AFGE’s Guide to
FAMILYFRIENDLY/
FAMILY MEDICAL LEAVE

The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO that represents approximately 600,000 employees of the United States federal government and the government of the District of Columbia.

Under the leadership of the National Vice President for Women's and Fair Practices, the Women's and Fair Practices Departments are devoted to promoting the civil, human, women's and workers' rights of federal and D.C. government workers.

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Family Friendly/Family Medical Leave
AFGE’s Women’s and Fair Practices Departments
Table of Contents

Introduction 1

Definitions for FMLA 2

FMLA – Family and Medical Leave Act of 1993 8

What Does FMLA Allow? 9

Who Administers FMLA and FMLA Coverage? 9

Protections During FMLA Leave 11

Are You Covered by FMLA? – Eligibility Requirements 13

Requesting/Invoking FMLA 14

Use of FMLA Leave 16

Returning to Work After FMLA 19

Enforcing FMLA and Leave Rights 21

Definitions for DCFMLA 22

DCFMLA 24

Notice 24

Use 25

Protection 25

Medical Certification 25

Definitions for OPM 26

Family Friendly Laws & Regulations for Federal and DC Employees 29

Requesting & Granting Sick Leave for Family/Bereavement Purposes 30

Appendices:

Appendix A: DOL Regulations for FMLA – Table of Contents for 29 CFR Part 825 32

Appendix B: DC Regulations for DCFMLA – Table of Contents for 4 DCMR Part 1600 37

Appendix C: OPM Regulations for FMLA – Table of Contents for 5 CFR Part 630 40
Appendix D: FMLA/DCFMLA Medical Certification Form

Appendix E: Frequently Asked Questions and Answers About the Revisions to the Family and Medical Leave Act
Introduction

Everyone will experience an illness or health condition that will require taking time off work, whether it is your own experience or that of a loved one, choosing between taking care of yourself or a loved one and taking time off work should not be a choice an employee should have to worry about.

The Family and Medical Leave Act of 1993 (FMLA) also provides sick leave for family and medical related purposes. However, DC government employees have the choice of using the District of Columbia Family Medical Leave Act of 1990 (DCFMLA) or FMLA to request leave for medical absence.

FMLA and DCFMLA are intended to benefit workers but the eligibility requirements are strict and differ based on the Department of Labor (DOL), Office of Personnel Management (OPM) and DC government regulations. This guide provides an overview of the different laws and regulations governing AFGE members working throughout large and small agencies.

More detailed information can be obtained directly from DOL, OPM and DC Office of Human Rights (OHR) for private, federal, and DC government employees, respectively.

This book is divided into three sections:

- FMLA;
- DCFMLA; and
- Family Friendly Leave.
Definitions for FMLA

- **Adoption** means a legal process in which an individual becomes the legal parent of another's child. The source of an adopted child—e.g., whether from a licensed placement agency or otherwise—is not a factor in determining eligibility for leave under this subpart.

- **Covered active duty or call to covered active duty status** means:
  
  (1) In the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty (or notification of an impending call or order to active duty); and

  (2) In the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to any of the following sections of title 10, United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress.

- **Covered military member** means the employee's spouse, son, daughter, or parent on covered active duty or call to covered active duty status.

- **Employee** means an individual to whom this subpart applies.

- **Essential functions** means the fundamental job duties of the employee's position, as defined in 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

- **Family and medical leave** means an employee's entitlement to 12 administrative workweeks of unpaid leave for certain family and medical needs, as prescribed under sections 6381 through 6387 of title 5, United States Code.

- **Foster care** means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement by the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family to take the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

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1 These definitions are applicable to employees who are covered under Title II of FMLA. This is not a comprehensive list of definitions. For a complete list, see 5 CFR § 630.1202 (last accessed May 29, 2015).
- **Health care provider** means:

  1. A licensed Doctor of Medicine or Doctor of Osteopathy or a physician who is serving on active duty in the uniformed services and is designated by the uniformed service to conduct examinations under this subpart;

  2. Any health care provider recognized by the Federal Employees Health Benefits Program or who is licensed or certified under Federal or State law to provide the service in question;

  3. A health care provider as defined in paragraph (2) of this definition who practices in a country other than the United States, who is authorized to practice in accordance with the laws of that country, and who is performing within the scope of his or her practice as defined under such law;

  4. A Christian Science practitioner listed with the First Church of Christ, Scientist, in Boston, Massachusetts; or

  5. A Native American, including an Eskimo, Aleut, and Native Hawaiian, who is recognized as a traditional healing practitioner by native traditional religious leaders who practices traditional healing methods as believed, expressed, and exercised in Indian religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, consistent with Public Law 95-314, August 11, 1978 (92 Stat. 469), as amended by Public Law 103-344, October 6, 1994 (108 Stat. 3125).

- **In loco parentis** refers to the situation of an individual who has day-to-day responsibility for the care and financial support of a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.²

- **Incapacity** means the inability to work, attend school, or perform other regular daily activities because of a serious health condition or treatment for or recovery from a serious health condition.

- **Intermittent leave or leave taken intermittently** means leave taken in separate blocks of time, rather than for one continuous period of time, and may include leave periods of 1 hour to several weeks. Leave may be taken for a period of less than 1 hour if agency policy provides for a minimum charge for leave of less than 1 hour under § 630.206(a).

- **Leave without pay** means an absence from duty in a nonpay status. Leave without pay may be taken only for those hours of duty comprising an employee’s basic workweek.

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² An eligible employee is entitled to FMLA leave to care for a person who stood *in loco parentis* to that employee when the employee was a child. For more information about the determination of *in loco parentis* status for eligible employees, visit [http://www.dol.gov/whd/fmla](http://www.dol.gov/whd/fmla) (last accessed May 29, 2015).
- **Parent** means a biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a son or daughter. This term does not include parents-in-law.

- **Reduced leave schedule** means a work schedule under which the usual number of hours of regularly scheduled work per workday or workweek of an employee is reduced. The number of hours by which the daily or weekly tour of duty is reduced are counted as leave for the purpose of this subpart.

- **Regularly scheduled** means the same as that term in § 610.102.

- **Regularly scheduled administrative workweek** means the same as that term in § 610.102.

- **Serious health condition** means: (1) Serious health condition means an illness, injury, impairment, or physical or mental condition that involves—

  (i) Inpatient care (*i.e.*, 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 inpatient care; or

  (ii) Continuing treatment by a health care provider that includes (but is not limited to) examinations to determine if there is a serious health condition and evaluations of such conditions if the examinations or evaluations determine that a serious health condition exists. Continuing treatment by a health care provider may include one or more of the following—

  (A) A period of incapacity of more than 3 consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves—

    (1) Treatment two or more times by a health care provider, by a health care provider under the direct supervision of the affected individual's health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider; or

    (2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider (e.g., a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition).  

  (B) Any period of incapacity due to pregnancy or childbirth, or for prenatal care, even if the affected individual does not receive active treatment from a health care provider during the period of incapacity or the period of incapacity does not last more than 3 consecutive calendar days.
(C) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition that—

(1) Requires periodic visits for treatment by a health care provider or by a health care provider under the direct supervision of the affected individual’s health care provider,

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.). The condition is covered even if the affected individual does not receive active treatment from a health care provider during the period of incapacity or the period of incapacity does not last more than 3 consecutive calendar days.

(D) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The affected individual must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider (e.g., Alzheimer’s, severe stroke, or terminal stages of a disease).

(E) Any period of absence to receive multiple treatments (including any period of recovery) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury or for a condition that would likely result in a period of incapacity or more than 3 consecutive calendar days in the absence of medical intervention or treatment (e.g., chemotherapy/radiation for cancer, physical therapy for severe arthritis, dialysis for kidney disease).

(2) (Serious health condition does not include routine physical, eye, or dental examinations; a regimen of continuing treatment that includes the taking of over-the-counter medications, bed-rest, exercise, and other similar activities that can be initiated without a visit to the health care provider; a condition for which cosmetic treatments are administered, unless inpatient hospital care is required or unless complications develop; or an absence because of an employee's use of an illegal substance, unless the employee is receiving treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches (other than migraines), routine dental or orthodontia problems, and periodontal disease are not serious health conditions. Allergies, restorative dental or plastic surgery after an injury, removal of cancerous growth, or mental illness resulting from stress may be serious health conditions only if such conditions require inpatient care or continuing treatment by a health care provider.)

