The Family and Medical Leave Act

A practical guide

Ohio School Boards Association

8050 N. High St., Ste. 100, Columbus, OH 43235

(614) 540-4000 • (800) 589-OSBA • www.ohioschooolboards.org

Table of contents

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Chapter 1

Introduction to FMLA

The Family and Medical Leave Act (FMLA) has a noble purpose: to help employees balance the demands of the workplace with the needs of families; to promote the stability and economic security of families; and to promote national interests in preserving family integrity. Since FMLA was enacted in 1993, millions of employees have relied on it to take leave to recover from a serious illness, care for an ailing family member, bond with a new child or handle qualifying exigencies arising out of active duty in the military.

Despite its broad use and noble purpose, human resource professionals can face challenges when administering FMLA leave. It can be difficult to apply FMLA when employees try to take leave in the real world. Issues arise on a daily basis, and school districts have to determine how to handle these issues legally and fairly, while protecting their interests.

In January 2008, Congress amended FMLA to add military family leave provisions and, in November 2008, the United States Department of Labor (DOL) released new regulations that addressed the new provisions and made major changes to the existing regulations for FMLA leave. The National Defense Authorization Act for Fiscal Year 2010 made minor changes to the military family leave provisions. In February 2015, DOL amended the definition of "spouse" so that eligible employees in same-sex marriages could take FMLA leave to care for their spouse or family member, regardless of where they lived. This publication incorporates these important changes and is designed to explain how FMLA works and what it requires.

As the FMLA coordinator for your district, it is your responsibility to answer FMLA questions; determine if FMLA applies; properly notify employees of their rights and responsibilities under FMLA; ensure that the employees' FMLA leave is properly captured; and reinstate employees appropriately. When you're faced with a leave situation that might be covered by FMLA, you should ask yourself the following questions:

- Is the employee covered by FMLA? (Chapter 2)
- Does the employee need leave for a reason covered by FMLA? (Chapters 3, 4 and 5)
- How much leave is available to the employee? (Chapter 6)
- Did you and the employee meet your notice and paperwork requirements? (Chapter 7)
- Did you request a certification and did the employee return it? (Chapter 8)
- Did you successfully manage the employee's leave and corresponding leave benefits? (Chapter 9)
- Did you follow the rules for reinstating an employee returning from leave? (Chapter 10)
- Are you making, keeping and preserving records appropriately? (Chapter 11)

Chapter 2

Is the employee covered by FMLA?

To be eligible to take leave under FMLA, an employee must have been:

- employed by the district for at least 12 months;
- employed for at least 1,250 hours of service during the 12-month period immediately preceding the start of the leave.

Meeting the 12-month requirement

Although a district must employ an employee for at least 12 months before they become eligible for FMLA, the 12 months do not need to be consecutive months of service. The district may count any and all time the employee has worked for the district. However, periods of employment that occurred prior to a break of service of seven years or more do not need to be counted in determining if an employee has been employed by the district for at least 12 months, unless:

- the employee's break in service was due to the employee's fulfillment of a military service obligation;
- a written agreement, including a collective bargaining agreement, exists concerning the district's intention to rehire the employee after the break in service.

Nothing prevents a district from considering employment prior to a continuous break in service of more than seven years. However, if a district chooses to recognize such prior employment, the district must do so uniformly, with respect to all employees with similar breaks in service.

Meeting the 1,250-hour requirement

To be eligible to take leave under FMLA, an employee also must have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the start of the leave.

Only hours actually worked should be considered in determining if an employee has met the 1,250-hour requirement. Periods of time during which the employee is completely relieved of duty are not counted, even if the district compensates the employee for the time off, such as vacation leave, sick leave, FMLA leave, personal leave or holidays. Overtime hours worked are counted toward FMLA eligibility.

If an employee goes on military leave and returns to employment, the employee must be credited with the hours the employee would have worked but for the military leave. In most cases, the calculation is based on the schedule the employee worked in the period prior to going on military leave. In other words, the district must count the hours the employee would have worked but for the military service toward the 1,250-hour requirement.

The determination of whether an employee has worked for the district for 1,250 hours in the past 12 months must be made "as of the date leave commences." The 1,250-hour eligibility test is applied only once, on the commencement of a series of intermittent absences, if all involve the same FMLA-qualifying serious health condition during the same 12-month FMLA leave year (FMLA 112). In other words, an employee remains entitled to FMLA leave for that FMLA reason during the 12-month period, even if the 1,250-hour calculation is not met at a later point in the 12-month period during the series of related intermittent absences.

Example: John worked for the district from 2017 to 2019 and was rehired in January 2022. His break in service from 2019 to 2022 was not due to any military service obligation, nor was he governed by any collective bargaining agreement. If John requests to take leave in July 2022, does John meet the 12-months of service requirement?
Explanation: Yes. Although John has not been employed for 12 months since his return to service in January 2022, his prior service with the district can be counted towards meeting the service requirement since the 12 months of service do not need to be consecutive months of service.

Example: Assume the same facts as above, but John's break in service occurred from 2011 to 2022. If John requests to take leave in July 2022, does he meet the 12-months of service requirement?
Explanation: Not necessarily. John's break in service from 2011 to 2022 was 11 years. Under FMLA, the district does not need to count service that occurred prior to a break in service of seven years or more. If the district wanted, it could ignore John's service prior to 2011 for purposes of determining John's FMLA eligibility. If the district elects to ignore the prior service, John would not meet the 12-months of service requirement since he has not been employed for 12 months since his return to service in January 2022.

Example: Jane is diagnosed with multiple sclerosis (MS), which requires her to take intermittent leave due to the condition's episodic nature. She was eligible to take intermittent FMLA leave in April. In July and October, Jane needs leave again when her condition returns. Does Jane have to requalify under the 1,250-hour eligible test?
Explanation: No. Jane would be entitled to FMLA leave without having to requalify under the 1,250-hour eligibility test if the absences occurred in the same 12-month period and she did not exhaust the 12-week leave entitlement for her MS or any other FMLA-qualifying reason. If Jane needed leave for MS again in a new 12-month period, she would have to requalify under the 1,250-hour eligibility test to be entitled to take FMLA leave in the new 12-month period (FMLA-112).

Example: Assume the same facts as above and, in addition, assume that Jane requests FMLA leave for up to six weeks for another serious health condition that requires major surgery and a subsequent period of recovery, such as a hysterectomy. Does Jane need to requalify under the 1,250-hour eligibility test for this subsequent condition?
Explanation: Yes. If, at the time of this second and different FMLA-qualifying circumstance, Jane meets the 1,250-hour eligibility test, she would be entitled to FMLA leave for that second reason. She also would continue to be eligible for intermittent FMLA leave for the chronic serious health condition (for example, MS) for the remainder of the current 12-month period or until the 12-week leave entitlement has been exhausted.

