FMLA MASTER CLASS

COURSE MATERIALS

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Introduction to FMLA

FMLA overview and types of leave

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. There are four distinct types of FMLA leave available, depending on the size of the employer and worker service.

Basic FMLA leave is available under two separate provisions. When Congress first passed the law, it provided up to 12 weeks of unpaid leave for three specific situations.

- **Self-care.** Employees who suffer from a serious health condition may take up to 12 weeks of unpaid FMLA leave. This is the so-called self-care provision.
- **Birth or adoption.** Employees can take FMLA leave following the birth, adoption, or foster care placement of a child.
- **Care for a spouse or immediate family member.** Employees may take FMLA leave to care for a spouse, parent, child, or other immediate family member suffering from a serious health condition.

Congress later amended the FMLA to cover military servicemembers and their families. They are eligible for two additional types of leave.

- **Military deployment.** Employees may take up to 12 weeks of FMLA leave for qualifying exigencies when the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces. This includes providing childcare, attending military ceremonies, visiting with the servicemember during Rest and Recreation breaks, and taking care of legal matters related to the absence.
- **Military caregiver leave.** Employees can take up to 26 weeks of caregiver leave to care for a seriously injured or ill covered servicemember.

FMLA eligibility

First, one must determine if an employer is covered by the FMLA.

The FMLA only applies to employers that meet one of the following criteria.

- Private-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer;
- Public agency, including a local, state, or federal government agency, regardless of the number of employees it employs; or

- Public or private elementary or secondary school, regardless of the number of employees it employs.

If an employee works for a covered employer (as determined above), then the following criteria can be used to determine if that employee is eligible for FMLA leave.

An employee at a covered employer is eligible if the employee:

- Has worked for the employer for at least 12 months. Breaks in service are allowed as long as they are for less than seven years. Special rules apply for military service members returning from military service. Their absence is counted towards FMLA eligibility and does not constitute a break in service.
- Worked at least 1,250 hours for the employer within the last 12 months. Thus, some part-time workers are covered if their hours total 1,250 for the year. Again, special rules apply for military service members returning from military service. Their absence is counted towards FMLA eligibility to reach the 1,250 minimum service hours requirement.
- Works at a location where the employer has at least 50 employees within 75 miles.

Setting your FMLA calendar

Under the FMLA, eligible employees are entitled to up to 12 weeks of unpaid leave to deal with qualifying serious health conditions.

Employers can calculate the 12-week entitlement by choosing one of four methods.

1. **The calendar-year method** is the simplest. Eligible employees are entitled to 12 unpaid weeks during any calendar year. Eligibility resets Jan. 1. However, it also potentially allows an employee to take 24 weeks of continuous unpaid leave if the timing is right.
2. **The fixed 12-month year method** is based on any fixed 12-month “leave year” the employer chooses, such as the employer’s fiscal year or the employee’s anniversary date.
3. **The single 12-month period method** begins on the first day the employee takes leave and ends 12 months later.
4. **The rolling 12-month calendar method** measures backward from the date an employee first takes FMLA leave.

Not choosing a method can be risky. Employers that don’t choose must provide leave under the method most beneficial for the employee. That means you will have to calculate leave under all four methods. Special rules apply to the calendar method for calculating FMLA leave to care for a military member or veteran. In that case, regardless of the calendar method the employer chose for other FMLA leave, the employer must count forward 12 months from the date military caregiver leave begins.

FMLA notification requirements

Employees must comply with their employer's usual and customary requirements for requesting leave and provide enough information for their employer to reasonably determine whether the FMLA may apply to the leave request. Employees generally must request leave 30 days in advance when the need for leave is foreseeable. When the need for leave is foreseeable less than 30 days in advance or is unforeseeable, employees must provide notice as soon as possible and practicable under the circumstances.

When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. If an employee later requests additional leave for the same qualifying condition, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave.

All covered employers must display a general notice about the FMLA (an FMLA poster). Additionally, covered employers who have employees who are eligible for FMLA leave must:

- Provide employees with general notice about the FMLA;
- Notify employees concerning their eligibility status and rights and responsibilities under the FMLA; and
- Notify employees whether specific leave is designated as FMLA leave and the amount of time that will count against their FMLA leave entitlement.

General notice requirements

To meet the general notice requirements of the FMLA, covered employers must display a poster in plain view for all workers and applicants to see, notifying them of the FMLA provisions and providing information concerning how to file a complaint with the Wage and Hour Division. A covered employer must display this poster even if it has no eligible employees. An employer who willfully violates this posting requirement may be subject to a civil money penalty.

In addition to displaying a poster, a covered employer who has any eligible employees also must provide a general notice containing the same information that is in the poster in its employee handbook (or other written material about leave and benefits). If no handbook or written leave materials exist, the employer must distribute this general notice to new employees upon hire. Employers may meet this general notice requirement by either duplicating the general notice language found on the FMLA poster or by using another format so long as the information provided includes, at a minimum, all the information contained in the FMLA poster.

The poster may be posted electronically and the general notice may be distributed electronically provided all other requirements are met.

Eligibility and rights and responsibilities notice requirements

Employee eligibility is determined, and notice of eligibility status must be provided, the first time the employee takes leave for an FMLA-qualifying reason in the employer's designated 12-month leave year.

The eligibility notice may be either oral or in writing and must:

- Be provided within five business days of the initial request for leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason;
- Inform the employee of his or her eligibility status; and
- If the employee is determined to be ineligible for FMLA leave, state at least one reason why.

The eligibility notice is not required for FMLA absences for the same qualifying reason during the same leave year or for FMLA absences for a different qualifying reason where the employee's eligibility status has not changed. If the employee requests leave for a different qualifying reason in the same leave year and the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days.

Each time employers are required to provide the eligibility notice, they must also provide employees with a rights and responsibilities notice, notifying employees of their obligations concerning the use of FMLA leave and the consequences of failing to meet those obligations.

The rights and responsibilities notice must be in writing and must include, as applicable:

- Notice that the leave may be counted as FMLA leave;
- The employer's designated 12-month period for counting FMLA leave entitlement;
- Any requirement for the employee to furnish a certification and the consequences for failing to do so;
- Information regarding the employee's right or the employer's requirement for substitution of paid leave and conditions relating to any substitution, and the employee's right to take unpaid FMLA leave if the conditions for paid leave are not met;
- Instructions for making arrangements for any premium payments for maintenance of health benefits that the employee must make during leave (and potential employee liability if the employee fails to return to work after FMLA leave);
- Notice of designation as "key" employee and what that could mean; and
- The employee's right to job restoration and maintenance of benefits.

The rights and responsibilities notice may be distributed electronically provided all other requirements are met. Employers must be responsive to questions from employees concerning their FMLA leave.

Designation notice requirements

The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation to the employee.

This notice must:

- Be provided in writing within five business days of having enough information to determine whether the leave is FMLA-qualifying;
- Be provided for each FMLA-qualifying reason per applicable 12-month period (additional notice is required for any changes in the designation information);
- Include the employer's designation determination, and any substitution of paid leave and/or fitness for duty requirements; and
- Provide the amount of leave that is designated and counted against the employee's FMLA entitlement, if known. If the amount of leave is not known at the time of the designation, the employer must provide this information to the employee upon request, but no more often than once in a 30-day period and only if leave was taken in that period.

If the requested leave is not FMLA-qualifying, the notice may be a simple written statement that the leave does not qualify and will not be designated as FMLA leave.

If an employer is unable to determine whether a leave request should be designated as FMLA-protected because a submitted certification is incomplete or insufficient, the employer is required to state in writing what additional information is needed. The employer may use the designation notice to inform the employee that the certification is incomplete or insufficient and identify what information is needed to make the certification complete and sufficient.