Son or daughter means a biological, adopted, or foster child; a step child; a legal ward; or a child of a person standing in loco parentis who is—

(1) Under 18 years of age; or
(2) 18 years of age or older and incapable of self-care because of a mental or physical disability. A son or daughter incapable of self-care requires active assistance or supervision to provide daily self-care in three or more of the “activities of daily living” (ADL’s) or “instrumental activities of daily living” (IADL’s). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using the telephones and directories, using a post office, etc. A “physical or mental disability” refers to a physical or mental impairment that substantially limits one or more of the major life activities of an individual as defined in 29 CFR 1630.2 (h), (i) and (j).

- **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 stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

- **Spouse** means an a husband or wife as defined or recognized under state law for purposes of marriage where the employee resides, including common law marriage and same-sex marriage.

- **Covered Service Member** means a current 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 a serious injury or illness incurred in the line of duty on active duty. (See also 29 CFR § 825.127(a)).

- **A qualifying exigency** means a specific and exclusive list of reasons for which an eligible employee can take leave. (29 CFR § 825.126). The following general categories are qualifying exigencies:
  
  (1) Short-notice deployment (7 or less calendar days notice);

  (2) Military events and related activities;

(1) DOL has moved from a “state of residence” rule to a “place of celebration” rule for the definition of spouse under the FMLA regulations. The Final Rule changes the regulatory definition of spouse in 29 CFR §§ 825.102 and 825.122(b) to look to the law of the place in which the marriage was entered into, as opposed to the law of the state in which the employee resides. A place of celebration rule allows all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live.

(2) The Final Rule’s definition of spouse expressly includes individuals in lawfully recognized same-sex and common law marriages and marriages that were validly entered into outside of the United States if they could have been entered into in at least one state.
(3) Childcare and school activities;

(4) financial and legal arrangements;

(5) Counseling;

(6) Rest and recuperation (eligible employees may take up to 5 days);

(7) Post-deployment activities; and

(8) Additional activities – left open for the employer and employee to agree that such leave will qualify as an exigency.
The Family and Medical Leave Act of 1993 (FMLA)

FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.

FMLA is intended to 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. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women. (29 CFR § 825.101).

FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

Eligible employees are entitled to 12 workweeks of leave in a 12-month period the birth of a child and to care for the newborn child within one year of birth; the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; to care for the employee’s spouse, child, or parent who has a serious health condition; a serious health condition that makes the employee unable to perform the essential functions of his or her job; any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty;”

Eligible employees are entitled 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember’s spouse, son, daughter, parent, or next of kin (military caregiver leave).

Note: Workers in the federal and District of Columbia governments are governed by different FMLA eligibility and administrative requirements than employee who work in the private sector.

FMLA Coverage

- Title I of FMLA covers private employees and certain federal employees not covered by Title II of FMLA. This includes USPS employees, DC government employees, and individual employees on a temporary (one year or less) or intermittent appointment. Nonappropriated Fund employees of the Department of Defense and Coast Guard, DOD teachers, and Title 38 employees of the Department of Veterans Affairs are covered by agency regulations to mirror Department of Labor regulations. (See 29 CFR § 825).
Title II of FMLA covers most federal employees covered by the annual and sick leave system established under Title 5 USC, Chapter 63. (OPM regulations published in 5 CFR § 630).

Title III of FMLA establishes the Commission on Leave.

Title IV of FMLA contains miscellaneous provisions, including rules governing the effect of the Act on more generous leave policies, other laws, and existing employment benefits.

Title V of FMLA covers entitlement to family medical leave for certain employees of the US Senate and House of Representatives.

**Note:** It is very IMPORTANT that an employee complies with the notice and medical certification requirements. If an employee does not comply with the notification requirements in 5 CFR § 630.1206, and does not provide medical certification signed by a health care provider that includes all the information required in 5 CFR § 630.1207(b) then the employee is NOT entitled to FMLA.

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**What Does FMLA Allow?**

- FMLA entitles most federal employees to take up to **12 workweeks** of job-protected, unpaid leave in any 12-month period for one or more of the following reasons:
(1) for the birth and care of the newborn child of the employee;

(2) for placement with the employee of a son or daughter for adoption or foster care;

(3) to care for a spouse, child, or parent with a serious health condition;

(4) to take medical leave when the employee is unable to work because of a serious health condition; or

(5) any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a military member or covered active duty.4

- An eligible employee may also take up to 26 workweeks of FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

- If an employee has one or more of the above reasons to take leave AND is eligible, his or her employer is required to grant the employee’s request for unpaid leave.

- An employee does not have to take 12 consecutive weeks off; he or she may request intermittent leave.

- Neither agency policies nor collective bargaining agreements can take away any of these rights, but they can add to these statutory rights. However, FMLA states that the provision permitting return to work certifications does not supersede a valid State or local law or collective bargaining agreement that governs the return to work of employees.

- Maternity and Pregnancy Issues

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4 The National Defense Authorization Act for Fiscal Year 2010 (2010 NDAA) was enacted in 2009. The 2010 NDAA amends FMLA to expand military family leave provisions that were added to FMLA in 2008.
- A new mother or father is allowed to use paid sick leave for the period of recovery following childbirth as certified by a medical professional (generally the recovery period is for no more than 6 weeks, unless there are complications).

- Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave.

- The caregiver (e.g. husband or parent) is entitled to use sick leave during the mother’s entire period of incapacitation, but only during that period of incapacitation. (5 CFR §§ 630.1203, 630.1206).

Who Administers FMLA?

- FMLA is administered by the Department of Labor (DOL) and the Office of Personnel Management (OPM). Most federal employees are covered by either Title I of FMLA or Title II of FMLA. DOL issues regulations for private employees and certain federal employees (US Postal Service employees and some civilian Department of Defense workers) not covered by Title II of FMLA. For more information on DOL’s new FMLA regulations, see www.dol.gov/whd/fmla/finalrule.htm.

Protections During FMLA Leave

An employee is entitled to protections during the period of time that the employee is on FMLA leave. Protections include: group health insurance benefits, substitution of paid leave, and other benefits. These protections are discussed in greater detail below.

- Group Health Insurance Benefits

  If an employee is provided group health insurance, the employee is entitled to the continuation of the group health insurance coverage during FMLA leave on the same terms as if the employee continued to work. If family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. The employee must continue to make regular contributions to the cost of the health insurance premiums.

- Substitution of Paid Leave

  FMLA entitles eligible employees to take unpaid leave. Under certain conditions, employees may “substitute,” or run at the same time as their FMLA leave, accrued paid leave (such as sick or vacation leave) to cover some or all of the period of FMLA leave. An employer may also require employees to substitute accrued paid leave for unpaid leave even when the employee has not elected to do so. Paid leave taken for reasons that do not qualify for FMLA leave does not count against the employee’s FMLA leave entitlement.
Other Benefits

An employee’s rights to benefits other than group health insurance while on FMLA leave depend upon the employer’s established policies. Any benefits that would be maintained while the employee is on other forms of leave, including paid leave if the employee substitutes accrued leave paid during FMLA leave, must be maintained while the employee is on FMLA leave.

Adverse Employment Actions

Your employer cannot fire you for complaining about a FMLA violation nor can they take any other adverse employment action against you on this basis.

- It is unlawful for your employer to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under FMLA.
- It is unlawful for any employer to interfere with or restrain or deny an employee the exercise of any right provided under this law.
- Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; nor can FMLA leave be counted under “no fault” attendance policies.

Limitations to FMLA Protections

- An employee on FMLA leave is not protected from actions that would have affected him or her if the employee was not on FMLA leave. For example, if a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours. If an employee is laid off during the period of FMLA leave, the employer must be able to show that the employee would not have been employed at the time of the reinstatement.

- An agency may take appropriate action if the agency thinks that the employee may be a danger to himself or others, or is a disruptive force in the worksite (e.g., adverse action). (5 CFR § 630.1208(d)).
Am I Eligible to Take FMLA Leave?

If you fall under Title I of FMLA, you may take FMLA leave if you are an **eligible employee** as defined below.

