

# FMLA

By: Lara J. Peppard  
Thompson, Sizemore, Gonzalez, & Hearing, P.A.  
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# Compliance

Who must comply?

- 50 or more employees
- 75 mile radius of worksite
- All public employers (school boards)

# Eligible employee

Who is an eligible employee?

- 1,250 “hours of service”
- 12 month period
  - Break in service?
- Full-time teachers meet the 1,250 hour test
  - Which employees are NOT included?
- Eligibility is determined as of the date the leave is to commence.

# Conditions Giving Rise to Leave (12 weeks)

- To care for a child--within 12 months of birth
- Adoption or foster care--within 12 months of placement
- Employee unable to perform the functions of the job due to serious health condition
- To care for close relative with a serious health condition
  - a spouse, son, daughter, or parent*
- Deployment of member of Armed Forces

# Conditions Giving Rise to Leave (26 weeks)

- To care for an employee's spouse, son, daughter, parent, or next of kin who was injured or became ill while on active military duty
- To care for a veteran undergoing medical treatment, recuperation or therapy for a serious illness or injury and who was a member of the Armed Forces at any time during the 5 years preceding the treatment

# serious health condition: definitions

- Inpatient care
- Treatment
- Incapacity

# What is a serious health condition?

- In-Patient Care or
- Continuing Treatment
  - Incapacity for more than 3 consecutive days and:
  - Medical treatment 2 or more times; or
  - In-person visit and continuous medical treatment.
- Chronic Illness
  - Alzheimer's disease
  - Depression
  - Asthma

# NOT serious health conditions:

- routine physicals;
- most cosmetic surgeries;
- common colds, flu, ear aches, upset stomachs, minor ulcers, non-migraine headaches;
- routine dental or orthodontic treatment;
- routine eye examinations; or
- acne treatment;

# How should an employee ask for FMLA leave?

- Inform employees to whom they should report the need for FMLA leave
- No “magic words” are required from the employee.
- Determine eligibility and notify the employee.

# How much notice must an employee give?

- leave is foreseeable: 30 days' notice.
- leave is unforeseeable: notice per applicable call-in policy.
- For planned medical treatment (foreseeable leave), the employee must:
  - try to schedule the treatment so as to not disrupt unduly the school's operations (subject to the approval of the employee's health care provider); and
  - provide the district with at least 30 days' notice before the leave is to begin.

# What notice must the employer give?

- General FMLA notice
  - In an employee handbook OR
  - If there is no handbook, at the time of hire.
- Eligibility notice
- Notice whether the leave has been approved and designated as FMLA qualified.

# Certification

- the date the serious health condition began;
- the probable duration of the condition;
- the appropriate medical facts regarding the condition;
- a statement that the employee is needed to care for a covered family member or a statement that the employee is unable to perform the functions of his or her position;
- dates and duration of any planned treatment; and
- a statement of the medical necessity of intermittent/reduced schedule leave and the expected duration of such leave.

# Designation of leave notice

- Designation of leave as FMLA leave;
- Certification requirements;
- Any paid leave substitution requirements;
- Any requirements regarding payment of health benefit premiums;
- Whether employee must report on their status;
- Whether a fitness for duty certification is required

# Fitness for duty

- Must require this uniformly:
  - All employees in the same position;
  - Same serious health conditions.
- Must provide the employee a list of the essential functions of their job and ask the health care provider to certify whether the employee can perform them

# Who determines serious health condition?

- Rely on the healthcare professional's opinion
- Request clarification or authentication regarding certification

# Who determines serious health condition?

- Request second opinion if there is **genuine** doubt as to validity of clarification

# Permissible Leave

- Total of 12 weeks over a 12 month period based on the five conditions giving rise to leave.
- May be intermittent or reduced leave schedule.
- Choices of 12 month period:
  - Calendar Year
  - Fixed 12 month leave year
  - 12 months from any employee's first date of FMLA
  - Rolling backward from date employee uses FMLA leave

# Permissible leave

- 26 weeks to care for an injured service member.
- The 26 weeks must be used in a single 12-month period, which begins on the first day the employee takes this type of leave.

# Examples

- 12 weeks of the first type of leave followed by 26 weeks of caring for military service member is the maximum amount of leave an employee can take.