All notices

Employers also may be required to provide notices in languages other than English where a significant portion of the employer's workforce is not literate in English.

Employers are also required to comply with all applicable requirements under federal or state law for notices provided to sensory-impaired individuals.

Consequences of failure to provide notice

Failure to follow the notice requirements may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

The essential guide to FMLA certification

Understanding and properly using the FMLA medical certification process is essential to controlling FMLA leave abuse. With the exception of time off to welcome a newborn, adopted, or foster child to the family, you can and should request that employees complete an FMLA medical certification for leave. For bonding leave, you can, however, request confirmation of the relationship to the child. Requiring employees to back up their requests helps cut down on possible leave abuse since workers know they have to get the certification form filled out and returned.

Plus, employers need to understand that there are different FMLA guidelines for different leave needs. For example, FMLA certification forms differ for taking time off for personal illness, caring for a family member, and taking military exigency leave. What you should ask for depends on the reason for leave. Fortunately, the Department of Labor (DOL) recently updated FMLA certification forms to make it easier to choose the right form and to provide more information about how medical providers should complete the forms. Here's how to get the balance right so your workforce remains productive, well, and happy, and you don't end up in court.

When you have doubts about FMLA eligibility

Given how many forms of FMLA leave are available, it's sometimes hard to decide whether you have the right information. That's especially true when leave is for self-care or to care for a family member. That's why it's essential to get a certification from a health care provider that confirms a serious health condition exists.

DOL has standard FMLA certification forms for both circumstances. They're available from DOL here. The care for a family member form includes questions for the employee. For example, it asks her to identify the person she will care for and the nature of the relationship. This helps you decide whether the employee is eligible for FMLA leave. It also asks what your employee will be doing to help. At the very least, these questions force employees to think through their plan. They'll know their employer is scrutinizing the leave request.

Both forms require that a health care provider assess medical needs. The self-care FMLA certification also includes questions about whether the employee can perform the essential functions of the job. Include a current job description with the form for the doctor's use.

Having FMLA guidelines that show you want to approve legitimate requests but won't tolerate leave abuse discourages that abuse. Sometimes you may doubt the accuracy or authenticity of the FMLA certification form the employee returns. In that case, you have several options. The first is to cast doubt aside and approve the leave. The second is to contact the medical office that filled out the FMLA form and ask them to verify its accuracy. This can catch fraudulent submissions or alterations. Send them a copy of the form and simply ask whether they filled it out. You may not request additional medical information. You must make sure that the request comes from an HR professional, leave administrator, or health care provider. The request cannot come from the employee's supervisor.

The third option is to request a second and third FMLA certification. If you take this route, you locate a health care provider you do not routinely use and have them complete a new FMLA certification. The cost is yours. If the first and second certifications don't conflict, you must accept the result and grant leave. However, if they conflict, you can arrange for (and pay for) a third, final tie-breaking FMLA certification.

Special rules for FMLA and military leave

The FMLA military leave provisions were added in 2008 – partly in response to the wars in Afghanistan and Iraq. Long and repeated foreign deployments can create problems for those left behind. Injuries sustained while serving can mean your employees are called on to help during the recovery process. Congress felt one way to ease their burden was to extend protected but unpaid FMLA leave.

FMLA certification for military leave depends on what type the employee needs. The first kind, military exigency leave, is available for up to 12 unpaid weeks. It applies to employees with a spouse, son, daughter, or parent in the Armed Forces serving a foreign deployment. The second kind is available for employees to care for a servicemember with a serious injury or illness. It provides up to 26 weeks off for a service member's spouse, daughter, son, parent, or next of kin to render care. It also includes leave when the servicemember is a veteran – which can happen when injury cuts short service.

Here's how to handle FMLA certifications for military leave.

Military exigency leave
You may verify that your employee's servicemember is on active duty or has been called up for foreign service. You may also ask about the exigent needs. Your employee may take leave for exigencies like:

- Making alternative childcare arrangements for a child of the deployer servicemember;
- Attending military ceremonies and briefings;
- Making financial or legal arrangements to address the servicemember's absence;
- Attending counseling; and
- Taking up to 15 calendar days of leave during the servicemember's Rest and Recuperation (R&R) leave during deployment.

Military caregiver leave
Your employee may care for an injured or sick service member or veteran for up to 26 weeks. The serious injury or illness must have happened in the line of duty on active duty. It must have caused the servicemember to be medically unfit to perform his or her military duties. It includes pre-existing injuries or illnesses if they were aggravated in the line of duty. However, the injury or illness does not have to qualify the servicemember for VA benefits, nor can you require a VA service-related finding.

Employers can request an FMLA certification from either a military or civilian health care provider. But you must also accept a copy of a military Invitational Travel Order issued to your employee. These are essentially documents authorizing a family member's travel to the injured servicemember. For example, your employee may have a travel order to go overseas where his wife (the servicemember) lies injured.

You are allowed to verify basic information, including asking for copies of military orders. You can also ask how your employee will care for the servicemember like you did for other family members' care. DOL has also created an FMLA certification form for each type of military leave. You can find them here, here, and here.

Some unusual situations and questions

What happens when FMLA leave is exhausted before the baby is born?

Question: An employee is expecting a baby, but has had some complications and has been put on bed rest. She is currently on FMLA leave. By the time the baby is born, she will have already used 10 weeks of FMLA. Does the birth start a new FMLA leave cycle or is it a 12-week max within a year regardless of reason(s)?

Answer: The Family and Medical Leave Act provides up to 12 weeks of job-protected leave in a 12-month period. Thus, the employee would have two more weeks of leave available. In addition, depending on which benefit year method her employer selected, she could be immediately eligible for more time off at the beginning of a new calendar year. Some jurisdictions offer additional leave through state or local legislation, with or without rights to reinstatement at the end of the leave. Your policies also may be more generous.

For example, your employee may be eligible for short-term disability benefits for some weeks after the baby is born. You would follow your plan's rules. You may want to invite the employee to speak with you about her plans and the options available to her if her condition permits.

In addition, as of 2023, the Pregnant Workers Fairness Act (PWFA) provides reasonable accommodations for pregnancy-related conditions. The EEOC, which administers the PWFA, takes the position that time off to recover from childbirth — among other pregnancy related matters — is a reasonable accommodation under the new law. Thus, running out of FMLA leave does not automatically mean the employee isn't entitled to more unpaid time off to recover. However, the PWFA is silent on whether health benefits must be maintained for extended leave.

FMLA leave for domestic violence

> **Question:** I have an employee who is having domestic violence issues. Can she take FMLA leave for reasons related to domestic violence issues and for various problems like counseling and insomnia? Is she eligible?
>
> **Answer:** FMLA leave may be available to address certain health-related issues resulting from domestic violence. An eligible employee may take FMLA leave because of his or her own serious health condition or to care for a qualifying family member with a serious health condition that resulted from domestic violence. For example, an eligible employee may be able to take FMLA leave if he or she is hospitalized overnight or is receiving certain treatment for post-traumatic stress disorder that resulted from domestic violence. In addition, mental or physical conditions accompanying recovery from domestic violence may be disabilities under the ADA, requiring reasonable accommodations including time off for counseling and treatment.

FMLA leave for organ donation

> **Question:** I have an employee who volunteered to donate an organ to a stranger. He wants FMLA leave. Is he eligible?
>
> **Answer:** Yes, an organ donation can qualify as a serious health condition under the FMLA when it involves either inpatient care or continuing treatment as defined in the regulations. Organ-donation surgery commonly requires overnight hospitalization and that alone suffices for the surgery and the post-surgery recovery to qualify as a serious health condition. While it may seem that donating an organ is a voluntary act, that does not preclude FMLA time off.