However, if Jane does not meet the 1,250-hour eligibility test at the time of the second and different FMLA-qualifying condition, she would not be eligible for that second reason. It is possible that an employee could remain eligible for leave for one FMLA-qualifying reason, but not be eligible for FMLA leave for a different FMLA-qualifying reason due to the 1,250-hour test being recalculated at the commencement of the subsequent and separate need for leave (FMLA-112).

Chapter 3

Leave for a serious health condition

Under FMLA, eligible employees may take leave for their own serious health conditions or to care for immediate family members, such as a spouse, child or parent with serious health conditions.

Defining 'spouse, parent, son or daughter'

The definition of "spouse" means a husband or wife as defined or recognized in the state where the individual was married and includes individuals in a same-sex or common law marriages. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States if the marriage could have been entered into in at least one state.

"Parent" means a biological, adoptive, step- or foster father or mother, or any other individual who stood "in loco parentis" to the employee when the employee was a child. This term does not include "parents-in-law."

The definition of "son or daughter" under FMLA includes not only a biological or adopted child but also a "foster child, stepchild, legal ward or child of a person standing in loco parentis" who is either under 18 years of age or is 18 years of age or older and "incapable of self-care because of a mental or physical disability" at the time FMLA leave commences.

The FMLA regulations define "in loco parentis" as including those with day-to-day responsibilities to care for and financially support a child. Employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave. Courts have enumerated factors to be considered in determining in loco parentis status, which include the age of the child, the degree to which the child is dependent on the person claiming to be standing in loco parentis, the amount of support provided and the extent to which duties commonly associated with parenthood are exercised. See Administrator's Interpretation No. 2010-3 for more information about in loco parentis.

For a parent to take FMLA leave for a child who is 18 years old or older, the son or daughter must have a disability as defined by the Americans with Disabilities Act (ADA) at the time the leave commences, be incapable of self-care because of the disability, have a serious health condition and need care because of the serious health condition. See Administrator's Interpretation No. 2013-1 for more information about an adult son or daughter incapable of self-care because of a mental or physical disability.

> **Example**: Steve provides day-to-day care for his unmarried partner's child Lucy (with whom there is no legal or biological relationship) but does not financially support Lucy. Is Steve able to take FMLA leave to care for Lucy if she has a serious health condition?
> **Explanation**: Yes. Steve could be considered to stand in loco parentis to Lucy and would be entitled to FMLA leave to care for Lucy as his daughter.

Serious health condition

FMLA defines a serious health condition as an illness, injury, impairment, or physical or mental condition that involves either of the following:

- inpatient care (such as an overnight stay) in a hospital, hospice or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with such care;
- continuing treatment by a health care provider.

Under this definition, any absence involving overnight hospitalization qualifies as a serious health condition. In 2018, DOL opined that an employee who donates an organ can qualify for FMLA leave when it results in an overnight stay in a hospital, even when the donor is in good health before the donation and chooses to donate the organ solely to improve someone else's health (FMLA2018-2-A).

A more difficult task, however, is identifying those illnesses that qualify as a serious health condition because they involve "continuing treatment by a health care provider." In general, the following conditions are classified as continuing treatment by a health care provider:

Incapacity and treatment	A period of incapacity of more than three full consecutive days, plus either: ● treatment two or more times by a health care provider within 30 days of the first day of incapacity; ● treatment once by a health care provider, plus a regimen of continuing treatment under the supervision of a health care provider.
Pregnancy or prenatal care	Any period of incapacity due to pregnancy or prenatal care.
Chronic conditions	Any period of incapacity due to a chronic serious health condition involving periodic visits — at least two a year — to a health care provider over an extended period (such as asthma, diabetes or epilepsy).
Permanent or long-term conditions	A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (such as Alzheimer's disease, a severe stroke or terminal illness). The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.
Conditions requiring multiple treatments	Any period of absence for multiple treatments by a health care provider for restorative surgery or a condition that would likely result in a period of incapacity of more than three days in the absence of treatment, such as receiving chemotherapy due to cancer, physical therapy for severe arthritis or dialysis for kidney disease.

FMLA is not intended to cover short-term conditions for which treatment and recovery are very brief. Unless complications arise, the following conditions generally will not meet the definition of a serious health condition under FMLA: the common cold, flu, earaches, upset stomach, minor ulcers, headaches (other than migraines), routine dental or orthodontia problems or periodontal disease.

When an employee requests FMLA leave for a serious health condition, a district may request a medical certification by the employee's health care provider to confirm that a serious health condition exists. Additional information about medical certifications can be found in Chapter 8.

'Caring for' a family member

Employees may take FMLA leave to "care for" their immediate family members with a serious health condition. Under FMLA, caring for a family member includes both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for their own basic medical, hygienic or nutritional needs or safety, or is unable to transport themselves to the doctor. The term also includes providing psychological comfort and reassurance that would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member.

In 2019, DOL opined that a parent's need to attend IEP meetings addressing the educational and special medical needs of her children — who had serious medical conditions as certified by a health care provider — was a qualifying reason for taking FMLA leave. DOL found that the parent's attendance at IEP meetings was "essential to her ability to provide appropriate physical or psychological care" to her children and therefore met the

criteria under FMLA for caring for a family member with a serious health condition. (FMLA2019-2-A).

Example: On Jan. 3, George awoke to find his skin covered with itchy red bumps. On Jan. 6, his wife drove him to the hospital's emergency room, where he was examined and diagnosed. George was told to remain off work until the bumps went away, received a prescription for an antiviral medication and was instructed to call the medical clinic to schedule a follow-up appointment. He returned to the medical clinic on Jan. 28 for a follow-up exam, as instructed by his doctor. He was told he could return to work at any time without restrictions. Does George have a "serious health condition" that would qualify him for FMLA?
Explanation: Yes. George had the requisite two treatments pursuant to doctor's orders within the appropriate time frames. The first treatment occurred within seven days of the first day of incapacity and both occurred within 30 days. George was told by his physician that he couldn't work until the bumps went away, which resulted in a period of incapacity of more than three days.

