

**FAMILY AND MEDICAL LEAVE ACT
IAM LEGAL DEPARTMENT
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I. PURPOSE

The purpose of this outline is to provide you with an overview of the Family and Medical Leave Act (FMLA), to discuss common FMLA issues in unionized workplaces, and to identify strategies for maximizing employees' leave rights through collective bargaining and contract administration.

II. OVERVIEW OF THE FMLA

A. ENACTMENT AND ENFORCEMENT

1. The FMLA was passed by Congress and signed into law in 1993. The FMLA went into effect on August 5, 1993 for non-unionized employers, but did not over most unionized workplaces until February 5, 1994.
2. The U.S. Department of Labor (DOL) enforces the FMLA. In connection with its enforcement duties, the DOL has issued regulations interpreting the FMLA. The DOL's FMLA regulations are contained in Part 825 of Title 29 of the Code of Federal Regulations.¹ The DOL also has several FMLA fact sheets and summaries available. You can obtain this information from the nearest DOL Regional Office or it can be accessed through the Wage & Hour Division of the Employment Standards Administration on the DOL world wide web page at <http://www.dol.gov>.
3. An employee who believes his or her rights under the FMLA have been violated has several options. Generally, an employee has two years from the date of the violation in which to take legal action.
 - a. The employee may file a complaint with the DOL. DOL will investigate the complaint and may bring legal action on behalf of the employee. Because of staff and funding shortages, this can be a lengthy process, but the DOL has reported that it has been able to resolve most of the FMLA complaints brought by employees without going to court.
 - b. The employee may file suit in federal court. While a prevailing employee is entitled to attorney's fees, this can be a time-consuming and costly process. An employee may not file in court

¹ 29 CFR Part 825.

if the DOL has filed a complaint on his behalf unless the DOL has dismissed the complaint without prejudice.

- c. Many if not most FMLA problems can be dealt with effectively and relatively quickly through the grievance and arbitration procedure of a collective bargaining agreement.

B. ELIGIBILITY

1. To be eligible for FMLA leave, an employee must meet three requirements.
 - a. The employee must work for a covered employer. The FMLA only covers employers with 50 or more employees. The employee must have been on the payroll for 20 or more weeks during the current or preceding calendar year. Employees at different work sites can be counted to make up the 50 employees if the work sites are within 75 miles of the employee's work site.
 - b. The employee must have worked for his or her current employer for at least 12 months. The 12 months do not have to be consecutive.
 - c. The employee must have worked for his or her current employer for at least 1,250 hours in the previous 12 months.
2. Exception "Key Employees"
 - a. The highest paid 10% of employees are not entitled to automatically have their position or an equivalent position given to them after an FMLA leave. If the employer can show that doing so would cause substantial economic harm to the organization and tells the employee in advance that they may not be returned to their position, there is no requirement that the employer provide an equivalent position.
 - b. However, even these employees are entitled to have their health insurance continued during an FMLA leave.

C. LEAVE ENTITLEMENT

1. The FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave within a 12-month period for one of three reasons.

- a. To care for a newborn or newly adopted child. The right to take leave for an adopted child begins to run when the child is placed with you - not when the adoption is completed.
 - i. This leave must be taken within 12 months of the birth or adoption of the child. Both mothers and fathers are entitled to this type of FMLA leave, but if both parents work for the same employer, special limits may apply.
- b. To care for a family member with a serious health condition.
 - i. Family members include an employee's spouse, minor children and parents. In-laws and more distant relatives are not immediate family members for FMLA purposes. Employees may, however, take FMLA leave to care for adult children who are incapable of self-care due to a mental or physical disability or to care for a relative or other individual who acted as a parent to the employee in the employee's childhood.
- c. Because of the employee's own serious health condition that makes the employee unable to perform the functions of the employee's job.

2. Definition of "serious health condition" for FMLA purposes.

- a. Any period of incapacity or treatment in connection with inpatient care. Thus, if the condition requires a stay in the hospital, it is FMLA-qualifying.
- b. Any period of incapacity requiring absence from work for more than 3 days and involving continuing treatment by a health care provider.
 - i. Common colds, flu, routine dental work, etc. are normally not serious health conditions, but similar conditions could be if the person has to go to the doctor and is prescribed medicine or other follow-up care and is in fact incapacitated for at least three days.
- c. Continuing treatment for chronic conditions with episodic occurrences like asthma, epilepsy, diabetes, or cancer. Even if an incident of incapacity in connection with these types of chronic illnesses is less than three days, it is still FMLA-qualifying on the

theory that treatment is required or the result could be an even greater period of incapacity.