Intermittent Leave

How intermittent leave works

Intermittent FMLA leave explained

Private-sector employers with 50 or more workers and all public employers must provide eligible workers with FMLA leave. FMLA leave, including intermittent leave, may be paid or unpaid depending on the employer's existing paid leave policies. Employees with 12 months of service who have worked at least 1,250 hours over the past 12 months are eligible. Thus, even part-time employees (averaging about 24 hours per week) can take FMLA leave, including intermittent leave.

Eligible employees may take up to 12 weeks of FMLA leave:

- For the birth, adoption, or foster care placement of the employee's child.
- To care for a spouse, child, or parent who has a serious health condition.
- For the employee's serious health condition if he or she is unable to perform the essential functions of his or her job.
- When a spouse, child (of any age), or parent is a military member on or called to active duty and the employee needs time to arrange child care, attend military ceremonies, spend time with military members on leave, or attend to legal or financial matters. Up to 26 weeks is available if the military member is seriously injured or ill.

Employees usually take FMLA leave in a solid block of time. However, employees can also take FMLA intermittent leave for a single qualifying reason by either working a reduced schedule or calling off as needed. Intermittent FMLA leave is available for the employee's own medical condition or to care for a spouse, child, or parent for a single qualifying reason. Employers may, but are not required to, provide intermittent leave for a qualifying birth, adoption, or foster care placement. For example, an employer may approve a part-time work return for a new parent and allow unpaid FMLA leave for hours not worked, but does not have to.

Intermittent FMLA leave is one of the most difficult to manage. That's especially true when the employee is approved for intermittent leave for a condition that flares up both regularly and unpredictably. Often, medical certifications for intermittent leave will include an estimate on the number of times during a typical week or month the worker will need off. That places a burden on supervisors to plan for absences they know are coming but don't know when will happen. Intermittent leave also is the most likely to be abused.

Remind the employee that he's subject to any call-off rules already in place. You can and should discipline employees who don't call off as required even if they're on FMLA intermittent leave.

Common reasons for intermittent leave

Recurring health issues

While some employees may need to take large chunks of time to address a health issue, others may need to take a little time off here and there. For example, an employee undergoing chemotherapy might need to take a day or two of time off each week. Many health conditions like this may require reduced hours and sporadic days off. In addition, some health conditions may leave employees unexpectedly unable to work on a day, requiring them to call in. This can also qualify for intermittent leave, assuming the condition already received intermittent leave approval.

Caring for someone with a recurring health issue

Similar to the situations described above, if a family member or another individual an employee needs to care for is going through a similar issue, they may need to take time off to bring that individual to doctor's appointments or treatments, or care for them at home.

Prenatal care

Prenatal care can be a qualifying reason for intermittent FMLA leave. Expecting mothers need to attend appointments, could feel unwell at times, and may be given restrictions by their doctors on what kind of work they can do. This is especially true if there are any complications.

Birth of a child

After childbirth, both parents may be permitted to take intermittent leave to care for and bond with the child. But they are only entitled to take 12 weeks of unpaid leave as one block of time. If both parents work for the same employer, they are limited to a total of 12 weeks of leave for bonding. An employer is not required to allow intermittent leave in this situation, but they may choose to do so. An employee's entitlement to FMLA leave for birth and bonding expires 12 months after the date of birth, foster placement or adoption.

Adoption or foster care

FMLA leave may be taken before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be entitled to FMLA leave to attend counseling sessions, appear in court, consult with his or her attorney or the birth parent's representative, submit to a physical examination, or travel to another country to complete an adoption before the actual date of placement. Think of this time as equivalent to the time off an expectant mother would take before giving birth, for doctor's appointments and the like. An employer is not required to allow intermittent leave after the child is adopted or placed, but they may choose to do so. An employee's entitlement to FMLA leave for the placement of a child for adoption or foster care expires 12 months after the placement.

Additional examples of intermittent leave

Depression

Together, intermittent FMLA leave and ADA protections help workers suffering from depression obtain and maintain employment.

Make sure the employee obtains an intermittent FMLA leave certification from his health care provider. Since depression may also be an ADA-covered disability, find out if the employee is requesting reasonable accommodations. A health care provider may suggest practical accommodations eliminating intermittent leave absences. For example, the employee might be

able to work from home if a depressive episode is interfering with concentration. If insomnia is a symptom, a reasonable accommodation of a later start may eliminate an all-day absence.

Finally, remind the employee that he's subject to any call-off rules already in place. You can and should discipline employees who don't call off as required even if they're on FMLA intermittent leave.

Migraines

In most cases, migraine headaches meet the FMLA's definition of a chronic serious health condition. These conditions must continue over an extended period of time and may cause episodic periods of incapacity. Migraines are more severe than regular tension headaches, often affecting sight. Sufferers may also experience nausea and vomiting, which can limit the ability to start or finish a scheduled shift. The employer should require employees to provide certification from their health care provider. The certification should specifically diagnose the condition. To qualify as a chronic condition, the employee must see a health care provider at least twice a year.

Addictions

Drug and alcohol addictions are serious health conditions as well as disabilities under the ADA. Treatment often includes periodic hospitalization for complications or relapses, as well as regular counseling sessions and medication checks. These addiction-related absences would qualify for intermittent leave. However, employers do not have to tolerate the use of controlled substances or alcohol use during work hours.

Managing sporadic intermittent leave

Intermittent FMLA leave is leave in separate blocks for the same condition. Employees who want a reduced schedule or intermittent leave when a single, qualifying medical condition flares up must request it. As the employer, you can insist the employee's health care provider certify the need for intermittent leave. He or she then estimates how often and for what block of time the employee will be absent. For example, an employee undergoing chemotherapy may need three blocks of half-day intermittent FMLA leave per week for six weeks.

You can insist that an employee on intermittent FMLA leave requiring regular medical treatments work with you to schedule them. The employee must schedule those treatments to minimize disrupting the employer's operations. You can even transfer the employee to another job if that helps manage absences better. Just make sure the temporary assignment pays the same and provides the same benefits.

Allowable time increments

Eligible employees may take FMLA leave in increments as small as the employer's payroll system will capture, provided the minimum increment is not greater than one hour.

Moreover, an employer may not use an increment greater than the shortest period of time used for other forms of leave. For example, if you account for sick leave in 30-minute increments, but vacation in one-hour increments, you must count FMLA leave in, at a maximum, 30-minute increments.

You should also note that when employees take intermittent leave or leave for fractions of a day or week, you must convert weeks into hours of leave based on the number of hours the employee usually works in any week. For example, an employee who regularly works a five-day work week and eight hours per day is entitled to 480 hours of leave — that is 12 weeks times 40 hours per week. A worker who works a four-day week and eight hours per day is entitled to just 384 hours of leave — that is, 12 weeks times 32 hours per week. A worker who normally works 20 hours of overtime plus a 40 hour workweek would be entitled to 12 weeks times 60 hours or 720 hours of leave.

Carefully track leave

Tracking is a key component of managing intermittent leave. Employers may count leave in the smallest unit that their time-tracking system allows for non-exempt, hourly employees.

For exempt employees, leave can be taken in increments as small as one-half days. FMLA regulations allow employers to reduce pay for unpaid leave without destroying an employee's exemption under the Fair Labor Standards Act.

Whatever time measurement is used, it's still a fractional portion of a day. Employers are responsible for keeping track of the total amount of leave used. Inform employees of the amount of leave they have available at the start of each leave period.

Staying on top of the intermittent certification process

Managing FMLA intermittent leave can be vexing, but employers do have some tools available One of the most important is FMLA certification.