Example: What if George had telephoned the doctor but did not actually see the doctor for an examination?
Explanation: Under FMLA, "treatment" by a health care provider means an in-person visit to a health care provider for the purpose of determine if a serious health condition exists, evaluations of the condition and actual treatment by the health care provider to resolve or alleviate the condition. If George had only telephoned the doctor but was not seen or examined by the doctor, those circumstances would not qualify as "treatment" under FMLA. However, telemedicine visits with a health care provider are considered "in-person visits" and would qualify as "treatment" under FMLA so long as they include an examination, evaluation or treatment by a health care provider; are permitted and accepted by state licensing authorities; and are performed by video conference (Field Assistance Bulletin No. 2020-8).

Example: Steve has an ear infection, goes to the doctor and receives a prescription for an antibiotic. Does this constitute a serious health condition?
Explanation: It depends. The FMLA regulations state that ordinarily, unless complications arise, conditions such as the common cold, flu, earaches, upset stomach, minor ulcers, headaches (other than migraines), routine dental or orthodontia problems or periodontal disease do not meet the definition of a serious health condition and do not qualify for FMLA leave.

However, the circumstances surrounding each illness must be evaluated to see if it meets one of the regulatory definitions of a serious health condition. If the ear infection resulted in Steve's incapacity for more than three consecutive calendar days and involves continuing treatment by a health care provider, which can include a course of prescription medication like an antibiotic, then the illness would be considered a serious health condition for purposes of FMLA (FMLA-86).

Chapter 4

Leave for a new child

FMLA entitles an eligible employee to take up to 12 workweeks of leave for both:

- the birth of their son or daughter in order to care for such son or daughter;
- the placement of a son or daughter with an employee for adoption or foster care.

Defining 'son or daughter'

The definition of "son or daughter" under FMLA includes not only a biological or adopted child, but also a "foster child, stepchild, legal ward or child of a person standing in loco parentis" who is either under 18 years of age or is 18 years of age or older and "incapable of self-care because of a mental or physical disability" at the time FMLA leave is to commence.

The FMLA regulations define "in loco parentis" as including those with day-to-day responsibilities to care for and financially support a child. Employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave. Courts have enumerated factors to be considered in determining in loco parentis status, which include the age of the child, the degree to which the child is dependent on the person claiming to be standing in loco parentis, the amount of support provided and the extent to which duties commonly associated with parenthood are exercised. See Administrator's Interpretation No. 2010-3 for more information about in loco parentis.

Birth of child

The mother and father are entitled to FMLA leave for the birth of their child, and both are entitled to be with the healthy newborn child during the 12-month period beginning on the date of birth. The newborn does not have to have a serious health condition in order for the parents to qualify for FMLA leave.

Mothers also are entitled to FMLA leave for incapacity due to pregnancy, prenatal care or their own serious health condition following the birth of the child. A mother is entitled to leave even if she does not receive treatment from a health care provider during the absence and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be eligible to use FMLA leave due to her severe morning sickness. The mother's spouse also is entitled to FMLA leave if the leave is needed to care for the mother during her prenatal care or when she is incapacitated during pregnancy or following the birth of the child.

FMLA leave may be taken intermittently or on a reduced leave schedule when medically necessary due to pregnancy or birth. When the leave is for bonding time with a healthy newborn child, the employee may take leave intermittently or on a reduced leave schedule only if the district agrees. For example, a district and employee may agree to a part-time work schedule after the child is born.

Spouses who are eligible and employed by the same district may be limited to a combined total of 12 workweeks to care for a healthy child after birth.

Placement of child

Eligible employees are entitled to FMLA leave for the placement of a son or daughter for adoption or foster care. Placement for adoption occurs months before an adoption is formalized. Employees may take FMLA leave before the actual placement or adoption if an absence from work is required for the placement for adoption or foster care to proceed. For example, FMLA leave may be taken for required counseling sessions, court appearances or consultations with an attorney or doctor representing the child. An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement.

An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the school district agrees. For example, a district and employee may agree to a part-time work schedule after the placement for bonding purposes.

Example: Sharon is planning to coparent her same-sex partner's biological child. May Sharon take FMLA leave once the baby is born?
Explanation: Under FMLA, a "son or daughter" also includes a child of a person standing in loco parentis. In loco parentis is commonly understood to refer to a relationship in which a person has put himself or herself in the situation of a parent by assuming the obligations of a parent to a child with whom they have no legal or biological connection. It exists when an individual intends to take on the role of a parent. An employee who is in a same-sex relationship and who will share equally in the raising of a child with the child's biological or adoptive parent would be entitled to leave for the child's birth because she will stand in loco parentis to the child.

Example: Ernie plans to adopt a child from China in October. Prior to his departure, he has requested leave to consult with his attorney about the adoption, submit to a physical examination that is required before the adoption can proceed and attend a mandatory counseling session hosted by the adoption agency. Are these leave requests covered by FMLA?
Explanation: Yes. Employees may take FMLA leave before the actual placement or adoption if an absence from work is required for the placement. The time Ernie spends traveling to China to complete the adoption also would be covered by FMLA.

Chapter 5

Military family leave

The National Defense Authorization Act (NDAA) amended FMLA in 2008 to allow eligible employees to take up to 12 workweeks of job-protected leave for any "qualifying exigency" arising out of the active duty or call to active duty status of a spouse, son, daughter or parent. NDAA also amended FMLA to allow eligible employees to take up to 26 workweeks of job-protected leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. These two types of FMLA leave are known as the military family leave entitlements.

Defining 'son or daughter'

"Son or daughter" on covered active duty or call to covered active duty status means the employee's biological, adopted or foster child, stepchild, legal ward or a child for whom the employee stands in loco parentis who is on covered active duty or call to covered active duty status, regardless of the son or daughter's age.

Leave for qualifying exigency

A school district must grant an eligible employee up to a total of 12 workweeks of unpaid leave during the normal 12-month period established by the district for FMLA leave for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter or parent has been deployed to a foreign country or has been notified of an impending deployment.

Qualifying exigencies include:

Short notice deployment	Issues arising from a covered military member's short notice deployment — such as deployment on seven or less days notice — for a period of seven days from the date of notification.
Military events and related activities	Military events and related activities that are related to the active duty or call to active duty status: ● official ceremonies, programs or events sponsored by the military or military family support group; ● assistance programs and informational briefings sponsored or promoted by the military, military service organizations or the American Red Cross.
Child care and related activities	Certain child care and related activities arising from the active duty or call to active duty status of a covered military member: ● arrange for alternative child care when the active duty or call to active duty requires a change in existing child care arrangements; ● provide child care on an urgent, immediate need basis, but not on a routine everyday basis; ● enroll in or transfer to a new school or day care facility; ● attend meetings with staff at a school or day care facility. The employee does not need to be related to the military member's child to take qualifying exigency leave for this purpose. But, the military member must be the parent, spouse or child of the employee taking leave, and the child for whom the employee is arranging for or providing child care must be the child of the military member.