- An "eligible employee" is an employee of a covered employer who:
  
  1. Has been employed by the employer for at least 12 months, and
  2. Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and
  3. Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (29 CFR § 825.110) (See 29 CFR § 825.105(b) regarding employees who work outside the US).

- The 12 months do not need to be consecutive months worked for you to be eligible. Employment before a break in service is counted as well.
  
  - To determine whether an employee has worked 1,250 hours in the 12 months immediately preceding the beginning of FMLA leave, one must only count hours in which the employee performs work, excluding holidays, vacations, etc. The exception is time that would have been worked during a period of National Guard or Reserve military service is included in the 1,250 hours. (29 CFR § 825.110).
  
  - Full-time and part-time federal employees who have completed 12 months of Federal service are entitled to FMLA and a total of 12 administrative workweeks should be made available to the full-time employee.
    
    - If the employee is an eligible employee who has met FMLA’s notice and certification requirements (and he or she has not exhausted their FMLA leave entitlement for the year), the employee may not be denied FMLA leave.

**Note:** Generally, the employee has the burden of proving entitlement.

Employees Covered under Title II of the FMLA

If you fall under Title II of FMLA, you may take FMLA leave if you are an **employee** as defined below.

- An "employee" means - an employee as defined by 5 USC § 6301.
- Employees must have worked as a civil servant for 12 months. (5 CFR § 630.1201(b)).
The 12 months do not have to be consecutive or recent.
All time worked for the employer is counted.

**Requesting or Using FMLA**

Generally, federal employees must specifically invoke their rights under FMLA. It is the employee’s responsibility to know, understand, and invoke his or her rights to leave under FMLA. If an employee needs to request or use FMLA leave for the reasons that FMLA covers, there are three requirements that an employee must fulfill before he or she can take FMLA leave. The three requirements are **Notice, Medical Certification, and Recertification.**

**Notice for Title I**

- Employees covered under Title I of the FMLA - DOL’s regulations state that “at the employer’s request, an employee who does not give 30 days notice must explain why such notice was not practicable.” In addition, the regulations provide that an employee needing FMLA leave must follow the employer’s usual and customary call-in procedures for reporting an absence, absent unusual circumstances.** 29 CFR § 825.302(b).**

**Notice for Title II**

- Employees covered under Title II of the FMLA - If FMLA leave is foreseeable (e.g., based on birth, adoption or planned medical care), employees must give 30 days notice.

- If the leave isn't foreseeable and the employee cannot provide 30 days notice, the employee must provide notice within a timeframe reasonable under the circumstances.

- Employees must specifically invoke FMLA in requesting leave. OPM regulations require an employee to invoke his or her entitlement to FMLA leave subject to the notification and medical certificate requirements. 5 USC § 6382(e)(1); 5 CFR §§ 630.1206(b)), 630.1206(c), 630.1203 (b)).

*Note:* Check your collective bargaining agreement for any additional notice requirements.

**What Medical Certification is Required for Both Title I and Title II Employees?**
An employee must provide a medical certification signed by the health care provider, within 15 calendar days of the employer’s request. The employer may request that the employee, for any leave taken due to a serious health condition, provide a medical certification confirming that a serious health condition exists.

If it is not practical for the employee to provide the medical certification within 15 days, despite good faith efforts, the employee must provide within 30 calendar days of the agency’s request to submit medical certification.

Although the standard medical certification form (WH-380) was intended for use in the private sector, OPM has instructed federal employees to use the form to meet the needs and limits of medical certification required for FMLA.

An agency can deny the continuation of FMLA due to a serious health condition if the employee fails to fulfill any obligations to provide supporting medical certification.

For more information, see 5 USC § 6383; 5 CFR § 630.1208.

Medical certification regarding a serious health condition should include:

(1) the date the serious health problem began;

(2) the probable duration, or when the condition is chronic and continuing in nature, the probable duration of the current episode; and

(3) appropriate medical facts regarding incapacitation and treatment.

If an employee submits a complete and sufficient certification signed by the health care provider, an agency may not require a second or third opinion on the medical certification to return to work. However, if an employer has reason to doubt the validity of a medical certification, it may require the employee to obtain a second opinion at the employer’s expense.

A third opinion is permitted if there is a conflict between the two previous opinions. This third opinion shall be final and binding.

OPM's regulations also allow a health care provider, human resource professional, a leave administrator, or management official representing the agency to contact the health care provider of the employee covered under Title II of the FMLA, with the employee's permission, to clarify medical information pertaining to the serious health condition. In no case may the employee’s direct supervisor make contact.

Note: The employer (NOT direct supervisor) is allowed to contact the health care provider for purposes of clarification and authentication of the medical certification after the employer has given the employee the opportunity to cure any deficiencies. (29 CFR § 825.307).

Note: Check your collective bargaining agreement for any additional certification requirements.
Recertification

- OPM regulations allow an agency to require “recertification” of a serious health condition every 30 calendar days at its own expense. An agency can ask for recertification if it has already approved FMLA leave based on the medical documentation provided, it can ask for follow up medical documentation to ensure that the employee still requires FMLA leave.

- An agency cannot require medical certification before the end of the employee’s approved FMLA leave. However, recertification is usually permitted before the end of the minimum duration period of incapacity that the health care provider has stated on the initial medical certification.

- If the agency obtains information that casts doubt upon the continuing validity of the original medical certification, including the need for care, it may:
  
  (1) require recertification more frequently than every 30 calendar days; or
  
  (2) require an employee to recertify the care he or she will be provided and to estimate the amount of time needed to provide such care.

Note: Check your collective bargaining agreement for any additional recertification requirements.

Use of FMLA Leave

- Once an employee has been approved to take FMLA leave, the employee may take a total of 12 administrative workweeks of unpaid leave (leave without pay) during any 12-month period. The 12-month period begins on the first day that FMLA leave is taken and may not carry over.

1. An employee may request to use only part of his or her FMLA leave.

2. Under certain conditions, FMLA leave may be taken intermittently, not consecutively, or the employee may work under a work schedule that is reduced by the number of hours of leave taken as family and medical leave.

3. By law, employees retain health benefits during the entire period they are on family and medical leave.

4. Employees are responsible for paying their share of the premiums.

Note: Employees may pay their share of the premiums on a current basis or upon return to work.
**Family Friendly/Family Medical Leave**

AFGE’s Women’s and Fair Practices Departments

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**For Employees Covered under Title I of FMLA:**

- The employer designates leave, paid or unpaid, as FMLA-qualifying, and gives notice of the designation to the employee.

- The employer may require that paid leave taken under an existing leave plan be counted as FMLA leave. (29 CFR § 825.207(a)).

- The employer has five business days to notify the employee of the employee’s eligibility to take FMLA leave, absent extenuating circumstances. (29 CFR § 825.300(b)).

**For Employees Covered under Title II of FMLA:**

- The agency cannot deny FMLA to eligible employees covered under Title II of FMLA.

- An employee cannot be required to substitute paid leave for unpaid FMLA leave.

- An employee must invoke FMLA to give the agency permission to deduct FMLA leave from an employee’s 12-week entitlement.

- An employee may elect to separately (consecutively) use paid leave before using unpaid FMLA leave. (5 CFR. § 630.1205(d), 630.1203(h)).

---

**Can I Substitute FMLA Leave for Compensatory Time, Annual Leave, or Sick Leave?**

- Federal employees may NOT substitute compensatory or credit time for family leave under FMLA.

- However, an employee may use earned compensatory time off and credit hours in addition to the period of FMLA leave.

- An employee does not have to use leave without pay (LWOP) rather than annual leave; annual leave may be substituted for unpaid leave under FMLA. Annual leave can be used for any purpose including vacations.

- An employee may substitute paid sick leave for unpaid leave under the FMLA leave in those situations in which the use of sick leave is permitted.

- Employees do not have a limit to the amount of sick leave they accumulate.
Can My Leave be Used Retroactively?

- Normally, federal employees may not invoke entitlement to FMLA leave retroactively for any previous absence of work.

- An employer cannot count leave as FMLA leave retroactively, however, the employee and employee can both mutually agree that leave be retroactively designated as FMLA leave. (5 CFR § 630.1203(b); 29 CFR § 825.301(d)).