As with FMLA leave taken in one block, employees who request FMLA intermittent leave must give you notice — at least 30 days in advance when the need is foreseeable. When it's not, they must notify you "as soon as practicable."

Certify and schedule the leave

Don't accept intermittent leave requests at face value. The FMLA allows you to demand certification from a doctor that an employee needs FMLA leave. You can request a new medical certification from the employee at the start of each FMLA year. You're also entitled to ask for a second or third opinion (at your expense) before granting FMLA leave.

When employees have chronic conditions and certifications that call for intermittent leave, attempt to work out leave schedules as far in advance as possible. It's legal to try to schedule FMLA-related absences, but you can't deny them.

When a worker requests intermittent leave or a reduced schedule for foreseeable medical treatment, you can require the employee to try to schedule the treatment so that it's least disruptive to your business, such as making appointments after work. But you can only ask the employee to go so far. While the ADA does give you some leeway by not requiring you to provide an accommodation if it creates an "undue hardship" on your business, there's no such standard for FMLA leave. Simply put, FMLA leave for those who qualify is an entitlement. You can't refuse FMLA leave when workers are entitled to it or force them to return early from an injury for light-duty work.

Immediately nail down the expected frequency and duration of FMLA intermittent leave. Request a medical provider's estimate of how often the employee will need time off. You also can wait until the provider gives you that estimate to approve intermittent leave.

Four tips on certifying FMLA intermittent leave requests

1. **Ask about the specific condition.** Medical certification must relate only to the serious health condition that is causing the leave. Don't ask about the employee's general health or other conditions.
2. **Allow time to respond.** After you request FMLA certification, give employees at least 15 calendar days to submit the paperwork. If the employee's medical certification is incomplete or insufficient, specify in writing what information is lacking. Allow seven days to address it.
3. **Investigate the certification** if you doubt the need for leave. Under the updated FMLA regulations, you can directly contact the employee's physician to clarify the medical certification. An employee's direct supervisor cannot make this call. It must be done by an HR professional, a leave administrator (including third-party administrators), or a management official.
4. **Require (and pay for) a second opinion** if you're still not convinced. Use an independent doctor who you select, not a doctor who works for your organization. If the two opinions conflict, you can pay for a third and final, binding medical opinion.

You may also seek recertification

What happens if employees use their initial FMLA certification to take intermittent leave in a noticeable pattern of Friday and Monday absences? You can seek recertification to verify the person's continuing need for time off.

The law says you can request recertification "on a reasonable basis." If the certification form doesn't specify a time limit, you can typically request recertification no more than once every 30 days.

If you receive information that makes you suspect FMLA leave abuse, you can ask for recertification more frequently. Fortunately, a recent DOL opinion letter says that a pattern of Friday/Monday absences counts as information that casts doubt on an employee's stated need for FMLA leave. That means you can seek recertification more frequently than every 30 days, as long as the request is made in connection with an absence.

Consider using a calendar to manage FMLA intermittent leave

Employees who take FMLA intermittent leave can wreak havoc with work schedules because their conditions can flare up at any time. But there are legal ways to curtail intermittent leave. One of the easiest is to use the calendar-year method to set FMLA leave eligibility.

Sometime during the calendar year, an employee submits documentation showing she will need FMLA intermittent leave for a chronic condition. If she is eligible for leave at that time, she can take up to 12 weeks of intermittent leave until the end of the calendar year. Then the process starts again.

If, on Jan. 1, she hasn't worked 1,250 hours in the preceding 12 months, she's no longer eligible — and won't be eligible again until she hits 1,250 hours.

When intermittent leave is and isn't a right

Employees are not always entitled to take intermittent FMLA leave. While some of these examples were discussed above, this section specifically outlines when employees have a right to take intermittent leave, and when it can only be taken under employer discretion.

Employees can always take intermittent leave in the following circumstances:

- The employee has a serious health condition that makes the employee unable to perform the functions of his or her job. Updates to the FMLA note that a serious health condition under the FMLA involves at least three full, consecutive days of disability and at least two visits to the health care provider.
- To care for a spouse, son, daughter, or parent who has a serious health condition.
- When a pregnant woman requires time for prenatal care or other related medical needs.
- Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty.

In the following circumstances, intermittent leave can be taken with employer discretion:

- Leave for either parent after the birth of a child. Typically, this must be taken in one block; however, an employer may choose to permit intermittent leave.
- The placement with the employee of a child for adoption or foster care. Typically, this must be taken in one block; however, an employer may choose to permit intermittent leave.

COVID "long haulers" and intermittent leave

During the COVID-19 national emergency, millions have contracted the virus. Some have died and others have become seriously ill while others had few or no symptoms and seemed to recover easily. However, as the pandemic drags on, there are emerging reports that even those who had few or no symptoms may be experiencing long-term effects. And those who were hospitalized seem to recover very slowly, with potentially disabling complications.

In fact, a new study of about 1,700 patients shows 76% suffered at least one symptom months after they were discharged from the hospital. Other reports indicate that some survivors have heart and lung damage. Still others suffer from depression, anxiety, memory problems, fatigue, and other potentially long-lasting consequences. As yet, we don't have any estimate on how many patients will suffer permanent disabilities, but there surely will be many. We also know that many patients are reporting that their symptoms persist and happen sporadically.

That means it's very likely employers are facing more requests for FMLA leave, including intermittent leave, associated with past COVID-19 infection. Employers should review their leave policies and make sure that each request is properly handled.

Managing Accommodations and Abuse

Supporting employees who need additional leave

Employees who have used all of their FMLA leave may request additional leave if their situation has not fully resolved by the end of the FMLA period. Your legal liability to provide it may vary. Generally speaking, employees who have used all their FMLA leave and are not yet eligible for another round do not have the right to more leave under the FMLA. If you do provide more time off, they're not guaranteed to return to the same or a similar position, either. However, if an employee is in good standing and a valuable asset, it may be in your best interest to work with them on accommodations. As you will see below, he or she may be entitled to more time off under the ADA under the right circumstances.

Assuming they adhere to any company policies or state/local leave law, employers may choose to simply work with employees. Below are a few examples of ways to do so:

- Allowing employees to take additional paid or unpaid time off as needed.
- Letting employees work flexible schedules to make up hours in the evening and on weekends.
- Adjusting an employee's job responsibilities and/or hours on a semi-permanent basis.
- When job duties permit, allowing an employee to work remotely as needed.

While an employer may choose to work with an employee to make accommodations, in some situations it may also be required.

Running out of FMLA leave isn't the end of the time-off road

Employers must remember that an employee's exhaustion of his or her FMLA entitlement is not necessarily the end of the family and medical leave road for that worker. Employers may have to offer additional leave, pursuant to the ADA.

Consider the following scenario. An employee is out of work on approved FMLA leave for a properly-certified "serious health condition." Since taking leave, the employee's condition has not improved, even though she has remained out of work for a substantial period of time.

The employee repeatedly submits notes from her doctor, certifying that she is totally unable to work. The notes repeatedly extend the date when she can be expected to return to work.

The employee eventually exhausts all of her available FMLA leave and she has no other leave benefits she can draw against. She still cannot yet return to work.

What to do now?

At some point, the ADA may kick in

First and foremost, remember that your compliance obligations as an employer may not end there.

The ADA may require the employer in this scenario to engage in an interactive process with the employee regarding her health condition and how that condition may affect her performance of her essential job functions with the aim to come up with a reasonable accommodation. That is, if her condition qualifies as a disability under the ADA. Some, but not all, serious health conditions qualifying her for FMLA leave may also qualify her for reasonable ADA accommodations.

Depending on what information was contained in the prior FMLA medical certification, it may also be necessary for the employer to request additional documentation regarding the employee's impairment and her corresponding work limitations. That is, you will want to determine if the serious health condition is a disability, too. In turn, the ADA may require the employer to provide a reasonable accommodation to the worker.