Financial and legal arrangements	Making or updating financial and legal arrangements to address a covered military member's absence, including: ● make or update financial or legal arrangements, such as powers of attorney; ● transfer bank account signatory authority; ● enroll in the Defense Enrollment Eligibility Reporting System; ● obtain military identification cards; ● prepare or update a will or living trust; ● act as the covered military member's representative before a federal, state or local agency to obtain, arrange or appeal military service benefits.
Counseling	Attending counseling provided by someone other than a health care provider for oneself, the covered military member or the child of the covered military member, the need for which arises from the active duty or call to active duty status of the covered military member.
Rest and recuperation	Taking up to 15 calendar days of leave to spend time with a covered military member who is on short-term, temporary rest and recuperation leave during deployment. Leave for this reason is available beginning on the first day of the military member's rest and recuperation leave and must be taken within the period of time specified in the military member's leave orders.
Post-deployment activities	Attending to certain post-deployment activities, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status and addressing issues arising from the death of a covered military member.
Additional activities	Any other event that the employee and district agree is a qualifying exigency.

Military caregiver leave

A school district must grant an eligible employee who is a spouse, son, daughter, parent or next of kin of a covered servicemember with a serious injury or illness up to a total of 26 workweeks of leave during a single 12-month period to care for a servicemember. The "single 12-month period" begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12-month period used by the district for other types of FMLA leave.

Military caregiver leave covers a need to care for a member of the armed forces, including a member of the National Guard or reserves, who is undergoing medical treatment, recuperation or therapy; is otherwise in outpatient status; or is otherwise on the temporary disability retired list for serious injury or illness. It also covers a need to care for a veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness and who was a member of the armed forces, including a member of the National Guard or reserves, at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation or therapy.

Military caregiver leave is applied on a per-covered servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period

of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken in any single 12-month period.

An eligible employee is limited to a *combined* total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period. Only 12 of the 26 weeks may be for an FMLA-qualifying reason other than to care for a covered servicemember. For additional information, please see Chapter 6.

Example: Angela's husband Brad is in the Army Reserves. On Jan. 1, Brad receives notice that he is being called to active duty on Jan. 3 for a six-month tour. Angela takes the week off work to spend time with Brad before he goes. In February, the couple's young daughter becomes uncharacteristically aggressive at school, clearly in response to her father's absence. Angela takes time off work to attend a meeting with school officials to discuss her daughter's behavior. Angela also seeks help from her local military support group and takes time off work to attend one of their meetings on family team building. She also leaves work early one day to take her daughter to the military chaplain to see what, if anything, he suggests she should do to remedy her daughter's behavioral issues. In April, Brad is released for a two-week military furlough from his tour. Angela is thrilled to have Brad home and plans to take the entire two weeks off of work to spend time with Brad. Which of Angela's absences are covered by FMLA?

Explanation:

Week off work at deployment: Angela may take FMLA leave for up to seven calendar days even though the seven-day period ended after Brad was deployed. She can take leave for any purpose, including spending time with Brad, without providing that it qualifies as an "exigency."

Meeting with school officials: Angela may take FMLA leave to attend meetings with staff at a school or daycare facility, such as meetings with school officials regarding disciplinary measures.

Family team-building meetings: Angela may take FMLA leave to attend family support or assistance programs that are sponsored by the military.

Meeting with military chaplain: Angela may take FMLA leave to attend counseling sessions provided by someone other than a health care provider.

Brad's military furlough: Angela may take up to 15 days of FMLA leave (not the entire furlough) to spend time with Brad while he is on short-term, temporary rest and recuperation leave.

Chapter 6

How much leave can an employee take?

Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period.

Counting the 12-month leave year

A school district is permitted to choose any of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs:

- the calendar year;
- any fixed 12-month "leave year," such as a fiscal year or a year staring on an employee's "anniversary" date;
- the 12-month period measured forward from the date any employee's first FMLA leave begins;
- a rolling 12-month period measured backward from the date an employee uses any FMLA leave.

Once the district has selected which option it will use to establish the 12-month period, that option must be uniformly applied to all employees taking FMLA.

In the case of leave to care for a covered servicemember with a serious injury or illness, the "single 12-month period" is the 12-month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. This is true regardless of which method the district chooses. Additionally, an eligible employee is limited to a *combined* total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period. Only 12 of the 26 weeks may be for an FMLA-qualifying reason other than to care for a covered servicemember.

Intermittent and reduced schedule leave

FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. "Intermittent leave" is FMLA leave taken in separate blocks of time due to a single qualifying reason. A "reduced leave schedule" is a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments or leave taken several days at a time spread over a period of six months, such as for chemotherapy. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

When intermittent leave is needed for a planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to unduly disrupt the district's operations. If FMLA leave is for birth and care, or placement for adoption or foster care, use of intermittent leave is subject to district approval.

FMLA regulations contain specific provisions regarding an instructional employee's ability to take intermittent leave or leave on a reduced leave schedule. "Instructional employees" are those whose principal function is to teach and instruct students in a class, small group or individual setting. Under the regulations, if an instructional employee needs intermittent leave or leave on a reduced leave schedule and the employee would be on leave for more than 20% of the total number of working days, the district can require the employee to choose either to:

- take leave for a period of a particular duration, not greater than the duration of the planned treatment;
- temporarily transfer to an available alternative position for which the employee is qualified, which has equivalent pay and benefits, and which better accommodates the leave request than does the employee's regular position.

If an employee chooses to take a block of leave for the duration of time needed instead of transferring temporarily to an available alternative position, the entire period of leave taken will count as FMLA leave.

Measuring the amount of leave

FMLA leave entitlement is limited to a total of "12 workweeks." The employee's actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work eight-hour days works four-hour days for a week under a reduced leave schedule, the employee would use one-half of a week of FMLA leave. When an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. For example, if an employee who would otherwise work 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

There are different rules for measuring the amount of leave taken by instructional employees who begin leave near the end of an academic term:

- *Leave begins more than five weeks before the end of the term*: The district may require the employee to continue taking leave until the end of the term if the leave will last at least three weeks and the employee would return to work during the three-week period before the end of the term.
- *Leave begins during the five-week period before the end of the term*: The district may require the employee to continue taking leave until the end of the term if the leave will last more than two weeks and the employee would return to work during the two-week period before the end of the term.
- *Leave begins during the three-week period before the end of the term*: The district may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

In these cases, only the period of leave until the instructional employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The district has the option to not require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the district to the end of the school term is not counted as FMLA leave. However, the district shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job, including other benefits, at the conclusion of leave.

