Calculation of Leave Taken

Workweek is the basis of leave entitlement.

This means that employees with a 37.5 hour workweek will get fewer hours of FMLA leave than will an employee with a 40 hour workweek.

An employee with a 45 hour workweek will get an even greater number of hours of FMLA leave.

This is OK!

43

Calculation of Leave

- a) Employee who works five days a week begins FMLA leave on a Monday and returns three weeks later on a Thursday.
- b) A full-time employee who would otherwise work 40 hours per week (8 hours per day, five days a week) now works four-hour days (20 hours a week) under a reduced leave schedule.
- c) An employee who would otherwise work 30 hours per week works only 20 hours a week under a reduced leave schedule.

Fluctuating Schedules

If an employee's schedule varies from week to week, a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period would be used for calculating the employee's leave entitlement.

Return to Work: Fit for Duty?

**One
-- and only one --
opportunity
to request
fit-for-duty certification**

**Same rules as medical certifications except:
no second or third opinions**

“Job-Protected Leave”

An employee has right to return to:

- the same position

OR

- an equivalent position with the same pay, benefits and terms and conditions of employment.

Health Insurance

Employers must continue to pay their share of employee insurance premiums while employee is on FMLA leave.

When Does an Employer's Obligation End?

Termination during the period of FMLA leave

50

When Does an Employer's Obligation End?

When an employee informs employer of intent not to return from leave

51

When Does an Employer’s Obligation End?

When the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

52

Recovery of Health Insurance Premiums

- **No return to work or a return to work that lasts fewer than 30 calendar days.**
- **Employee who transfers directly from FMLA leave to retirement, or who retires during the first 30 days after returning to work, has “returned to work.”**

53

Exceptions

- **Serious health condition of employee or family member continues, recurs or another serious health condition develops which the employee would be entitled to take FMLA leave for.**
- **Circumstances beyond the employee’s control**

54

Examples

- a parent decides to stay home with a newborn child **who has a serious health condition**;
- An employee's spouse is unexpectedly **transferred** to a job location more than 75 miles from the employee's worksite;
- a relative or individual **other than a covered family member** has a serious health condition and the employee is needed to provide care;
- employee is laid off while on leave.

55

Two kinds of FMLA Claims

- Interference claims (also called entitlement claims)
- Retaliation claims (also called discrimination claims)

56

Retaliation Claims

“[A]n employer may not do bad things to an employee who has exercised or attempted to exercise any rights under the statute.”

Eleventh Circuit, 2000

57

Military Family Leave

Qualifying Exigency Leave

- Up to twelve weeks of leave
- For employees whose *spouse, child of any age or parent* is a military service member
 - Under a call or order to federal active duty, AND
 - Is about to be deployed to a foreign country
- For certain qualifying exigencies

Qualified Exigencies

1. Deployment of service member with 7 or fewer days notice;
2. Military ceremonies and events such as family-assistance or informational programs related to the family member's active duty or call to active duty;
3. Urgent, immediate childcare or arranging for alternative childcare for the children of service members;
4. Attending school or daycare meetings relating to the child of service member;
5. Making financial or legal arrangements related to a family member's active duty status or call to active duty; or
6. Post-deployment activities for a period of ninety days after the termination of the service member's active duty status.

**Certification of Qualifying Exigency Leave:
An Employer May Ask for**

- (a) a copy of active duty orders or other documentation issued by the military indicating that the military member is on or called to active duty in support of a contingency operation and the dates of active duty service, **and**
- (b) a certification from *the employee*

Same certification deadline of 15 days

**Use DOL Form 384: Certification of Need
for Qualifying Exigency Leave**

Military Caregiver Leave

Basic Concept:

FMLA-eligible employees may take up to 26 weeks of leave within a 12-month period to care for a family member who is a current member of the armed forces and who has been injured or become ill in the line of duty.

The Military Service Member Must:

- Have a serious injury or illness incurred in the line of duty on active duty that makes him/her medically unfit to perform the duties of his or her office, grade or rating

Compare to basic FMLA leave:

- “because of a serious health condition that makes the employee unable to perform the functions of the employee’s job”

The Military Service Member Must Also:

- Be undergoing medical treatment, recuperation or therapy;
- Be otherwise in outpatient status, or
- Be otherwise on the temporary disability retired list.

Which Family Members Can Take Military Caregiver Leave:

- a) Spouse
- b) Son or daughter includes foster and step- children, legal wards or any child for whom the service member stood in loco parentis
- c) Parent includes foster and step-parents and any other person who stood in loco parentis to the employee
- d) Next of kin.

Notice and Certification of Military Caregiver Leave

- Notice provisions are the same as for FMLA leave
- Certification: Employer may require certification from provider of military service member.
 - DOD providers
 - VA providers
 - TRICARE network
 - Non-network authorized private providers
- Timeframes the same as for FMLA leave

Notice and Certification of Military Caregiver Leave

- Certification: Employer may require certification from provider of military service member.

Amount of Military Caregiver Leave Allowed

- Limit of one-time per service member per injury
- Total of 26 workweeks of combined FMLA, qualifying exigency and military caregiver leave in any twelve-month in which an employee takes military caregiver leave
- The twelve-month period begins on the first day that an employee takes military caregiver leave and ends twelve-months later, regardless of method of calculating FMLA year.