And employers must also remember that an additional period of unpaid recuperative leave may constitute such a reasonable accommodation!

The intersection of ADA reasonable accommodations and FMLA leave

Courts have concluded that additional time off can be a reasonable ADA accommodation.

The problem is determining how much more leave a disabled employee may be entitled to. Is one week enough? A month? A year? Obviously, at some point the additional time becomes unreasonable.

One court-approved measure is that a doctor can estimate when the employee will be able to return to work. Indefinite leave is unreasonable. A specific period of recommended leave may be reasonable.

Extra leave after FMLA? How to handle requests for more time off

Here's how to handle extra time-off requests when an employee has been out on FMLA leave.

- If you are an FMLA-covered employer (with 50 or more employees), grant any remaining FMLA leave for the year.
- Request a return-to-work certification showing the employee is able to perform the job's essential functions. If she can't, consider whether her condition might be an ADA disability. That is, does the condition substantially impair a major life function such as eating, walking, or breathing? If so, more time off may be a reasonable accommodation. Other options include a reduced schedule or increased breaks.
- If a doctor recommends more time off, be sure that recommendation spells out the anticipated length. If it's indefinite, you can reject the request. If it's specific, decide whether it would be reasonable under the circumstances. Do you have the staff and flexibility to provide the leave?

What the ADA requires

Employers that fail to look beyond FMLA requirements can easily run afoul of the ADA, even if an employee doesn't qualify for FMLA leave. For example, an employee who has only been on the job for a few months won't qualify for FMLA, but employers should consider their ADA rights. These include an exploration of possible reasonable accommodations. Employers should never immediately terminate a worker who has not yet earned time off without first considering whether the worker is disabled and, if so, engaging in the interactive accommodation process.

The ADA reasonable accommodation process requires an interactive dialog between the employer and employee, discussing the employee's condition, needs, and limits the employer deems reasonable. Employers can ask for medical certification of the employee's need for leave, but must make the request in good faith.

If their condition is a disability under the ADA and more time off or a flexible arrangement such as working from home is feasible, it may be considered a required reasonable accommodation.

If an employee asks for more time off or to work from home, handle the request just like you would another disabled employee's reasonable accommodation request. Verify the disability and discuss possible accommodations before you reject the request.

The best approach is to determine whether the request is for a specific time period, or for indefinite leave. If doctors can't give a concrete return date, chances are a court will find the ADA doesn't require granting the request.

If the request includes a specific return date, however, you should consider the request. The shorter the requested leave, the more likely it will be considered a reasonable accommodation.

Remember that the ADA also requires employers to engage in an interactive accommodation process. That applies to unpaid leave, too. Try offering alternatives such as part-time work or working from home to show your good-faith efforts.

In addition, the PWFA may require you to grant time off for a long list of pregnancy related conditions, complications and limitations. These include time off for fertility treatments, prenatal care, birth and recovery, abortion, stillbirth and miscarriage and post-pregnancy conditions like postpartum depression. There's no minimum length of service or hours worked requirement for the PWFA reasonable accommodations provisions to kick in, either. Employers with far fewer employees are covered - you are a covered employer if you have 15 or more workers.

When mental health challenges require FMLA leave

Employees dealing with mental health challenges in the workplace or elsewhere may be suffering from an FMLA serious health condition. Eligible employees can take up to 12 weeks of unpaid leave for treatment or when the condition flares up. FMLA leave is also available intermittently. For example, a depressed employee may periodically request later arrival when his symptoms are most severe.

Make sure the employee understands he must get a certification from his medical provider explaining the need for intermittent leave. The doctor should estimate how often intermittent leave will be necessary and for how long. If you have call-off rules, explain that these need to be followed. Have him call in as he would for any other absence, but report that the late arrival or absence is intermittent FMLA leave.

Under the FMLA, an employee is entitled to 12 weeks of unpaid leave to care for his or her "serious health condition." The regulations interpreting the FMLA list several different circumstances under which a physical or *mental* condition may be covered by the statute.

One such circumstance is continuing treatment by a health care provider for a period of incapacity of more than three consecutive calendar days that also involves "treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment

under the supervision of the health care provider." The regulations provide that an incapacity includes an inability to "perform any of the essential functions of the employee's position."

Thus, your employee may be eligible for FMLA leave if he is unable to perform the essential functions of his job and is receiving treatment from a psychiatrist who has placed him on drug therapy treatment.

If your employee states that she may require inpatient care for her psychiatric condition, she may also be entitled to FMLA leave for that period.

As with other requests for FMLA leave, you should require a medical certification from a health care provider verifying that she is suffering from a serious health condition.

Does stress qualify as a condition that requires leave?

As a general matter, under the FMLA, employees who claim leave based on their own medical condition, such as "stress," must show the leave is needed because the employee has a serious health condition that renders her unable to perform the functions of her job. Because the general term "stress" is not a specific medical condition, the employee would have to show a specific diagnosis that qualifies as a serious health condition. Possibilities include PTSD, anxiety, and other conditions that are tied to stress.

Before the U.S. Department of Labor revised the regulations for implementing the FMLA in 2009, the law specified that mental illness "resulting from stress or allergies" may be a serious health condition. That language was deleted in the current regulations to clarify that a mental illness, regardless of its cause, can be a serious health condition under the FMLA if all the regulatory requirements are met.

Currently, under the FMLA, a "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider.

If an employee did not receive inpatient care for a medical condition such as anxiety, the employee must establish that he or she received "continuing treatment" by a health care provider to qualify for FMLA leave. To do so, the employee must first show he or she was incapacitated for more than three consecutive calendar days. If an employee cannot show that he or she was so incapacitated that it was impossible to perform the job, the employee is not covered under this section of the FMLA.

In several cases in which an employee claimed to suffer from a serious health condition due to stress, the individual failed to show incapacitation. For example, in *Cole v. Sisters of Charity of the Incarnate Word*, the Eastern District of Texas found that an employee failed to establish that she suffered from a serious health condition based on stress when she provided no evidence that she was unable to perform the functions of her job.

Furthermore, once an employee establishes incapacitation, he or she must still establish that he or she received “continuing treatment” for the condition. Specifically, for a stress-related condition to qualify as a serious health condition under the “continuing treatment” prong of the FMLA, courts have held that the continuing treatment must relate back to the condition that initially caused the incapacity.

The FMLA does not protect an employee who claims his or her employer “exacerbated” the employee’s condition due to increased stress.

Ultimately, if the employee presents a stress-related condition and you are not sure it qualifies as a serious health condition, you must avoid playing doctor. Review the WH 380 form (Certification of Healthcare Provider) to determine whether the condition meets the requirements under the FMLA and its implementing regulations. If the form doesn’t provide sufficient information, request clarification.

When you can set the rules for advance notice and medical appointments at your convenience

Advance Notice

Foreseeable leave

In general, the employee must give the employer at least 30 days’ advance notice of the need to take FMLA leave when he or she knows about the need for the leave in advance and it is possible and practical to do so. For example, if the employee is scheduled for surgery in two months, the need for leave is foreseeable and at least 30 days’ advance notice is required. If 30 days’ advance notice is not possible because the situation has changed or the employee does not know exactly when leave will be required, the employee must provide notice of the need for leave as soon as possible and practical. When the employee has no reasonable excuse for not providing at least 30 days’ advance notice, the employer may delay the FMLA leave until 30 days after the date notice is provided. When the employee could not have provided 30 days’ advance notice but has no reasonable excuse for not providing a shorter period of advance notice, the employer may delay the FMLA leave by whatever amount of time that the employee delayed in notifying the employer.