# Substitution of paid leave

- The district can require employees to substitute paid leave during FMLA leave.
- Examples:
  - Sick
  - Vacation
  - Personal
  - Disability leave plan

# Intermittent and Reduced leave schedule

- Intermittent leave: leave taken on a periodic basis, where the employee takes off a few hours a day or a few days a week for several weeks
- Reduced leave schedule: another way of saying part-time work.

# Counting the 12 weeks for intermittent or reduced leave

- Intermittent leave and leave on a reduced leave schedule are counted on a pro-rated basis.

## Illustrations:

- If an employee normally works a 5-day week and takes 1 day off for FMLA in a week, the leave is counted as  $1/5$  of a week.
- If an employee who normally works 30 hours per week works only 20 hours per week under a reduced leave schedule, the employee's 10 hours of leave would constitute  $1/3$  of a week of FMLA leave.

# Holidays and FMLA leave

- When a holiday occurs during a full week of FMLA leave, the week is counted as a full week of FMLA leave.
- When an employee regularly works Monday through Friday but requires Wednesday through Friday for FMLA leave, and Friday is a holiday, only two days are counted as FMLA leave.

# Special rules for instructional employees

- Leave taken for a period that ends with the school year and begins the next semester is deemed to be taken consecutively rather than intermittently.
- The period during the summer vacation, when the employee would not have been required to report for duty, is not counted against the employee's FMLA leave entitlement.
- An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

# Special rules for instructional employees

- If intermittent/reduced schedule leave is needed for medical treatment and the employee would be on leave for  $> 20\%$  of the time, the district may require the employee to choose either to:
  - Take leave for a period of a particular duration, not longer than the duration of the treatment; or
  - Transfer temporarily to an available alternative position for which the employee is qualified...

# Spouses with same employer

- Employee's own serious health condition
  - Each spouse may take 12 workweeks.
- Birth, adoption, foster care of a child
  - Spouses may take a combined total of 12 workweeks.
- Serious health condition of a child or spouse
  - Each spouse may take 12 workweeks.

# Spouses with same employer

- Serious health condition of a parent
  - Only the employee who is the child of this parent may take 12 workweeks.
- Care for a covered service member under the military family leave special leave entitlement
  - Spouses may take a combined total of 26 workweeks.

# Employee benefits while on FMLA leave

- Premium payments, consequences, and lapses
- Potential responsibility to reimburse employer
- Right to restoration of benefits

# Reinstatement Rights

- The employee must be able to perform the essential functions of the job
- Provide accurate information about employee's job duties and functions
- Determine whether employee is eligible for any additional leave or for any accommodation

# Restoration to position

- Same position the employee held when the FMLA leave began; OR
- An equivalent position with equivalent benefits, pay, and other terms and conditions of employment (i.e., the same hours, opportunities for overtime, etc.)

# Documentation

- If at the end of the leave the employee requests a different position than the one he held before taking the leave, document that request.
- When placing an employee in a different position, the change should be documented along with an explanation of how the new position is “equivalent” to the employee’s old position and why the change was necessary.

# “Key Employee”

- Highest paid 10% of employees employed within 75 miles of facility.
- Before denying restoration, three prerequisites:
  - Necessary to prevent substantial and grievous economic injury
  - Notification of intent to deny restoration as soon as determination is made
  - Where employee is already on leave when determination is made and notice is given, employee elects not to return to work

# Attendance bonuses

- No longer required to pay, when employee does not have perfect attendance after having taken FMLA leave
- Check with any applicable collective bargaining agreement

# Record Keeping Requirements

## -3 Years-

- Payroll and employee identification data
- Dates of leave granted
- Copies of employee notices
- Copies of employer policies
- Employee premium payments
- Records of any disputes with the employee regarding leave

# Posting and Notification Requirements

- Include FMLA policy in employee handbook
- Give a copy of the policy to new hires
- Post FMLA notice poster in a conspicuous place
- Willful violation may result in a fine

# Set Up Procedure for Reviewing Leave Requests

- Appoint a decision-maker
- Consider the ADA.
- Designate a 12-month period
- Determine which benefits must be restored
- Determine which benefits will accrue during leave
- Adopt an eligibility form (or use DOL form)
- Adopt certification of health care provider form
- Adopt FMLA designation form

# Set Up Procedure for Reviewing Leave Requests

- Maintain up-to-date job descriptions with essential functions
- Calendar the deadlines for return of the certification and any need for correction of an incomplete certification.
- Check the authenticity of the certification.
- Do not hesitate to seek advice.

Questions???