- Employees covered under Title II of the FMLA who seek to retroactively invoke FMLA cannot if:
  
  o The employer is awaiting receipt of the medical certification to confirm the existence of a serious health condition;

  o The employer was unaware that leave was for a FMLA reason, and later gets information from the employee such as when the employee requests additional or extensions of leave; or

  o The employer was unaware that the leave was for a FMLA reason, and the employee is physically or mentally incapable of notifying the employer thereby allowing the employee to inform his or her employer two (2) days after return to work that the leave was FMLA leave. (5 CFR § 630.1203).

Note: Check your collective bargaining agreement.
Returning to Work After FMLA

Most agencies establish a uniformly applied practice or policy that requires all employees who take family and medical leave for a serious health condition to provide medical certification to return to work.

- If an employee presents the agency with the requisite certification from his or her physician or health care provider, FMLA prevents the agency from denying the employee the opportunity to return to work.

- FMLA states that an agency cannot impose stricter certification standards than those contained in a valid state or local law or provision in a collective bargaining agreement. (29 USC § 1614).

- An agency may not require an employee to return to work prior to the expiration of his or her FMLA leave.

- An employer MUST take an employee back into the same or equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment at the end of FMLA leave. However, there are exceptions to this rule. Some include:
  - Federal employers are not required to continue FMLA benefits and reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as (e.g., due to a general layoff). (5 CFR § 630.1208(f)).
o Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave and its benefits.

o Federal employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated 12-month period no longer have FMLA protections of leave or job restoration. (5 CFR § 630.1208).

Note: Check your collective bargaining agreement for additional information.

Are my medical records confidential?

- Although an employee does not have to provide medical records, complete medical information about the serious health condition is required.

- Employers are not allowed to ask health care providers for additional information beyond that required by the certification form. (5 CFR § 630.1207(c); 29 CFR § 825.307).

- Only those people who need to know may see the documentation requested by the agency (e.g., supervisory, timekeeper).

- The information within the medical records is protected by the Privacy Act.

- Your employer may ask you questions to confirm whether the leave needed or being taken qualifies for FMLA purposes and may require periodic reports on your status and intent to return to work after your leave.

Note: Check collective bargaining agreements and agency internal procedures for how that information would be released, where it should be kept and when it should be destroyed.
Enforcing FMLA

- Employees covered under Title I of FMLA may file a complaint with DOL. Most employees choose to do this first as it costs nothing and the DOL may be able to persuade the employer to quickly remedy the situation if the DOL believes the employer is not in compliance with FMLA.

- Employees covered under Title I of FMLA can sue for civil monetary damages for lost benefits or compensation.

- If the violations are willful, damages may be doubled.

- Attorney’s fees, reasonable expert witness fees, and other costs are also available. (See 29 USC § 2617(a)(2); 29 CFR § 825.400(c)).

- A federal employee under Title II of FMLA may file a grievance under the collective bargaining agreement or the agency’s administrative grievance process.

- If the local collective bargaining agreement does not address FMLA leave, an employee may file a claim with OPM’s Office of General Counsel.

- For more information about initiating a grievance in your agency, contact your union representative.

Note: The EEOC has no enforcement responsibility for FMLA. While the EEOC cannot enforce FMLA, it can ensure that all employees are treated equitably under FMLA.
Definitions for the District of Columbia Family and Medical Leave Act of 1990 (DCFMLA)\textsuperscript{5}

- **Child** means: (a) a person under twenty-one (21) years of age; (b) a person, regardless of age, who is substantially dependent upon the employee by reason of physical or mental disability; and (c) a person who is under twenty-three (23) years of age who is a full-time student at an accredited college or university.

- **Committed relationship** means a domestic partnership, as defined in section 2(4) of the Health Care Expansion Act of 1992; DC Official Code § 32-701(4), or a familial relationship between two individuals demonstrated by such factors as, but not limited to, mutual economic interdependence, including joint bank accounts, joint tenancy, shared lease, and joint and mutual financial obligations such as loans; domestic interdependence, including close association, public presentment of the relationship, and exclusiveness of the relationship; length of the relationship; and the intent of the relationship, as evidenced by a will or life insurance.

- **Director** means the Director of the Office of Human Rights.

- **Employee employed in an instructional capacity** means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, or auxiliary personnel, such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

- **Employer** means an individual, firm, association, or corporation, a receiver or trustee of any individual firm, association, or corporation, or the legal representative of a deceased employer, including the District of Columbia government, who employs the services of another individual for pay in the District.

- **Employment benefit** means a benefit, other than salary or wages, provided or made available to an employee by an employer, including, but not limited to, group life, health, and disability insurance; sick and annual leave; and educational and pension benefits, regardless of whether the benefit is provided by a policy or practice of an employer or by an employee welfare benefit plan as defined in title 1, subtitle A, section 3(3) of the Employee Retirement Income Security Act of 1974, effective September 2, 1974 (88 Stat. 833; 29 USC § 1002(1)).

\textsuperscript{5} This is not a comprehensive list of definitions. For a complete list, see 4 DCMR § 1699.1 (last accessed May 29, 2015).
■ **Family member** means: (a) a person related by blood, legal custody, or marriage; (b) a foster child; (c) a child who lives with an eligible employee and for whom the eligible employee permanently assumes and discharges parental responsibility; or (d) a person with whom the eligible employee shares or has shared, within the last year, a mutual residence and with whom the eligible employee maintains a committed relationship.

■ **Health care provider** means a person licensed under federal, state, or District law to provide healthcare services.

■ **Intermittent leave** means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time. Intermittent leave may include leave of periods from an hour or more to several weeks. 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 (6) months, such as for chemotherapy.

■ **Reduced leave schedule** means leave that is scheduled for a fewer number of hours than the employee is officially scheduled to work each workweek or workday. A reduced leave schedule is one that includes less than forty (40) hours or five (5) days in a given week. Examples of reduced schedule leave would include where an employee who typically works a full-time schedule works less than full-time due to the fatigue, pain, or anxiety caused by the employee’s normal schedule or due to a serious health condition, or where an employee works a reduced schedule in order to provide care or psychological comfort to a family member with a serious health condition who does not require full-time care.
DCFMLA

Overview

The DC Office of Human Rights administers the DC Family and Medical Leave Act (DCFMLA) for DC employees. (DC Code § 32-516(2)). DCFMLA applies to any employer that employs 20 or more employees in the District of Columbia. DC government constitutes one employer.

DC government employees are covered by both the DCFMLA and the Federal FMLA. An eligible employee must choose under which statute he or she will be covered when in need of family or medical leave.

To qualify for DCFMLA, an employee must have: (1) been employed by the employer for at least one year without a break in service and (2) worked for at least 1,000 hours during the 12-month period immediately preceding the requested medical leave. DC Code § 32-501(1).

DCFMLA ensures that families have the protections needed to care for family members and provides that during any 24-month period:

- employers covered under DCFMLA must grant an eligible employee 16 workweeks of paid parental leave or “family” leave for the birth, foster care placement, or adoption of a child, or to care for the serious health condition of a family member (DC Code § 32-502); and

- 16 workweeks of “medical” leave where the employee may take continuous or intermittent medical leave for his/her own serious medical condition. (DC Code § 32-503).

DCFMLA also requires all employers to provide 24 hours of parental leave per year to allow employees to attend school-related events but they must give ten days of advance notice, unless such notice is not possible. (DC Code § 32-1202).

The requirements to obtain DCFMLA are very similar to those of FMLA: notification and medical certification must be provided.

Notice

DCFMLA – Under the regulations, the employee must notify the employer of his or her need for medical leave either 30 days prior to the commencement of the leave or “as soon as possible prior to the date on which the employee wishes the leave to begin” when the leave was not foreseeable. 4 DCMR § 1608.2. If an emergency prevents the employee from notifying the employer until the first day of absence, the employee must notify the employer “not later than two (2) business days after the absence begins.” 4 DCMR § 1608.3.
Use of Leave under DCFMLA

DCFMLA is unpaid leave but an employee may take paid vacation or sick leave while on DCFMLA. However, the different types of leave will run concurrently and the employee would not be able to add a full 16 weeks of unpaid DCFMLA leave after their paid leave is exhausted. (DC Code § 36-1303(b)(2)). DC employees are not allowed to tack on sick leave in addition to family or medical leave, 16 work weeks within a 24 month period is the maximum. *Harrison v. Children’s Nat. Medical Center*, 672 A.2d 572 (1996).