In the case of FMLA leave for a qualifying exigency, the employee must give notice of the need for such leave as soon as possible and practical, regardless of how far in advance the leave is needed.

Unforeseeable leave

Obviously, emergencies require a more lenient notice. In the case of FMLA leave for a qualifying exigency, the employee must give notice of the need for such leave as soon as possible and practical. For example, an unconscious employee being treated in an emergency room can't be expected to call in.

When the employee does not give timely notice of unforeseeable leave and does not have a reasonable excuse, the employer may delay or deny the FMLA leave. The extent of an employer's ability to delay FMLA coverage for leave depends on the facts of the particular case. For example, if it was possible for the employee to give notice of the need for leave the same day it was needed, but instead gave notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

Employer's leave policies

In general, the employer may require that the employee complies with the employer's normal policies for requesting leave. The employer can take action under its internal rules and procedures against the employee who fails to follow its usual and customary rules for requesting leave, as long as it does not discriminate against employees taking FMLA leave. The employer also can choose to waive the employee's notice requirements.

This is especially true in cases of intermittent leave. For example, if an employee has a qualifying health condition that requires them to take leave unexpectedly, the employer can require that the employee adheres to their traditional call-out process before taking leave. If the employee fails to do so, excluding any unusual circumstances that may prevent them from doing so, then they may be subject to disciplinary actions outlined in the employer's policies.

Managers should pay attention to FMLA needs

Employees don't specifically need to cite the law or say they need "FMLA leave." It's the employer's responsibility to identify leave requests that could qualify as job-protected FMLA leave. If you suspect a leave request could qualify, it's important to notify HR right away.

Medical Appointments

Medical appointments and FMLA leave can cause challenges for employers. After all, frequent appointments can disrupt schedules and create additional work for both managers and other employees.

Employers may request that employees make a "reasonable effort" to schedule appointments in a way that is less disruptive to the employer.

The U.S. Department of Labor (DOL) has stated that once an employer can establish that its operations are being unduly disrupted by the employee's scheduling practices, the employee "must try to arrange treatment on a schedule that accommodates the employer's needs." Even so, the DOL recognizes that it may not always be possible for an employee to meet that requirement.

An employer, nevertheless, still can require the employee to make serious and reasonable scheduling efforts.

While it is acceptable to request that employees work with employers on scheduling, it is important to note that managers should not criticize employees for taking time off for medical treatment if the underlying condition either qualifies as a disability or is a serious health condition under the FMLA. Any such remarks could be held against the employer in court and could strengthen a retaliation suit if the employee were ever to be terminated at a future date.

What to do when you suspect FMLA leave abuse and how you spot it

The FMLA is a valuable benefit for employees who need to balance work with family needs. Many are appreciative of the ability to take time off. However, FMLA leave is also vulnerable to employee abuse. Sometimes that abuse is obvious, as when an employee on intermittent leave always has flare-ups on Fridays or Mondays. Other times, the abuse is not so easy to spot — as when a friendly doctor rubber stamps an FMLA certification request.

If you suspect FMLA abuse has taken place

Discipline for FMLA abuse is legal. However, employers should proceed with caution. Even if it appears that an employee is misusing his FMLA leave, you must make discipline or termination decisions based on a rational review of the facts, including the doctor's certification. Additionally, courts have concluded that demanding more than medical certifications without some reasonable suspicion of leave abuse can constitute interfering with an employee's FMLA rights. When in doubt, check with your attorney. Let's look at one case as an example.

Richard, an IT manager in Massachusetts, took FMLA leave for foot surgery, and his certification form said he'd need four to six weeks of recovery. During that recovery time, he went on a pre-scheduled vacation to Mexico. He limited his activities because his foot was still in a medical boot.

When HR found out about the vacation during FMLA leave, it quickly investigated and fired him. He sued.

At trial, the HR director said she believed that employees on FMLA could not take vacation. But the court said that's not automatically true, noting that "an employee recovering from a leg injury may sit with his or her leg raised by the seashore while fully complying with FMLA leave requirements, but they may not climb Machu Picchu without abusing the FMLA process."

The court sided with Richard, awarding him a whopping $1.3 million verdict, including $715k in punitive damages. (*DaPrato v. Massachusetts Water Resources Authority*, Mass Sup. Ct.)

How to investigate suspected FMLA abuse

Suspected abuse of intermittent FMLA leave is one of the more frustrating employment issues because it is so difficult to prove the abuse, and even suggesting that abuse may be a problem could give rise to a claim of FMLA retaliation or interference. By law, employers may not interfere with, restrain, or deny employees the right to exercise or attempt to exercise any rights provided by the FMLA, which may include refusing to authorize FMLA leave, or discouraging an employee from using such leave when he or she is entitled to do so.

Nevertheless, employers have been able to successfully defend claims of interference or retaliation when they acted on a bona fide belief that FMLA leave was not being used for its intended purpose. For example, in one case, the court dismissed the plaintiff's FMLA claims based on evidence that he went camping while on FMLA leave that had been granted to care for his father. In another case, the court dismissed the plaintiff's FMLA claims when the employer presented evidence from a private investigator that the plaintiff was not utilizing FMLA leave for the day to take his mother to physical therapy. In doing so, the court noted that whether the plaintiff actually took his mother to physical therapy was irrelevant. The court, rather, found that the plaintiff's termination was justified because the employer reasonably believed that the employee took fraudulent FMLA leave. The bottom line is that as long as an employer acts in good faith, that employer can be wrong about the facts.

In many of the cases addressing terminations for fraud in FMLA leave, the employer hired a private investigator to determine whether the employee was in fact abusing the leave. In other cases, reports from co-workers and customers or even postings on social media sites showing the employee doing something other than approved activities have been relevant. On the other hand, be aware that some activities may not be inconsistent with the leave, even if the employee appears to be doing something other than resting at home. For that reason, if you do decide to check up on an employee you believe may be abusing leave, you should take care to act reasonably and respectfully, and ideally consult with counsel before you decide to take adverse employment action.

An 11-step plan to sniff out suspicious FMLA cases

Use of the medical certification process is the biggest weapon employers have in combating FMLA abuse. It gives you the right to obtain information from the employee's physician about the ailment and, at least for the first certification, to obtain a second or third opinion from an independent physician.

The following steps are important parts of an effective anti-fraud program:

1. Obtain a medical certification for each request for leave due to a serious health condition. It's important that your sick leave or attendance policy requires a doctor's certification for all absences of three or more days for the leave to be excused. If there's no such requirement and you intend to require paid leave to run concurrently with FMLA leave, you might not be able to require a medical certification, which is the first step in an anti-fraud program.

2. Enforce a policy denying the leave request if an employee fails to submit certification within 15 days. In each instance, assess any appropriate penalties for failure to be at work.

3. Examine the certification closely to ensure it's been properly and fully completed. Many doctors will complete the form in a hurried fashion. In some cases, they'll intentionally leave some sections incomplete in order to remain "truthful" while accommodating the desires of the patient/employee for leave.

If the medical certification is incomplete, specify in writing what information is lacking and allow the employee at least seven days to cure the deficiency. If the employee fails to do so, deny the leave request. Of course, if the medical certification doesn't support the existence of a serious health condition, you should deny the request.

4. Require a second opinion if the circumstances are even slightly suspicious and it's an original certification.

5. Once the certification is approved, make a limited inquiry each time the employee requests more leave, particularly in the case of intermittent leave. The goal is to determine whether the leave is for the same qualifying reason.

6. Watch the schedule of absences closely in cases of intermittent leave to determine whether a suspicious pattern develops (e.g., immediately before and after weekends or days off) or whether there's a change in the frequency or timing. Such actions could suggest a change in condition that enables you to request a recertification.