Example: Woodsville School District has adopted a "rolling" 12-month calendar. Suppose Annie has taken eight weeks of leave in the last 12 months. How many additional weeks of leave can Annie take?
Explanation: Under the rolling 12-month period, each time an employee takes FMLA leave, the remaining leave entitlement would be any balance of the 12 weeks that has not been used during the immediately preceding 12 months. In this example, Annie would have an additional four weeks of FMLA leave that could be taken.

Example: Woodsville School District has adopted a "rolling" 12-month calendar. Suppose that, in the last calendar year, Annie takes four weeks beginning Feb. 1, four weeks beginning June 1 and four weeks beginning Dec. 1. When in the new calendar year would Annie be eligible again to take FMLA leave?
Explanation: Annie would not be eligible to take FMLA leave again until Feb. 1 of the new calendar year. On Feb. 1 of the new calendar year, Annie could recoup — and be entitled to use — one additional day of FMLA leave each day for four weeks. Annie also would begin to recoup additional days beginning on June 1 of that year and additional days beginning on Dec. 1.

Districts that elect to use the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA each time the leave is requested. Employees taking FMLA in a rolling 12-month period may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, if Annie needed six weeks of leave for a serious health condition commencing

Feb. 1, only the first four weeks of leave would be protected by FMLA.

Example: Robert is seriously injured during military service. His sister Jan takes 16 weeks of leave to care for him from January to April. In July, Jan has a baby. How many weeks of FMLA leave does Jan have to care for her newborn child?
Explanation: Since all the incidents occurred in a single 12-month period, Jan would have 10 weeks of leave. Jan is limited to a combined total of 26 workweeks of leave for any FMLA-qualifying reasons during the single 12-month period.

Example: Robert is seriously injured during military service. His sister Jan takes eight weeks of leave to care for him from January to February. In July, Jan has a baby. How many weeks of FMLA leave does Jan have to care for her newborn child?
Explanation: Jan would have 12 weeks of leave to care for her newborn child. Although Jan would not reach a combined total of 26 workweeks of leave, only 12 of the 26 weeks may be for FMLA-qualifying reasons other than to care for a covered servicemember.

Example: Tonya, a teacher who normally works five days each week, needs to take two days of FMLA leave per week over a period of several weeks. What are the district's options for scheduling Tonya's leave?
Explanation: Tonya is an employee to whom the special rules would apply since she would be on leave for 40% of the time she is scheduled to work. In this case, the district could either allow Tonya to take two days of FMLA leave per week or it could temporarily transfer Tonya to an available alternative position that better accommodates her intermittent work schedule.

Example: Susie requests two weeks of leave to recover from knee surgery. A holiday occurs during the two-week period of leave. Should the holiday be counted against Susie's FMLA leave entitlement?
Explanation: The fact that a holiday may occur in the week taken as FMLA leave has no effect. The entire week may be counted as a week of FMLA leave. However, if Susie were using FMLA leave in increments of less than one week, the holiday would not be counted against her FMLA leave entitlement unless she was otherwise scheduled and expected to work during the holiday. Similarly, if the district's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (for example, the district closing for two weeks for the Christmas/New Year holidays), the days the district's activities have ceased do not count against the employee's FMLA leave entitlement. Additionally, the FMLA regulations specifically state that the period during the summer vacation when a district employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement.

Example: Sean normally is required to work 48 hours in a week, but due to a serious health condition, he is unable to work more than 40 hours in a week. Are the eight hours Sean would have been required to work counted against his FMLA leave entitlement?
Explanation: Yes. If an employee would normally be required to work overtime but is unable to do so because of an FMLA-qualifying reason, the hours that the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is essentially using intermittent or reduced schedule leave. In this example, Sean would use eight hours or one-sixth of a workweek of FMLA-protected leave out of the 48-hour workweek. Voluntary overtime hours that an employee does not work due to a serious health condition are not counted against the employee's FMLA leave entitlement.

Chapter 7

Giving notice and designating leave

Employee notice

Employees seeking to use FMLA leave are required to provide notice as follows:

If the need for leave is …	The employee must provide notice …
Foreseeable and more than 30 days in advance	30 days in advance
Foreseeable and less than 30 days in advance	As soon as practicable — generally, either the same or next business day
Not foreseeable	As soon as practicable under the facts and circumstances of the particular case

Absent unusual circumstances, employees must comply with the district's usual and customary notice and procedural requirements for requesting leave. If the employee fails to comply with the normal procedures for reporting an absence, then the employee is subject to whatever discipline the district's rules provide for such a failure, and the district may delay FMLA coverage until the employee complies with the rules (FMLA 2009-1-A).

Employees must provide sufficient information for the district to reasonably determine if FMLA may apply to the leave request. Calling in sick often is not enough information. Depending on the situation, such information may include that the employee is incapacitated due to pregnancy; has been hospitalized overnight; is unable to perform the functions of the job; and/or that the employee or employee's qualifying family member is under the continuing care of a health care provider.

When an employee seeks leave for an FMLA-qualifying reason for the *first* time, the employee need not expressly assert FMLA rights or mention FMLA. When an employee seeks leave, however, due to an FMLA-qualifying reason for which the district has previously provided the employee FMLA-protected leave, the employee *must* specifically reference either the qualifying reason for leave or the need for FMLA leave.

Employer notice

Districts have the following notice obligations under FMLA:

Notice	Time frame
General notice	Upon hiring each new employee and each time the notice is revised
Eligibility notice; rights and responsibilities notice	Within five business days of the district acquiring knowledge that an employee's leave may be for an FMLA purpose
Designation notice	Within five business days of required and completed certification

General notice

Districts must post a notice approved by the U.S. secretary of labor explaining the rights and responsibilities under FMLA. Additionally, districts must either include this general notice in employee handbooks or other written guidance to employees concerning benefits or must distribute a copy of the notice to each new employee upon hiring. School districts may use the DOL notice to meet this requirement: www.dol.gov/agencies/whd/posters/fmla.

Eligibility and Rights and Responsibilities notices
When an employee requests FMLA leave or the district learns that leave may be for an FMLA purpose, the district must send the employee an eligibility notice that notifies the employee of his or her eligibility to take leave, including a reason for noneligibility if the employee is determined not to be eligible (such as the employee has not worked 1,250 hours in the last 12 months). The eligibility notice may be oral or written, and generally should be given within five business days of the request for FMLA leave.