- Employers covered under the Act must grant an eligible employee 16 workweeks of “family” leave for the birth, foster care placement, or adoption of a child, or to care for the serious health condition of a family member (DC Code § 32-502 (2001)); and

- 16 workweeks of “medical” leave where the employee may take continuous or intermittent medical leave for his/her own serious medical condition. (DC Code § 32-503 (2001)).


Protection

DC Workers

- If an employee has a complaint regarding DCFMLA, an employee may file it with the DC Human Rights Commission but the complaint must be filed within one (1) year of the violation.

Medical Certification

A standard medical certification form as well as more information for DCFMLA can be found at: [http://dchr.dc.gov/page/employee-leave](http://dchr.dc.gov/page/employee-leave).

DCFMLA does not specifically allow leave for military service under NDAA. Therefore, eligible DC employees who need leave for such purposes would have to be placed under the Federal FMLA and not the DCFMLA.

DC workers and families have the protections needed to care for family members. The DCFMLA provides that during any 24-month period:

- Family leave may consist of unpaid leave. Any paid family, vacation, personal, or compensatory leave provided by an employer that the employee elects to use shall count against the 16 workweeks of allowable family leave. (DC Code § 32-502).

- Medical leave can be substituted as paid vacation, personal, or compensatory leave if the employer and employee both agree to do so and the leave shall count against the 16 workweeks of allowable medical leave. (DC Code § 32-503).
OPM Definitions

- **Accrued leave** means the leave earned by an employee during the current leave year that is unused at any given time in that year.

- **Accumulated leave** means the unused leave remaining to the credit of an employee at the beginning of the leave year.

- **Agency** means an Executive agency, as defined in 5 USC 105, and any other entity of the Federal Government that employs officers and employees to whom subchapter I of chapter 63 of title 5, United States Code, applies.

- **Committed relationship** means one in which the employee, and the domestic partner of the employee, are each other's sole domestic partner (and are not married to or domestic partners with anyone else); and share responsibility for a significant measure of each other's common welfare and financial obligations. This includes, but is not limited to, any relationship between two individuals of the same or opposite sex that is granted legal recognition by a State or by the District of Columbia as a marriage or analogous relationship (including, but not limited to, a civil union).

- **Domestic partner** means an adult in a committed relationship with another adult, including both same-sex and opposite-sex relationships.

- **Employee** means an employee to whom subchapter I of chapter 63 of title 5, United States Code, applies.

- **Family member** means an individual with any of the following relationships to the employee:

  1. Spouse, and parents thereof;
  2. Sons and daughters, and spouses thereof;
  3. Parents, and spouses thereof;
  4. Brothers and sisters, and spouses thereof;
  5. Grandparents and grandchildren, and spouses thereof;
  6. Domestic partner and parents thereof, including domestic partners of any individual in paragraphs (2) through (5) of this definition; and

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6 A complete list of definitions is located at 5 CFR § 630.201 (last accessed May 29, 2015).
(7) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

- **Health care provider** means the same as that term in § 630.1202.

- **Leave year** means the period beginning with the first day of the first complete pay period in a calendar year and ending with the day immediately before the first day of the first complete pay period in the following calendar year.

- **Medical certificate** means a written statement signed by a registered practicing physician or other practitioner certifying to the incapacitation, examination, or treatment, or to the period of disability while the patient was receiving professional treatment.

- **Parent** means—
  
  (1) A biological, adoptive, step, or foster parent of the employee, or a person who was a foster parent of the employee when the employee was a minor;

  (2) A person who is the legal guardian of the employee or was the legal guardian of the employee when the employee was a minor or required a legal guardian;

  (3) A person who stands *in loco parentis* to the employee or stood *in loco parentis* to the employee when the employee was a minor or required someone to stand *in loco parentis*; or

  (4) A parent, as described in paragraphs (1) through (3) of this definition, of an employee's spouse or domestic partner.

- **Serious health condition** has the meaning given that term in § 630.1202.

- **Son or daughter** means—
  
  (1) A biological, adopted, step, or foster son or daughter of the employee;

  (2) A person who is a legal ward or was a legal ward of the employee when that individual was a minor or required a legal guardian;

  (3) A person for whom the employee stands *in loco parentis* or stood *in loco parentis* when that individual was a minor or required someone to stand *in loco parentis*; or

  (4) A son or daughter, as described in paragraphs (1) through (3) of this definition, of an employee's spouse or domestic partner.

- **Uncommon tour of duty** means an established tour of duty that exceeds 80 hours of work in a biweekly pay period, provided the tour—
(1) Includes hours for which the employee is compensated by standby duty pay under 5 USC 5545(c)(1) and § 550.141 of this chapter;

(2) Is a regular tour of duty (as defined in § 550.1302 of this chapter) established for firefighters compensated under 5 USC 5545b and part 550, subpart M, of this chapter; or

(3) Is authorized for a category of employees by the Office of Personnel Management.

- *United States* means the several States and the District of Columbia.
Family Friendly Laws and Regulations for Federal and DC Government Employees

FAMILY FRIENDLY LEAVE

The Federal Employees Family Friendly Leave Act (FEFFLA) was enacted in December of 1994, and authorized federal employees to use their sick leave for family care/bereavement purposes. Although FEFFLA was a test program that lasted three years, the US Office of Personnel Management (OPM) made the program permanent and extended the use of sick leave for family care or bereavement purposes under its regulations. (5 CFR § 630, subpart D).

Several types of leave exist for federal and DC government employees to care for themselves and their families. Some of them include:

- Sick Leave (General)
- Sick Leave for Personal Medical Needs
- Sick Leave for Family Care and Bereavement (SLFCB)
- Sick Leave to Care for a Family Member with a Serious Health Condition
- Sick Leave for Adoption
- Family and Medical Leave
- Military Family Leave
- Annual Leave
- Donated Leave under the Voluntary Leave Transfer and Leave Bank Programs

OPM issued final regulations to permit covered full-time employees to use sick leave each year for:

- personal medical needs;
- care of a family member who is incapacitated or is with a serious medical condition;
  - death of a family member;
- adoption-related purposes. (5 CFR § 630.401).
OPM regulations regarding sick leave for family care or bereavements (SLFCB) purposes allow leave for one of two types of purposes, one for **general health** and one for a **serious medical condition**.

- Under the **general health** provision, most federal employees may use a total of up to 104 hours (13 workdays) of paid sick leave each leave year to:
  - Provide care for a family member who is incapacitated as a result of physical or mental illness, injury, pregnancy, or childbirth;
  - Provide care for a family member receiving medical, dental or optical examination or treatment; or
  - Make arrangements necessitated by the death of a family member or attend the funeral of a family member.

- Under the **serious medical condition** provision, most federal employees may use a total of up to 12 administrative workweeks of sick leave to care for a family member with a serious health condition. However, if an employee has already used 12 weeks of sick leave to care for a family member with a serious health condition, he or she cannot use an additional 13 days in the same leave year for general family care purposes. (5 CFR §§ 630.401, 630.1202).

- Employees may take sick leave for adoption-related purposes.

  This includes time for:
  - appointments with adoption agencies, social workers and attorneys;
  - court proceedings;
  - required travel; or
  - any periods during which an adoptive parent is ordered or required by the adoption agency or by a court to be absent from work to care for the adopted child.

**Requesting and Granting Sick Leave for Family Care or Bereavement (SLFCB) Purposes**

- Each agency will generally require an employee to request sick leave within a certain time limit and may require that employees request advance approval of sick leave for medical, dental, or optical examination or treatment. (5 CFR § 630.402).
An agency may grant sick leave only when supported by evidence **administratively acceptable** to the agency. For those absences longer than three (3) days, or for a lesser period when determined necessary by the agency, a medical certificate or other administratively acceptable evidence may be required.

- Each agency is permitted to determine what constitutes “administratively acceptable evidence” for sick leave and when or how often such documentation is required.

- Generally, a medical certificate should certify that:
  
  - the family member requires psychological comfort and/or physical care;
  
  - the family member would benefit from the employee’s attendance;
  
  - the employee is needed to care for the family member for a specified period of time; and
  
  (4) if applicable, the family member has a serious health condition.