7. Request recertifications as often as the law allows. The frequency of recertification permitted will differ depending on the type of leave and the type of serious health condition.

8. Require accrued leave to run concurrently with FMLA leave when allowed by law. When an employee realizes that taking leave today will affect future vacation time, he or she is more likely to take FMLA only when the need is legitimate.

9. Ask the physician to verify that the medical certification is exactly as he or she signed it and has not been altered.

10. Inquire about the intended method of transportation if an employee requests to leave work early because of his or her own serious health condition. If the employee can't work, perhaps an ambulance is needed.

11. Aggressively pursue potential fraud, and if concrete evidence of fraud is discovered, take appropriate disciplinary action. Always follow up on reports from fellow employees or other sources that the employee does not, in fact, need leave.

Final note: Even if these actions uncover no fraud, your efforts will still reap dividends. Once employees become aware that you intend to use these tools to detect fraud, employees otherwise inclined to take advantage of the FMLA will wait until a legitimate need arises.

Return to work

Discharge or return to work?

Fitness-for-duty certification

As a condition of restoring an employee whose FMLA leave was for self-care, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees to obtain and present certification from the employee's health care provider that the employee is able to resume work. This is commonly referred to as a fitness-for-duty certification. The employee has the same obligations to participate and cooperate in the fitness-for-duty certification process as in the initial certification process and is responsible for any associated costs.

If state or local law, or the terms of a collective bargaining agreement, govern an employee's return to work, those provisions must be applied. Requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical examination is job-related and consistent with business necessity also apply.

An employer may seek fitness-for-duty certification but it can only cover the health care condition that was the basis for FMLA leave in the first place. The certification must state that the employee is able to resume work. The FMLA designation notice must include the fitness-for-duty requirement or the employer loses the right to demand one. If the employer has provided a list of the essential functions of the employee's job by no later than the time the designation notice is provided, then an employer also may require that the certification address those essential functions.

The employer may not delay the employee's return to work pending receipt of the certification. Second or third opinions may not be required on a fitness-for-duty certification.

Bottom line: Employers should assume that an employee is ready to return if he or she claims to be.

An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule. However, if reasonable safety concerns exist regarding the employee's ability to perform his or her duties due to the serious health condition for which the employee took such leave, an employer is entitled to a fitness-for-duty certification for such absences up to once every 30 days. "Reasonable safety concerns" means a reasonable belief

of significant risk of harm to the employee or others. The employer may not terminate the employee while awaiting a fitness-for-duty certification for an intermittent or reduced-schedule leave absence.

Employer recovery of benefit costs

Under rare circumstances, the employer may recover its share of health plan premiums paid during unpaid FMLA leave from an employee. If leave is paid (i.e., the employee chooses to substitute paid leave for unpaid leave or the employer runs unpaid leave concurrent with paid leave) then no premium payment costs can be recovered. If an employee returns to work for at least 30 days, the employer cannot recover premiums paid out earlier even if the employee quits on day 31. The same is true if the employee retires rather than returning to work or retires within 30 days of returning to work.

Employers may not recover employer-paid health care premiums if the employee doesn't resume work because of:

- Circumstances beyond the employee's control.
- The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, that would otherwise entitle the employee to leave under FMLA.

If the employee's failure to return to work is based on the continuation, recurrence or onset of a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, the employer may require supporting medical certification of the condition. If the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work is due to other circumstances beyond the employee's control, the employer may recover all of the health benefit premiums it paid during the period of unpaid FMLA leave. As a practical matter, however, it may be difficult to collect payment. Most states have strict rules about what can and cannot be withheld from a final paycheck or other payments due, and suing the employee is expensive and time-consuming.

What's an equivalent job?

Equivalent position and benefits

An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and

authority. If an employee is no longer qualified for the position because he or she is unable to attend a necessary course, renew a license, fly a minimum number of hours, etc. as a result of the leave, the employee should be given a reasonable opportunity to fulfill those requirements upon return to work.

Equivalent pay

Equivalent pay includes a bonus or other payment made to employees. Whether an employee on FMLA leave is entitled to a bonus depends on whether employees on other similar types of leave receive the bonus. For example, if an employee is substituting accrued annual leave and other employees on annual leave receive the bonus, the employee on FMLA leave should receive the bonus as well. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold, or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent non-FMLA leave status.

An employee is also entitled to any unconditional pay increases that may have occurred during the FMLA leave period, such as cost-of-living raises. Pay increases conditioned upon seniority, length of service or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to the same or equivalent pay premiums, such as a shift differential and, ordinarily, the opportunity for overtime hours (and overtime pay).

Equivalent benefits

"Benefits" include all benefits provided or made available to employees by an employer, such as:

1. Group life insurance
2. Health insurance
3. Disability insurance
4. Sick leave
5. Annual leave
6. Educational benefits
7. Pensions

At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the leave affecting the entire workforce, unless otherwise elected by the employee. That is, any changes that apply to all other situated workers will also apply to the returning worker.

Upon return from FMLA leave, an employee cannot be required to requalify for any benefits he or she enjoyed before the leave began. Employers may find it necessary to modify life insurance

and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, to make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave or to pay these costs subject to recovery from the employee on return from leave.

Benefits accrued at the time leave began must be available to an employee upon return from leave. An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.

If while on unpaid FMLA leave an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

Any period of unpaid FMLA leave cannot be treated as a break in service for purposes of vesting and eligibility to participate in pension and other retirement plans. If the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date will be deemed to have been employed on that date. Unpaid FMLA leave periods, however, need not be treated as credited service for purposes of benefit accrual, vesting, and eligibility to participate.

Other terms and conditions

An equivalent position must have substantially similar duties, conditions, responsibilities, privileges, and status as the employee's original position. For example:

- The employee must be reinstated to the same or a geographically proximate worksite.
- The employee is ordinarily entitled to return to the same shift, or the same or an equivalent work schedule.
- The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

The FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position that better suits the employee's personal needs on return from leave, or to offer a promotion. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes. The requirement that an employee is restored to the same or equivalent job with the same or equivalent pay, benefits and terms and conditions of employment does not extend to de minimis, intangible or unmeasurable aspects of the job.

Joint employers have shared responsibilities for employee reinstatement.

Discovering poor performance or wrongdoing during FMLA absence

Employees who take FMLA leave are entitled to return to their old jobs or equivalent ones. However, that does not mean that employers have to ignore performance problems discovered during leave or forego discipline that was pending when the employee went out on unpaid FMLA leave.

For example, in one case Kimberly worked as an administrative assistant for one of Dow Chemical's attorneys. The majority of her work required her to be online and connected to Dow's network, either connected to servers while at Dow or using the company's virtual private network when she was away from the office.

Kimberly worked an every-other-Friday-off schedule that gave her a three-day weekend twice a month if she completed the necessary work. However, the attorney she worked for suspected she was cheating on her hours and gaming the system.

Kimberly took two months of FMLA leave. During her absence, an intern was assigned to pick up her workload. The intern told the attorney that most of Kimberly's work had either been late or had been done incorrectly. Eventually, Kimberly returned from FMLA leave.

Armed with the suspicion that Kimberly might have been cheating on her time records, the attorney began to carefully monitor her comings and goings. The attorney discovered a 60-hour difference between the records that Kimberly submitted and entry and exit times recorded by the Dow facility's card-swipe system. Kimberly attributed the difference to working from home some nights.

Dow fired her anyway for cheating on her time records. The virtual private network records didn't show she had been logged on during the times she claimed she was working at home.

Kimberly sued, alleging retaliation for taking FMLA leave, and a jury awarded her $175,000.