Districts also must provide employees with a rights and responsibility notice that informs employees of their rights and responsibilities under FMLA, including specific information on what is required of the employee. Districts are only required to send these two notices once during a 12-month period — even if the employee is requesting leave for a different qualifying condition — so long as neither the employee's eligibility status nor the employee's rights and responsibilities have changed.

Districts can use the Wage and Hour Division model form WH-381, Notice of Eligibility and Rights and Responsibilities, which is available on the department's website: **http://dol.gov/whd/fmla**.

Designation notice
When the district has enough information to determine that leave is being taken for an FMLA-qualifying condition, the district must send the employee a designation notice that notifies the employee that the leave is designated and will be counted as FMLA leave. The designation notice must be in writing and, generally, must be given within five business days of the determination. A district also must notify the employee of the number of hours, days or weeks that will be counted against the employee's FMLA entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement, such as in the case of unforeseeable intermittent leave, then the district must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee but not more often than once in a 30-day period and only if leave was taken in that period.

It's important to note that once the district has enough information to determine that leave is being taken for an FMLA-qualifying condition, the district must designate the leave as FMLA leave. In 2019, DOL was asked whether an employer's practice of voluntarily permitting employees to use their available paid sick leave prior to designating the leave as FMLA-qualifying, even when the leave was clearly FMLA-qualifying, was permissible. DOL opined that this was not permissible under FMLA. Once a district determines that leave is for an FMLA-qualifying reason, the employer may not delay designating the leave as FMLA-qualifying, even if the employee would prefer to delay the designation of their leave as FMLA-qualifying so they can first exhaust available paid leave before taking unpaid FMLA leave (FMLA2019-1-A).

If the district does not appropriately designate leave as required by FMLA, the district may retroactively designate leave as FMLA leave (with appropriate notice to the employee), so long as the district's failure to timely designate the leave does not cause harm or injury to the employee. In all cases when the leave would qualify for FMLA protections, a district and an employee can mutually agree that leave be retroactively designated as FMLA leave.

Districts can use the Wage and Hour Division model form WH-382, Designation Notice, which is available on the department's website: **http://dol.gov/whd/fmla**.

Example: On April 1, Mary calls her supervisor one hour before she is scheduled to work and states that she needs time off to care for her daughter Molly, who has chronic asthma that is exacerbated by high pollen levels in the air. On April 3, Mary's agency sends her a copy of the "Notice of Eligibility and Rights and Responsibilities," indicating that she is eligible for FMLA leave. They also send Mary a copy of the "Certification of Health Care Provider (HCP) for Family Member's Serious Health Condition." On April 9, Mary returns the completed certification, which indicates that she will periodically need to take time off to care for her daughter when the pollen levels are high. On April 10, Mary's agency sends her a "Designation Notice" form that indicates that Mary's FMLA leave request is approved. Did Mary's district comply with FMLA's notice requirements?
Explanation: Yes, it appears both Mary and the district have complied with FMLA's notice requirements.

Timing and content of Mary's notice: Mary's use of leave on April 1 is unforeseeable, which means she must give notice of the need "as soon as practicable." So long as one hour is considered a "reasonable time frame" in the district's policy, Mary has met the requirement. Calling in to the supervisor also is appropriate, unless the district has established a different policy for calling in absences. The content of Mary's notice is appropriate since she explains why the leave is needed and provides enough information for the agency to know FMLA is triggered.

Eligibility and Rights and Responsibilities Notice: The district provided Mary with notice of her eligibility within five days after she requested the leave.

Designation Notice: The district provided this within five days of receiving Mary's completed certification.

Example: Same facts as above, but now assume that on May 1, Mary calls her immediate supervisor one hour before she is scheduled to work and states that "the pollen is high today and Molly's asthma is acting up again." Does Mary's notice comply with the regulations? What notice, if any, does the district need to send?
Explanation:
Timing and content of Mary's notice: Mary provided sufficient notice. The district has enough background information to know that Mary is using FMLA leave pursuant to her certification on file.

Eligibility Notice and Rights and Responsibilities Notice: Assuming that neither Mary's eligibility status nor her rights and responsibilities have changed, the district is not required to send Mary a new notice since she is requesting leave within the same FMLA year.

Designation Notice: Since Mary is requesting leave during the same FMLA year, this notice is not needed, but the district should be prepared to respond to requests from Mary as to how much leave has been counted against her FMLA leave entitlement.

Example: Henry plans to take 12 weeks of FMLA leave beginning in August for the birth of his second child. Earlier in the 12-month leave year, however, he took two weeks of annual leave to care for his mother following her hospitalization for a serious health condition. Henry's district failed to notify him at the time of his mother's hospitalization that the time he spent caring for his mother would be counted as FMLA leave. Can the district retroactively designate this leave as FMLA leave and prohibit Henry from taking a full 12 weeks of FMLA leave for the birth of his second child?
Explanation: It depends. If Henry can establish that he would have made other arrangements for the care of his mother if he had known that the time would be counted against his FMLA entitlement, the two weeks his district failed to appropriately designate may not count against his FMLA entitlement.

Chapter 8

Certifications

Districts may require that an employee's request for leave be supported by an appropriate certification. DOL has developed four separate certification forms designed for this specific purpose:

- Certification of Health Care Provider for Employee's Serious Health Condition;
- Certification of Health Care Provider for Family Member's Serious Health Condition;
- Certification of Qualifying Exigency for Military Family Leave;
- Certification for Serious Injury or Illness of Covered Servicemember.

A district may not request certification of leave to care for a healthy newborn child or for placement with the employee of a son or daughter for adoption or foster care.

Timing

In most cases, the district should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter or, in the case of unforeseen leave, within five business days after the leave commences.

The district may request certification at a later date if the district later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the district within 15 calendar days after the district's request unless it is not practicable under the circumstances to do so.

When the employee's need for leave due to the employee's own serious health condition or the serious health condition of the employee's covered family member lasts beyond a single leave year, the district may require the employee to provide a new medical certification in each subsequent leave year.

Complete and sufficient certification

The employee has the responsibility to provide a complete and sufficient certification to the district. This includes the responsibility to pay any fees associated with the initial certification. The district must advise an employee when it finds a certification incomplete or insufficient, and must state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered "incomplete" if the district receives a certification but one or more of the applicable entries have not been completed. A certification is considered "insufficient" if the district receives a completed certification but the information provided is vague, ambiguous or nonresponsive. The district must provide the employee with seven calendar days to cure any such deficiency. If the deficiencies specified by the district are not cured in the resubmitted certification, the district may deny the taking of FMLA leave.