- d. Pregnancy or prenatal care absences qualify.
3. FMLA leave may be taken intermittently in some circumstances.
- a. FMLA leave need not be taken all at once. An employee may take leave intermittently in order to care for a family member with a serious health condition or due to the employee's own serious health condition.
 - i. An employee is not entitled to take intermittent FMLA leave to care for a newborn or newly adopted child. However, the FMLA does not prevent employers from allowing employees to take intermittent leave for this purpose.
 - ii. Examples of intermittent FMLA leave include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of several months for care of a chronic health condition.
 - b. An employee may take intermittent leave in days, hours or even partial hours. An employer should credit an employee on an intermittent leave schedule only with the actual amount of leave required. For example, if an employee needs two hours of FMLA leave in order to receive treatment for a chronic condition, the employer cannot force the employee to take an entire day of FMLA leave for that purpose; the employer should only count the time actually needed. If an employee will regularly need intermittent leave, the employer may temporarily transfer the employee to a position that is better suited to such intermittent leave. The employees pay and benefits cannot be reduced due to the transfer.

D. EMPLOYEE'S RESPONSIBILITIES UNDER THE FMLA

- 1. Give notice of the need for FMLA leave.
 - a. Employees do not have to specifically request "FMLA leave" or even mention the FMLA. Employees must simply give enough information to put employer on notice that the reason the employee

is requesting leave may be FMLA-qualifying.

- b. Employers can ask employees to provide “written notice” of need for leave, but employers cannot deny FMLA leave if the employee fails to comply with a written request requirement as long as the employee has given timely verbal or other notice.
- c. Amount of notice required.
 - i. When the need for leave is foreseeable, employees must give 30 days notice.
 - ii. When the need for leave is not foreseeable, employees must give notice “as soon as practicable” but usually within one or two days of the need for leave arising.

2. Provide certification of the medical need for leave.

- a. The FMLA allows employers to require employees to provide medical certification of the need for leave for the employee’s own serious health condition or for a family member’s serious health condition.
- b. Employers may not seek more information from the employee in the medical certification than what is allowed on the DOL’s model certification form. This certification may include: a description of the serious health condition; the date that the condition began or treatment became necessary; and the expected duration of the condition or treatment.
- c. Note that employers cannot require employees to provide a “diagnosis.”
- d. Employers should not require employees to sign an authorization allowing their doctors to release all their medical information to the employer. An employer’s doctor may contact the employee’s doctor only for clarification of the specific information provided in the certification. Any broader release is inappropriate.
- e. If an employer questions an employee’s medical certification, the employer cannot just deny the FMLA leave. Instead, the employer must send the employee for a second and possibly third medical opinion. The employer must pay for any such second or third opinion.

- f. An employer cannot require an employee who has provided a certification of a need for intermittent leave to provide a new certification each time the employee uses leave intermittently. An employer generally should not request recertification when an employee is using intermittent leave for a chronic condition more often than every 30 days.
- 3. Comply with fitness-for-duty certification requirements.
 - a. An employer may require employees scheduled to return from FMLA leave to certify that they are medically fit for duty.
 - b. An employer may not discriminate in requiring fitness-for-duty certifications. An employer cannot require a fitness-for-duty certification from an employee unless it does so for all similarly situated employees.
 - b. A fitness-for-duty examination or certification must be job-related and consistent with business necessity.

E. MAINTENANCE OF HEALTH BENEFITS

- 1. An employer is required to maintain group health insurance coverage during the time an employee is on FMLA leave on the same terms as if the employee had continued to work.
 - a. Employees must continue to pay their share of any monthly premium while on FMLA leave.
 - b. If an employee does not return from FMLA leave, the employer may require the employee to pay back the money paid to maintain health insurance during the leave. If the reason for failing to return is the employee or family member's serious health condition or other circumstances beyond the employee's control, the employer cannot collect the health insurance premium.
- 2. Health care benefits are the only benefit the FMLA requires an employer to continue through a period of unpaid FMLA leave. But, under the FMLA's anti-discrimination provisions, an FMLA-qualifying absence cannot be counted as a break in service for pension or other purposes.