- The agency is required to keep all medical certification in confidence. (5 CFR §§ 630.1206, 630.1207).

**Note:** Check your collective bargaining agreement.

A full-time employee is entitled to a total of 12 weeks of sick leave each year for all family care purposes.
Appendix A
### §825.100 The Family and Medical Leave Act.

### §825.101 Purpose of the Act.

### §825.102 Definitions.

### §825.103 [Reserved]

### §825.104 Covered employer.

### §825.105 Counting employees for determining coverage.

### §825.106 Joint employer coverage.

### §825.107 Successor in interest coverage.

### §825.108 Public agency coverage.

### §825.109 Federal agency coverage.

### §825.110 Eligible employee.

### §825.111 Determining whether 50 employees are employed within 75 miles.

### §825.112 Qualifying reasons for leave, general rule.

### §825.113 Serious health condition.

### §825.114 Inpatient care.
§825.115 Continuing treatment.

§§825.116- [Reserved]

825.118

§825.119 Leave for treatment of substance abuse.

§825.120 Leave for pregnancy or birth.

§825.121 Leave for adoption or foster care.

§825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

§825.123 Unable to perform the functions of the position.

§825.124 Needed to care for a family member or covered servicemember.

§825.125 Definition of health care provider.

§825.126 Leave because of a qualifying exigency.

§825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).

Subpart B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT

§825.200 Amount of leave.

§825.201 Leave to care for a parent.

§825.202 Intermittent leave or reduced leave schedule.

§825.203 Scheduling of intermittent or reduced schedule leave.

§825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

§825.205 Increments of FMLA leave for intermittent or reduced schedule leave.
§825.206 Interaction with the FLSA.
§825.207 Substitution of paid leave.
§825.208 [Reserved]
§825.209 Maintenance of employee benefits.
§825.210 Employee payment of group health benefit premiums.
§825.211 Maintenance of benefits under multi-employer health plans.
§825.212 Employee failure to pay health plan premium payments.
§825.213 Employer recovery of benefit costs.
§825.215 Employee right to reinstatement.
§825.216 Equivalent position.
§825.217 Limitations on an employee's right to reinstatement.
§825.218 Key employee, general rule.
§825.219 Substantial and grievous economic injury.
§825.220 Rights of a key employee.
§825.221 Protection for employees who request leave or otherwise assert FMLA rights.

Subpart C—EMPLOYEE AND EMPLOYER RIGHTS AND OBLIGATIONS UNDER THE ACT

§825.300 Employer notice requirements.
§825.301 Designation of FMLA leave.
§825.302 Employee notice requirements for foreseeable FMLA leave.
§825.303 Employee notice requirements for unforeseeable FMLA leave.
§825.304 Employee failure to provide notice.
§825.305 Certification, general rule.
§825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

§825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

§825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

§825.309 Certification for leave taken because of a qualifying exigency.

§825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

§825.311 Intent to return to work.

§825.312 Fitness-for-duty certification.

§825.313 Failure to provide certification.

Subpart D—ENFORCEMENT MECHANISMS

§825.400 Enforcement, general rules.

§825.401 Filing a complaint with the Federal Government.

§825.402 Violations of the posting requirement.

§825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.

§825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

Subpart E—RECORDKEEPING REQUIREMENTS

§825.500 Recordkeeping requirements.
Subpart F—SPECIAL RULES APPLICABLE TO EMPLOYEES OF SCHOOLS

§825.600 Special rules for school employees, definitions.
§825.601 Special rules for school employees, limitations on intermittent leave.
§825.602 Special rules for school employees, limitations on leave near the end of an academic term.
§825.603 Special rules for school employees, duration of FMLA leave.
§825.604 Special rules for school employees, restoration to an equivalent position.

Subpart G—EFFECT OF OTHER LAWS, EMPLOYER PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER FMLA

§825.700 Interaction with employer’s policies.
§825.701 Interaction with State laws.
§825.702 Interaction with Federal and State anti-discrimination laws.

Subpart H—SPECIAL RULES APPLICABLE TO AIRLINE FLIGHT CREW EMPLOYEES

§825.800 Special rules for airline flight crew employees, general.
§825.801 Special rules for airline flight crew employees, hours of service requirement.
§825.802 Special rules for airline flight crew employees, calculation of leave.
§825.803 Special rules for airline flight crew employees, recordkeeping requirements.
### D.C. Municipal Regulations and D.C. Register

DISTRICT OF COLUMBIA FAMILY AND MEDICAL LEAVE ACT

**Title:**
4 HUMAN RIGHTS AND RELATIONS

Click on a Rule Number to browse the Rule Home.

Click on a table header to re-sort the results.

Press **Ctrl-F** to search by text.

Total Records: 27 Other chapters using the same chapter number

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Rule Heading</th>
<th>Latest Version</th>
<th>Effective Date</th>
</tr>
</thead>
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<td>REASONABLE NOTICE BY EMPLOYEE TO BE PROVIDED TO EMPLOYER</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1615</td>
<td></td>
<td>CLAIMS FOR LEAVE-MEDICAL CERTIFICATION</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1616</td>
<td></td>
<td>CALCULATION OF LEAVE</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1617</td>
<td></td>
<td>ADMINISTRATION AND EMPLOYER RECORDKEEPING</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1618</td>
<td></td>
<td>EXCEPTION TO ELIGIBILITY-SCHOOL EMPLOYEES</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1619</td>
<td></td>
<td>EXCEPTION TO ELIGIBILITY-UNIFORMED EDUCATED EMPLOYEES</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1620</td>
<td></td>
<td>INTERACTION WITH FEDERAL LAW</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1621</td>
<td></td>
<td>PROHIBITED ACTS INVESTIGATION</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1622</td>
<td></td>
<td>HEARINGS</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1623</td>
<td></td>
<td>FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1624</td>
<td></td>
<td>FINAL DECISION OF THE DIRECTOR AFTER THE HEARING</td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1625</td>
<td></td>
<td></td>
<td>1/19/2010</td>
</tr>
<tr>
<td>4-1699</td>
<td></td>
<td></td>
<td>1/19/2010</td>
</tr>
</tbody>
</table>

**DEFINITIONS**

Other chapters using the same chapter number top

<table>
<thead>
<tr>
<th>ID</th>
<th>Chapter Number</th>
<th>Chapter Heading</th>
</tr>
</thead>
<tbody>
<tr>
<td>195181</td>
<td>4-16</td>
<td>FAMILY AND MEDICAL LEAVE</td>
</tr>
</tbody>
</table>
Appendix C
4-1614  REASONABLE NOTICE BY EMPLOYEE TO BE PROVIDED TO EMPLOYER  View Text  1/19/2010
4-1615  CLAIMS FOR LEAVE-MEDICAL CERTIFICATION  View Text  1/19/2010
4-1616  CALCULATION OF LEAVE  View Text  1/19/2010
4-1617  ADMINISTRATION AND EMPLOYER RECORDKEEPING  View Text  1/19/2010
4-1618  EXCEPTION TO ELIGIBILITY-SCHOOL EMPLOYEES  View Text  1/19/2010
4-1619  EXCEPTION TO ELIGIBILITY-UNIFORMED EMPLOYEES  View Text  1/19/2010
4-1620  INTERACTION WITH FEDERAL LAW  View Text  1/19/2010
4-1621  PROHIBITED ACTS INVESTIGATION  View Text  1/19/2010
4-1622  HEARINGS  View Text  1/19/2010
4-1623  FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER  View Text  1/19/2010
4-1624  FINAL DECISION OF THE DIRECTOR AFTER THE HEARING  View Text  1/19/2010
4-1625  View Text  1/19/2010
4-1699  View Text  1/19/2010

DEFINITIONS

Other chapters using the same chapter number top

<table>
<thead>
<tr>
<th>ID</th>
<th>Chapter Number</th>
<th>Chapter Heading</th>
</tr>
</thead>
<tbody>
<tr>
<td>195181</td>
<td>4-16</td>
<td>FAMILY AND MEDICAL LEAVE</td>
</tr>
</tbody>
</table>
PART 630—ABSENCE AND LEAVE

Contents

Subpart L—Family and Medical Leave

§630.1201 Purpose, applicability, and administration.
§630.1202 Definitions.
§630.1203 Leave entitlement.
§630.1204 Qualifying exigency leave.
§630.1205 Intermittent leave or reduced leave schedule.
§630.1206 Substitution of paid leave.
§630.1207 Notice of leave.
§630.1208 Medical certification.
§630.1209 Certification for leave taken because of a qualifying exigency.
§630.1210 Protection of employment and benefits.
§630.1211 Health benefits.
§630.1212 Greater leave entitlements.
§630.1213 Records and reports.
Appendix D
Certification of Health Care Provider (Family and Medical Leave Act of 1993)

U.S. Department of Labor
Employment Standards Administration Wage and Hour Division

(When completed, this form goes to the employee, Not to the Department of Labor.)