Authentication and clarification

If an employee submits a complete and sufficient certification signed by the health care provider, the district may not request additional information from the health care provider. However, the district may contact the health care provider for purposes of clarification and authentication after it has given the employee an opportunity to cure any deficiencies. To make such contact, the district must use a health care provider, human resource professional, leave administrator or management official. The district may not use the employee's direct supervisor.

"Authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document. No additional medical information may be requested. "Clarification" means

contacting the health care provider to understand the handwriting on the medical certification or understand the meaning of a response. Districts may not ask health care providers for additional information beyond that required by the certification form.

If an employee chooses not to provide the district with authorization allowing the district to clarify the certification with the health care provider and does not otherwise clarify the certification, the district may deny the taking of FMLA leave if the certification is unclear. It is the employee's responsibility to provide the district with a complete and sufficient certification and clarify the certification if necessary.

Second and third opinions

A district that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the district's expense. Pending receipt of the second medical opinion, the employee is provisionally entitled to FMLA benefits. The district is permitted to designate the health care provider to furnish the second opinion, but the individual may not be employed on a regular basis by the district.

If the opinions of the employee's and the district's designated health care providers differ, the district may require the employee to obtain certification from a third health care provider, again at the district's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the district and the employee.

Second and third opinions and recertification are not permitted for certification of a covered servicemember's serious injury or illness, or of a qualifying exigency.

Recertifications

The district may request recertification not more often than every 30 days and only in connection with an absence unless:

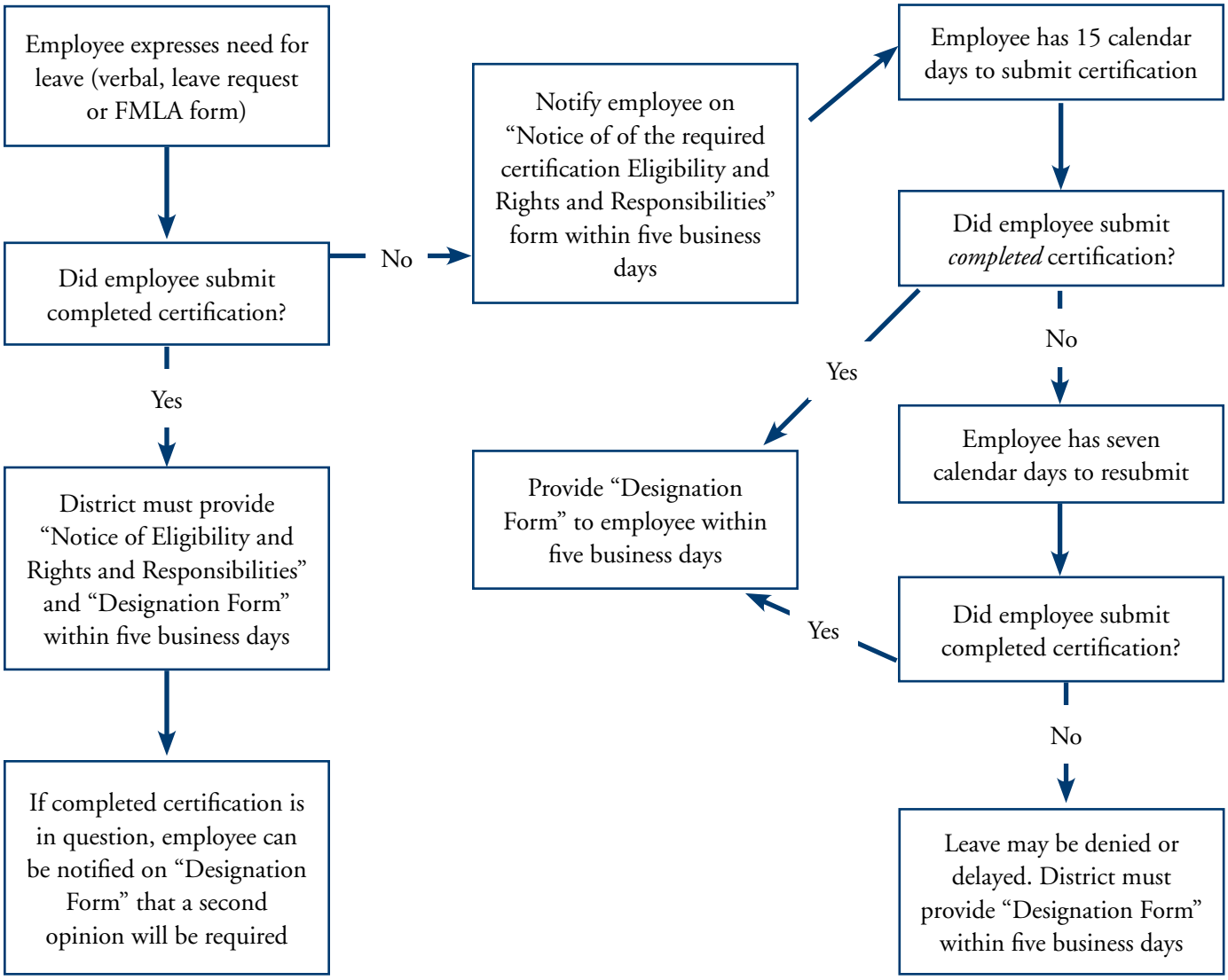
- More than 30 days: If the medical certification indicates that the minimum duration of the condition is more than 30 days, the district must wait until that minimum duration expires before requesting a recertification. However, in all cases, a district may request a recertification of a medical condition every six months in connection with an absence by the employee.
- Less than 30 days: A district may request recertification in less than 30 days if any of the following apply:
  - the employee requests an extension of leave;
  - circumstances described by the previous certification have changed significantly;
  - the district receives information that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification.

A district is prohibited from requesting second and third opinions on recertifications.

Fitness-for-duty certification

A district may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for their own serious health condition to obtain and present certification that the employee can resume work. The fitness-for-duty certification can be requested only for the health condition that caused the employee's need for FMLA leave. The employee is responsible for the cost of the fitness-for-duty certification.

FMLA paperwork flowchart



Example: Janie takes six weeks of FMLA for a cancer operation and treatment, and gives her district a medical certification that states she will be absent for six weeks. At the end of the six-week period, she asks to take two more weeks of FMLA leave. When can the district request a recertification from Janie?
Explanation: Because Janie's certification covers a six-week absence, the district can't ask for a recertification during that time absent information that casts doubt on her need for the leave. At the end of the six-week period, the district may properly ask Janie for a recertification for the additional two weeks since she has requested an extension of leave.