F. JOB RESTORATION

1. An employee returning from FMLA leave must be restored to the same or an equivalent job upon return from FMLA leave. An equivalent job means a job with equivalent pay, benefits and other terms and conditions of employment.
2. An employer may temporarily transfer an employee to an alternative position during a period of intermittent or reduced leave if the alternative position better accommodates recurring periods of leave.
 - a. The alternative position must have equivalent pay and benefits but does not have to have equivalent duties.
 - b. If the alternative position is a part-time position, the employer may still not require the employee to take more leave than is necessary to address his or her condition.
 - c. An employee must be restored to his or her normal position once he or she no longer needs to be on intermittent leave or reduced hours.
3. However, an employee does not have to be restored if the employee would have been terminated in the absence of an FMLA leave. For example, if the employee would have been legitimately laid off due to a reduction in force while on FMLA leave, the employee may be laid off upon return from leave.

G. SUBSTITUTION OF PAID LEAVE

1. FMLA leave is unpaid. The FMLA, however, allows employers to require employee to elect to use accrued paid leave for some FMLA-qualifying absences.
 - a. An employee can elect or an employer can require an employee to use any accrued paid vacation or personal leave for any FMLA-qualifying absence.
 - b. An employee can elect or an employer can require an employee to use accrued paid sick/medical leave for an FMLA-qualifying absence, which the paid leave could normally be used for.
 - i. If the employer's paid sick leave policy does not allow employees to use paid sick leave to care for an ill family member, the employee does not have a right to use the paid sick leave during an FMLA leave to care for a family

member with a serious health condition.

- c. Absences during which the employee is receiving workers compensation or benefits under other disability plans can be counted towards an employee's FMLA entitlement.
 - i. Because many state worker's compensation laws do not require an employer to continue health care coverage while an employee is absent from work on worker's compensation, an employee might benefit from having such an absence designated as FMLA leave.
2. When paid leave is substituted for FMLA leave the employee must comply only with the terms of the paid leave policy, not with any more stringent FMLA requirements, including medical certification.
3. When paid leave is substituted for FMLA leave, an employee gets any greater benefits to which he or she is normally entitled under the paid leave policy. For example, the only benefit the FMLA requires an employer to maintain through a period of unpaid FMLA leave is group health coverage. If the employee normally receives other benefits under the paid leave policy, such as life insurance coverage and seniority or pension credit accrual, then the employee remains entitled to those benefits when the paid leave is used for an FMLA-qualifying purpose.
4. An important limitation on an employer's right to substitute paid leave for FMLA leave is that an employer must notify an employee in writing that the employee's paid absence will be counted towards the employee's FMLA entitlement essentially as soon as the employer knows that the paid leave absence is also FMLA-qualifying. This issue currently is the subject of federal court litigation.

H. PROHIBITION ON INTERFERENCE OR DISCRIMINATION

1. It is a violation of the FMLA for an employer to interfere with or discriminate against employees who exercise their rights under the FMLA.
 - a. Under this provision it is a violation of the FMLA for an employer to count any FMLA-qualifying absence against an employee under a "no-fault" attendance policy.
 - b. Under this provision it is a violation of the FMLA for an employer to deny an employee on FMLA leave any bonuses like attendance

or safety bonuses which depend on an absence of occurrences or depend solely on being at work. Bonuses based on production, however, may be denied.

III. THE FMLA AND COLLECTIVE BARGAINING

A. THE FMLA SETS A MINIMUM STANDARD

1. The FMLA sets a minimum standard. It does not supercede any greater rights provided in a collective bargaining agreement or state or local law. The FMLA in fact encourages employers to provide employees with more generous benefits.
 - a. Any rights, which employees have under the FMLA, cannot be waived by the collective bargaining agreement, but employer's rights under the FMLA can certainly be limited by the collective bargaining agreement.
2. Under the National Labor Relations Act (NLRA), an employer has a duty to bargain in good faith with the union representing its employees over terms and conditions of employment. An employer's duty to bargain forbids the employer from changing working conditions of union-represented employees without first giving the union notice of the proposed change and an opportunity to bargain.
3. An employer has no duty to bargain over changes in working conditions mandated by law, but where a law such as the FMLA gives the employer some discretion in implementing its terms, the employer must still bargain with the union over those discretionary matters.