OMB No.: 1215-0181
Expires: 09-30-2010

1. Employee’s Name

2. Patient’s Name (If different from employee)

3. Page 4 describes what is meant by a “serious health condition” under the Family and Medical Leave Act. Does the patient’s condition qualify under any of the categories described? If so, please check the applicable category.

   (1) __________  (2) __________  (3) __________  (4) __________  (5) __________  (6) __________, or None of the above

4. Describe the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5. a. State the approximate date the condition commenced, and the probable duration of the condition (and also the probable duration of the patient’s present incapacity if different):

   b. Will it be necessary for the employee to take work only intermittently or to work on a less than full schedule as a result of the condition (including for treatment described in Item 6 below)?

   If yes, give the probable duration:

   c. If the condition is a chronic condition (condition #4) or pregnancy, state whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity:

---

3 Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

2 "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.
6. a. If additional treatments will be required for the condition, provide an estimate of the probable number of such treatments.

If the patient will be absent from work or other daily activities because of treatment on an intermittent or part-time basis, also provide an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

b. If any of these treatments will be provided by another provider of health services (e.g., physical therapist), please state the nature of the treatments:

c. If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

7. a. If medical leave is required for the employee's absence from work because of the employee’s own condition (including absences due to pregnancy or a chronic condition), is the employee unable to perform work of any kind?

b. If able to perform some work, is the employee unable to perform any one or more of the essential functions of the employee’s job (the employee or the employer should supply you with information about the essential job functions)? If yes, please list the essential functions the employee is unable to perform:

c. If neither a. nor b. applies, is it necessary for the employee to be absent from work for treatment?
8. a. If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation?

b. If no, would the employee’s presence to provide psychological comfort be beneficial to the patient or assist in the patient's recovery?

c. If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need:

______________________________________________________________

Signature of Health Care Provider                                                             Type of Practice

______________________________________________________________

Address                                                                                     Telephone Number

______________________________________________________________

Date

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

______________________________________________________________

Employee Signature                                                             Date
A “Serious Health Condition” means an illness, injury impairment, or physical or mental condition that involves one of the following:

**Inpatient care** (i.e., an overnight stay) in a hospital, hospice, of residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care.

2. **Absence Plus Treatment**
   (a) A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:
      1. **Treatment** two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
      2. **Treatment** by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

3. **Pregnancy**
   Any period of incapacity due to pregnancy, or for prenatal care.

4. **Chronic Conditions Requiring Treatments**
   A chronic condition which:
   1. Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
   2. Continues over an extended period of time (including recurring episodes of a single underlying condition); and
   3. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

5. **Permanent/Long-term Conditions Requiring Supervision**
   A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer’s, a severe stroke, or the terminal stages of a disease.

6. **Multiple Treatments (Non-Chronic Conditions)**
   Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical Intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis).

This optional form may be used by employees to satisfy a mandatory requirement to furnish a medical certification (when requested) from a health care provider, including second or third opinions and recertification (29 CFR 825.306).

**Note:** Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

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3 Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

4 A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves, or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

**Public Burden Statement**

We estimate that it will take an average of 20 minutes to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding, this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**DO NOT SEND THE COMPLETED FORM TO THIS OFFICE; IT GOES TO THE EMPLOYEE.**
Appendix E
The following are answers to commonly asked questions about the new Family and Medical Leave Act (FMLA) regulations. The effective date of the revised FMLA regulations is January 16, 2009.

A separate FAQ relating to the FMLA military family leave entitlements can be found at www.dol.gov/whd/fmla/finalrule.htm.

Qualifying Reasons for FMLA Leave

Q. Can I still use FMLA leave during pregnancy or after the birth of a child?

A. Yes. An employee’s ability to use FMLA leave during pregnancy or after the birth of a child has not changed. Under the regulations, a mother can use 12 weeks of FMLA leave for the birth of a child, for prenatal care and incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or child birth).

Q. Can I continue to use FMLA for leave due to my chronic serious health condition?

A. Under the regulations, employees continue to be able to use FMLA leave for any period of incapacity or treatment due to a chronic serious health condition. The regulations continue to define a chronic serious health condition as one that (1) requires “periodic visits” for treatment by a health care provider or nurse under the supervision of the health care provider, (2) continues over an extended period of time, and (3) may cause episodic rather than continuing periods of incapacity. The regulations clarify this definition by defining “periodic visits” as at least twice a year.

Q. Are there any changes to the definition of a serious health condition under the regulations?

A. A “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. The “continuing treatment” test for a serious health condition under the regulations may be met through (1) a period of incapacity of more than three consecutive, full calendar days plus treatment by a health care provider twice, or once with a continuing regimen of treatment, (2) any period of incapacity related to pregnancy or for prenatal care, (3) any period of incapacity or treatment for a chronic serious health condition, (4) a period of incapacity for permanent or long-term conditions for which treatment may not be effective, or (5) any period of incapacity to receive multiple treatments (including recovery.
from those treatments) for restorative surgery, or for a condition which would likely result in an incapacity of more than three consecutive, full calendar days absent medical treatment.

The regulations specify that if an employee asserts a serious health condition under the requirement of a “period of incapacity of more than three consecutive, full calendar days and any subsequent treatment or period of incapacity relating to the same condition,” the employee’s first treatment visit (or only visit, if coupled with a regimen of continuing treatment) must take place within seven days of the first day of incapacity. Additionally, if an employee asserts that the condition involves “treatment two or more times,” the two visits to a health care provider must occur within 30 days of the first day of incapacity. Finally, the regulations define “periodic visits” for treatment of a chronic serious health condition as at least twice a year.

**Eligibility for FMLA Leave**

**Q. I have 12 months of service with my employer, but they are not consecutive. Do I still qualify for FMLA?**

A. You may. In order to be eligible to take leave under the FMLA, an employee must (1) work for a covered employer, (2) work 1,250 hours during the 12 months prior to the start of leave, (3) work at a location where 50 or more employees work at that location or within 75 miles of it, and (4) have worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. The regulations clarify, however, that employment prior to a continuous break in service of seven years or more need not be counted unless the break in service is (1) due to an employee’s fulfillment of military obligations, or (2) governed by a collective bargaining agreement or other written agreement.

**Q. If I have to miss work due to National Guard or Reserve duty, will this affect my eligibility for FMLA leave?**

A. No. The regulations make clear the protections for our men and women serving in the military by stating that a break in service due to an employee’s fulfillment of military obligations must be taken into consideration when determining whether an employee has been employed for 12 months or has the required 1,250 hours of service.

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), hours that an employee would have worked but for his or her military service are credited toward the employee’s required 1,250 hours worked for FMLA eligibility. Similarly, the time in military service also must be counted in determining whether the employee has been employed at least 12 months by the employer.

Example:

Dean worked for his employer for six months in 2008, then was called to active duty status with the Reserves and deployed to Iraq. In 2009, Dean returned to his employer, requesting
to be reinstated under the USERRA. Both the hours and the months that Dean would have worked but for his military status must be counted in determining his FMLA eligibility.

**Employer Notice Requirements**

**Q. What are an employer’s posting and general notice requirements?**

A. Employers must post a general notice explaining the FMLA’s provisions and providing information regarding procedures for filing a claim under the Act in a conspicuous place where it can be seen by employees and applicants. Under the regulations, this posted notice includes additional information regarding the definition of a serious health condition, the new military family leave entitlements, and employer and employee responsibilities. Employers must also include the information in this general notice in any employee handbook or other written policies or manuals describing employee benefits and leave provisions. Additionally, under the regulations, an employer without a handbook or written guidance is required to provide this general notice to new employees upon hiring.