Example: Joe takes eight weeks of FMLA leave for a back operation and intensive therapy, and gives his district a medical certification that states that he will be absent for eight weeks. At the end of the eight-week period, Joe tells his district that he will need to take three days of FMLA leave per month for an indefinite period of time for additional therapy. When can the district request a recertification from Joe?
Explanation: Because Joe's certification covers an eight-week absence, the district can't ask for a recertification during that time absent information that casts doubt on his need for the leave. At the end of the eight-week period, the district may properly ask Joe for a recertification since the treatment described by the previous certification changed significantly. Six months later, and in connection with an absence, the district may properly ask Joe for another recertification for his need for FMLA leave.

Example: Sally has a medical certification that states she needs FMLA leave for one to two days when she suffers a migraine headache. Sally has a pattern of only using unscheduled FMLA leave for migraines on Mondays and Fridays (the first and last days of her workweek). When can the district request a recertification from Sally?
Explanation: DOL has held that a pattern of Friday/Monday absences could constitute "information that casts doubt upon the employee's stated reason for the absence," provided there is no evidence that provides a medical reason for the timing of such absences (FMLA 2004-2-A). As a result, the district could immediately request a recertification from the employee so long as the request is made in conjunction with an absence. As part of the information allowed to be obtained on recertification, the district may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

Chapter 9

Managing an employee's leave

Substitution of paid leave

Generally, FMLA leave is unpaid leave. However, FMLA permits an eligible employee to choose to substitute accrued paid leave for unpaid FMLA leave. If an employee doesn't choose to substitute accrued paid leave, the district may require the employee to do so. The term "substitute" means that the paid leave provided by the district runs concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the district's applicable paid-leave policy during the period of otherwise unpaid leave. Districts also may require employees to exhaust all of their eligible paid leave before using unpaid leave.

If the district has special procedural requirements for the use of paid leave, the district may require the employee to meet those specific procedural requirements when using the paid leave to substitute unpaid FMLA leave. For example, if the district's sick leave policy requires at least one hour of notice for the use of sick leave, the district can require an employee to provide one hour of notice when the employee seeks to substitute paid sick leave for unpaid FMLA leave. Any specific procedural requirements should be noted in advance in the space provided on the rights and responsibilities notice.

Remember that once a district determines that leave is for an FMLA-qualifying reason, the employer may not delay designating the leave as FMLA-qualifying, even if the employee would prefer to delay the designation of their leave as FMLA-qualifying so they can first exhaust available paid leave before taking unpaid FMLA leave. If an employee substitutes paid leave for unpaid leave, the employee's paid leave counts towards his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement (FMLA2019-1-A). Leave taken pursuant to a disability leave plan or workers' compensation injuries also may qualify as an FMLA-qualifying condition. In such cases, the district may designate and count the leave against the employee's FMLA leave entitlement.

Maintenance of employee benefits

During FMLA leave, a district must maintain an employee's group health coverage on the same conditions as would have been provided if the employee had been continuously employed during the leave period. The district must continue to pay the monthly employer contribution for an employee who continues coverage while on FMLA leave. An employee shall pay their portion of the premium cost for coverage while on paid or unpaid FMLA leave. When possible, this is typically obtained through a payroll deduction. However, the district also could bill the employee for the premium amount due each month. The employee has a 30-day grace period under FMLA in which to make the payment. If an employee's premium payment is more than 30 days late, the district's obligation to maintain health insurance coverage ceases under FMLA.

A district may recover its share of health plan premiums during FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to the continuation, recurrence or onset of a serious health condition that would otherwise entitle the employee to leave under FMLA or other circumstances beyond the employee's control. When paid leave is substituted for FMLA leave, the district may not recover its share of health insurance premiums for the period covered by paid leave.

An employee's entitlement to benefits other than group health benefits during a period of FMLA leave is determined by the district's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate.)

Chapter 10

Reinstatement

On return from FMLA leave, an employee is entitled to be returned to the same position they held when leave commenced or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. An "equivalent position" is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority. The determination of how an employee is to be restored to "an equivalent position" when returning from FMLA leave is made on the basis of established school board policies and practices, and any applicable collective bargaining agreements.

If an employee, as a result of FMLA leave, is no longer qualified for the position because of the inability to meet the requirements of the position (such as license, required courses or certification), the employee must be given a reasonable opportunity to fulfill those conditions upon returning to work.

An employee has no greater right to reinstatement or other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave. A district must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example, if an employee is laid off during the course of taking FMLA leave and employment is terminated, the district's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off. The district has the burden of showing that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

Chapter 11

Recordkeeping requirements

Maintenance of records

Districts are required to make, keep and preserve certain records that include the following:

- Basic payroll and identifying employee data, including:
  - name, address and occupation;
  - rate or basis of pay and terms of compensation;
  - daily and weekly hours worked each pay period;
  - additions to and deductions from wages;
  - total compensation paid.
- Dates FMLA leave is taken.
- Hours of FMLA leave used if leave is taken in increments of less than a day.
- Copies of FMLA notices provided by an employee to the district and by the district to its employees concerning FMLA.
- Any documents, including electronic records, describing employee benefits or district policies and practices regarding the taking of paid or unpaid leave.
- Premium payments for employee benefits.
- Records of any dispute between the district and an employee regarding the designation of leave as FMLA leave, such as emails or other written statements regarding a disagreement on the designation of the employee's FMLA leave request.

A district may maintain records electronically if all the required information is included. Records must be kept for no less than three years. Districts are encouraged to check their records retention schedules and revise them if they don't align with this minimum requirement. Districts must make records available for inspection, copying and transcription by representatives of DOL upon request.

Confidentiality of records

Districts are required to maintain records and documents relating to FMLA medical certifications and recertifications of employees or their family members as confidential medical records. Such records are to be maintained in separate files from the usual personnel files.

Appendix

FMLA resources

Available on the U.S. Department of Labor Wage and Hour Division website:

- Family and Medical Leave Act: **www.dol.gov/whd/fmla**
- General Guidance: **www.dol.gov/whd/fmla/general_guidance.htm**
- Fact Sheets: **www.dol.gov/whd/fmla/fact_sheets.htm**
- Poster: **www.dol.gov/whd/fmla/posters.htm**
- Forms: **www.dol.gov/whd/fmla/forms.htm**
- Interpretive Guidance: **www.dol.gov/whd/fmla/interpretive_guidance.htm**
- Field Assistance Bulletins: **www.dol.gov/agencies/whd/field-assistance-bulletins**
- Applicable Law and Regulations: **www.dol.gov/whd/fmla/applicable_laws.htm**