B. EXAMPLES OF FMLA IMPLEMENTATION ISSUES, WHICH ARE SUBJECT TO BARGAINING

1. Any area under the FMLA where the employer is given some discretion or a "choice" is appropriate for bargaining. An employer should not be allowed to unilaterally implement an FMLA policy in unionized workplaces. There are numerous FMLA implementation issues which are subject to bargaining, including but not limited to those listed below.
2. The 12-month period.
 - a. The FMLA entitles eligible employees to up to 12 weeks of leave in a 12-month period. Employers are given several options for counting the 12-month period.

- i. Most employers choose a “rolling” 12-month period measured backward from the date an employee uses any FMLA leave.
- ii. A fixed 12-month period can be more beneficial to employees. For example, in a workplace where the calendar year is used as the FMLA 12-month period, an employee who used 12 weeks at the end of one calendar year would immediately be entitled to another 12 weeks at the beginning of the next calendar year.

3. Substitution of Paid Leave.

- a. The FMLA allows but does not require employers to force employees to use paid leave for FMLA-qualifying purpose. The collective bargaining agreement can limit an employer’s option to force the substitution of paid leave.
- b. The FMLA allows but does not require employers to permit the use of paid sick leave for FMLA-qualifying absences to care for a seriously ill family member if the paid sick leave plan normally doesn’t apply to such absences. The collective bargaining agreement can give employees the right to use accrued paid sick leave for the FMLA-qualifying illnesses of their family members.
- c. An existing collective bargaining agreement may already limit an employer’s right to force an employee to use accrued paid vacation for any FMLA-qualifying absence.
 - i. There are several good arbitration decisions finding that where vacations are scheduled by seniority and the employer doesn’t have the explicit right in the contract to alter that vacation schedule for FMLA reasons, then the employer cannot force an employee to use paid vacation for an FMLA-qualifying absence.
 - ii. Note however, that because the FMLA gives the employee the right to elect to use paid vacation for FMLA purposes, the employee may do so despite the contract language. A collective bargaining agreement can limit an employer’s but not an employee’s rights under the FMLA.

4. Benefits during FMLA Leave.

- a. The only benefit, which the FMLA requires employers to provide through a period of unpaid FMLA leave, is health insurance. The collective bargaining agreement can extend other benefits like life insurance, pension credits or seniority accrual through a period of unpaid FMLA leave.
- b. Again, if paid leave is being used for an FMLA-qualifying purpose, the employee remains entitled to all benefits he/she normally would receive under the paid leave policy. Also, if the collective bargaining agreement provides for extension of benefits during periods of unpaid leave, like medical leaves of absence, then there is a good argument that the collective bargaining agreement already provides for extension of those other benefits through a period of unpaid FMLA leave.

5. Medical Certification and Fitness-for-Duty Reports.

- a. The FMLA allows but does not mandate that an employer require medical certification or fitness-for-duty reports in connection with FMLA leave.
- b. The collective bargaining agreement can limit an employer's ability to require medical certification or fitness-for-duty reports.
- c. If an employer does require medical certification or fitness-for-duty reports, those requirements cannot violate other terms in the collective bargaining agreement.

6. Medical Insurance Payments.

- a. If an employee must normally pay a share of his or her medical insurance premium, then he or she must continue to do so during FMLA leave. The FMLA, however, gives employers discretion in the method they choose for requiring employees to make that premium payment.
- b. The collective bargaining agreement can define which method of premium payment is used by employees on FMLA leave. The employer cannot select a method which violates the collective bargaining agreement.

7. Temporary Transfer Requirements.

- a. Temporary transfers to positions temporarily vacant because an employee is on FMLA leave should be governed by the collective bargaining agreement.
- b. The terms of transferring an employee to an alternative position to accommodate the need for intermittent leave or a reduced leave schedule must comply with the collective bargaining agreement.

C. BARGAINING TO EXPAND THE FMLA.

- 1. FMLA-related bargaining does not have to be limited to the areas where the employer has discretion in implementing the FMLA. A collective bargaining agreement can greatly expand employees' rights to paid or unpaid family leave.
- 2. Examples of ways to improve on the FMLA through bargaining.
 - a. Bargain for paid family leave.
 - b. Bargain to provide FMLA-type leave rights for employees who do not meet the FMLA's eligibility requirements or in workplaces which have fewer than the 50 employees needed to trigger FMLA coverage.
 - c. Bargain for more than 12 weeks of family leave.
 - d. Bargain for leave rights for purposes not covered by the FMLA, i.e. routine illnesses, children's school events, etc.