However, a federal appeals court reversed it. It said Dow wasn't required to ignore the information it discovered while Kimberly was out on FMLA leave, and that acting on that information wasn't retaliation.

Since Dow had a reasonable belief that Kimberly's records didn't match up, it was free to fire her whether she had just returned from FMLA leave or not. (*Hartman v. Dow Chemical*, No. 15-2318, 6th Cir., 2016)

How the ADA impacts return

Return-to-work certification

Under the FMLA, an employer may request a return-to-work certification only if the employee has been out for his or her own condition once per FMLA year, unless the employee has a

safety-sensitive job, in which case the employer may request certification if the employer has not asked for one within the past 30 days.

Under the ADA, the employer must have an objective basis to believe the employee cannot perform an essential function of the job in order to lawfully ask for return-to-work certification.

Qualifying for additional leave

Employees who take their full FMLA leave may not be quite ready to return to work when their 12 weeks are up.

If their condition is a disability under the ADA, and more time off or a flexible arrangement, such as working from home, is feasible, it may be considered a required reasonable accommodation.

If an employee asks for more time off or to work from home, handle the request just like you would another disabled employee's reasonable accommodation request. Verify the disability and discuss possible accommodations before you reject the request.

However, there are limits to how far this extends. One court-approved measure is that a doctor can estimate when the employee will be able to return to work. Indefinite leave is unreasonable. A specific period of recommended leave may be reasonable.

In one particular case, Kim held an important position at the Federal Reserve Bank of Philadelphia. She and two other managers oversaw coin inventory and the alarm system. When Kim hurt her shoulder, she requested FMLA leave. The bank told her to have her doctors certify her condition. They did, and Kim used up her FMLA leave entitlement for the year.

When Kim didn't immediately return, the bank contacted her for more information on her leave. She said she was suffering from migraine headaches and needed more time off. The bank again asked for Kim's doctors to certify her condition, along with an anticipated return date. This time, doctors told the bank Kim's migraines were so severe that she would not be able to work. They didn't provide a return date or even an estimate.

The bank told Kim she was being terminated. She immediately offered to return to work the next day. Perhaps surprised, the bank asked whether her doctor's recommendation had changed since the last certification. She said it had not, but nonetheless insisted she could work immediately. The bank told her she would be terminated anyway.

Kim sued, alleging failure to accommodate under the ADA.

The court tossed out her case. It reasoned that the bank wasn't obligated to reverse the termination when there was no medical documentation supporting Kim's return. (*Ryans v. Federal Reserve Bank of Philadelphia*, No. 11-7154, ED PA, 2013)

When you can fire a worker out on FMLA

A common misconception is that workers can't be fired while on FMLA leave. Fortunately, that's just not true — *if* you have good reason to terminate and you document *everything.* Employers must show that they would have fired the worker whether she took leave or not.

The FMLA isn't a shield from pending discipline or business restructuring, despite what some employees may believe. You do, however, have to justify the discharge with good, solid reasons unrelated to asking for or taking FMLA leave. Here's how to handle discipline and other discharge reasons when the affected employee is on FMLA leave.

Common (legitimate) reasons to fire workers on FMLA leave include:

- A reorganization that eliminates or restructures jobs, assigns new functions to some jobs or eliminates others. FMLA requirements don't demand that you retain workers you otherwise would terminate under a reorganization.
- Across-the-board budget reductions during economic downturns or simply a desire to maximize profits. As long as you don't use past or future FMLA leave as a factor, workers can be fired while on FMLA leave to cut costs.
- Worker wrongdoing necessitating discipline. Employees don't get a pass because they're on FMLA leave. Be prepared to show you disciplined all workers who broke the same rule and didn't single out leave-takers. If you were finalizing a discharge based on insubordination when the worker requested FMLA leave, you can move forward.
- Poor productivity. But make allowances for time missed while on FMLA leave or ADA accommodations leave, or for military service absences. In other words, adjust quotas, goals and sales targets to zero out the effect of lost time.
- Discovery of mistakes or poor performance during FMLA leave. Sometimes, it takes an employee's absence to see that the worker wasn't doing the job you thought. An absence may mean the employer moves another worker into the position to get the work done. He or she may discover uncompleted or error-filled work or other irregularities. If you would terminate *any* employee over the errors or irregularities, you can terminate the employee even while on FMLA leave. She may then have been fired while on FMLA leave, but not *because* she was.

FMLA laws show why termination is risky business

Employees fired while on FMLA leave, after asking for leave or in retaliation for taking leave can sue. That's because firing them may be:

- Interfering with the right to FMLA leave
- Retaliation
- Disability discrimination under the ADA
- Violation of the Uniformed Services Employment and Re-Employment Rights Act (USERRA)

The FMLA and other leave-related laws don't forbid discharging workers for other reasons, though. Employers have the right to fire workers for any reason, as long as it's not an illegal one. Using FMLA leave as a reason is an illegal one. So it's crucial that any discharge decision is backed up with information showing that taking or requesting leave wasn't a factor. The key is understanding where your FMLA responsibilities begin and end.

Fired while on FMLA leave

Among your FMLA requirements is to provide intermittent leave or a reduced schedule as needed. An employee may take leave in separate blocks of time or by reducing the time he or she works each day or week for a single qualifying reason. An employee can't be fired because his serious health condition requires daily breaks for medication or rest. He can also schedule medical treatments or appointments as FMLA intermittent leave.

An employee can't be fired while on FMLA leave — whether full or intermittent — because he's missing work. You cannot use past, present or future FMLA leave usage (known or speculative) as ANY part of the organizational decision-making. Nor do FMLA laws allow you to single out a division with high FMLA usage for layoffs. You must adjust any division goals or quotas to take into account FMLA leave.

Reductions in force

You cannot single out a group of individuals who *may* take FMLA leave in the near future. Don't cut a division of females of childbearing years, workers with elderly parents, or military spouses because of those characteristics. It doesn't matter if that leaves you with seemingly more reliable and present workers. You cannot use FMLA-related attendance as part of the decision-making of who to cut. If you use attendance, make sure you have excluded *any* FMLA usage from that attendance tally.

As part of a reduction in force, workers on FMLA leave can be terminated if you don't take leave into consideration.

Example: Jane takes FMLA leave to give birth. During her time off, the company undergoes a reorganization that eliminates 3 employees in her division. The employer's layoff list is based on the lowest-performing employee based on the last 3 years of performance reviews. Jane's rank is in the bottom 3 and thus her name appears on the layoff list. Her reviews didn't penalize past FMLA leave or downgrade her ranking for related attendance. She can be terminated as soon as the layoff is effective even if she has not yet returned from leave.

What about USERRA?

Both the FMLA and USERRA work together to protect service members who need time off. Under USERRA, employees can't be punished for their military service. Upon return, they must be reinstated at pay and benefit levels they would have attained had they not served. The FMLA intersects in two ways. First, their military absence counts toward their FMLA eligibility. Second,

USERRA allows servicemembers extra time to reclaim their jobs — up to two years following service-related injury. In addition, the returning service member can only be terminated for cause for 12 months following return.

Example: Madeline, an attorney, joined the Army National Guard two months after being hired by a law firm. She was called to active duty for two years, assigned to Afghanistan. There, while assisting deployed soldiers with their legal problems, she was injured in a suicide bombing. She was sent home and underwent rehabilitation for 18 months after the end of her active duty. She then told the law firm she had left that she wanted to return. It reinstated her and adjusted her pay according to its pay schedule to account for missed time. Two months later, service-related complications required her to have surgery. The firm discharged her, telling her she wasn't eligible for FMLA leave. The law firm violated both the FMLA and USERRA. First, she should have received credit towards FMLA eligibility. Second, she wasn't fired for cause.