**Q. Is there a penalty if an employer fails to post the required FMLA notice?**

A. An employer that willfully fails to post the required FMLA notice may be assessed a civil monetary penalty. Under the regulations, the penalty is increased to $110.

**Q. How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?**

A. Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee’s leave may be for a FMLA-qualifying reason.

**Q. Does an employer have to provide employees with information regarding their specific rights and responsibilities under the FMLA?**

A. At the same time an employer provides an employee notice of the employee’s eligibility to take FMLA leave, the employer must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, the employer must inform the employee whether the employee will be required to provide certification of the FMLA-qualifying reason for leave and the employee’s right to substitute paid leave (including any conditions related to such substitution, and the employee’s entitlement to unpaid FMLA leave if those conditions are not met). If the information included in the notice of rights and responsibilities changes, the employer must inform the employee of such changes within five business days of receipt of the employee’s first notice of the need for FMLA leave subsequent to any change. Employers are expected to responsively answer questions from employees concerning their rights and responsibilities.
**Q. How soon after an employee provides notice of the need for leave must an employer notify an employee that the leave will be designated and counted as FMLA leave?**

A. Under the regulations, an employer must notify an employee whether leave will be designated as FMLA leave within five business days of learning that the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances. The designation notice must also state whether paid leave will be substituted for unpaid FMLA leave and whether the employer will require the employee to provide a fitness-for-duty certification to return to work (unless a handbook or other written document clearly provides that such certification will be required in specific circumstances, in which case the employer may provide oral notice of this requirement). Additionally, if the amount of leave needed is known, an employer must inform an employee of the number of hours, days or weeks that will be counted against the employee’s FMLA leave entitlement in the designation notice. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (e.g., where the leave will be unscheduled), an employer must provide this information upon request by the employee, but no more often than every 30 days and only if leave was taken during that period.

**Q. If an employer fails to tell an employee that leave has been designated as FMLA leave, can the employer count the leave against the employee's FMLA leave entitlement?**

A. The regulations revise the designation provisions to comply with the U.S. Supreme Court’s decision in Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002). Ragsdale ruled that a "categorical" penalty for failure to appropriately designate FMLA leave was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute’s remedial requirement to demonstrate individual harm. Under the regulations, retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave (and notify the employee of the designation). The employer may be liable, however, if the employee can show that he or she has suffered harm or injury as a result of the failure to timely designate the leave as FMLA. Additionally, an employee and employer may agree to retroactively designate an absence as FMLA-protected.

Example:

Henry plans to take 12 weeks of FMLA leave beginning in August for the birth of his second child. Earlier in the leave year, however, Henry took two weeks of annual leave to care for his mother following her hospitalization for a serious health condition. Henry’s employer 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. 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 employer failed to appropriately designate may not count against his FMLA entitlement.
Employee Notice Requirements

**Q. How much notice must an employee give before taking FMLA leave?**

A. When the need for leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give at least 30 days notice. If 30 days notice is not possible, an employee is required to provide notice “as soon as practicable.” Employees must also provide notice as soon as practicable for foreseeable leave due to a qualifying exigency, regardless of how far in advance such leave is foreseeable (see FAQ for military family leave for additional information). The regulations clarify that it should be practicable for an employee to provide notice of the need for leave that is foreseeable either the same day or the next business day. In all cases, however, the determination of when an employee could practically provide notice must account for the individual facts and circumstances.

When the need for leave is unforeseeable, employees are required to provide notice as soon as practicable under the facts and circumstances of the particular case, which the regulations clarify will generally be within the time prescribed by the employer’s usual and customary notice requirements applicable to the leave.

Example:

When Mandy goes to her Monday physical therapy appointment for her serious health condition, she finds out that the appointment she had previously scheduled for Thursday has been changed to Friday. Upon her return to work after the Monday appointment, Mandy informs her employer that she will no longer need leave on Thursday for physical therapy, but will need leave on Friday instead. Mandy has provided notice of her need for foreseeable leave as soon as practicable.

**Q. What information must an employee give when providing notice of the need for FMLA leave?**

A. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA. The employee must, however, provide “sufficient information” to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

The regulations provide additional guidance for employees regarding what is “sufficient information.” Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee’s family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty and that the requested leave is for a qualifying exigency; if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities, or that the family...
member is a covered servicemember with a serious injury or illness; and the anticipated
duration of the absence if known.

Additionally, the regulations require an employee seeking leave due to a FMLA-qualifying
reason for which the employer has previously provided FMLA-protected leave either to
reference specifically the qualifying reason for leave or the need for FMLA leave. In all
cases, an employer should inquire further if it is necessary to have more information about
whether FMLA leave is being sought by an employee.

**Q. Is an employee required to follow an employer’s normal call-in procedures
when taking FMLA leave?**

A. Yes. Under the regulations, an employee must comply with an employer’s call-in
procedures unless unusual circumstances prevent the employee from doing so (in which
case the employee must provide notice as soon as he or she can practicably do so). The
regulations make clear that, if the employee fails to provide timely notice, he or she may
have the FMLA leave request delayed or denied and may be subject to whatever discipline
the employer’s rules provide.

Example:

Sam has a medical certification on file with his employer for his chronic serious health
condition, migraine headaches. He is unable to report to work at the start of his shift due to
a migraine and needs to take unforeseeable FMLA leave. He follows his employer’s
absence call-in procedure to timely notify his employer about his need for leave. Sam has
provided his employer with appropriate notice.

**Certification of Need for FMLA Leave**

**Q. Do I have to give my employer my medical records for leave due to a serious
health condition?**

A. No. An employee is not required to give the employer his or her medical records. The
employer, however, does have a statutory right to request that an employee provide medical
certification containing sufficient medical facts to establish that a serious health condition
exists.

**Q. What if I do not want my employer to know about my medical condition?**

A. If an employer requests it, an employee is required to provide a complete and sufficient
medical certification in order to take FMLA-protected leave due to a serious health
condition.
Q. How soon after I request leave does my employer have to request a medical certification of a serious health condition?

A. Under the regulations, an employer should request medical certification, in most cases, at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave begins.

A. An employer may request certification at a later date if it has reason to question the appropriateness or duration of the leave.

Q. What happens if my employer says my medical certification is incomplete?

A. An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The regulations require that the employer state in writing what additional information is necessary to make the certification complete and sufficient. The regulations also require that the employer allow the employee at least seven calendar days to cure the deficiency, unless seven days is not practicable under the particular circumstances despite the employee’s diligent good faith efforts.

Q. May my employer contact my health care provider about my serious health condition?

A. The regulations clarify that contact between an employer and an employee’s health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. Under the regulations, employers may contact an employee’s health care provider for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official. In order to address employee privacy concerns, the rule makes clear that in no case may the employee’s direct supervisor contact the employee’s health care provider. In order for an employee’s HIPAA-covered health care provider to provide an employer with individually-identifiable health information, the employee will need to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the employer. Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.

Q. Must I sign a medical release as part of a medical certification?

A. No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee’s discretion. Whenever an employer requests a medical certification, however, it is the employee’s responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide
complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.

**Q. How often may my employer ask for medical certifications for an on-going serious health condition?**

A. The regulations allow recertification no more often than every 30 days in connection with an absence by the employee unless the condition will last for more than 30 days. For conditions that are certified as having a minimum duration of more than 30 days, the employer must wait to request a recertification until the specified period has passed, except that in all cases the employer may request recertification every six months in connection with an absence by the employee. The regulations also allow an employer to request recertification in less than 30 days if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly, or if the employer receives information that casts doubt upon the employee’s stated reason for the absence or the continuing validity of the certification.

Additionally, the regulations codify a 2005 Wage and Hour opinion letter that stated that employers may request a new medical certification each leave year for medical conditions that last longer than one year. Such new medical certifications are subject to second and third opinions.

Examples:

Janie takes six weeks of FMLA leave for a cancer operation and treatment and gives her employer a medical certification that states that she will be absent for six weeks. Because her certification covers a six-week absence, her employer cannot ask for a recertification during that time. At the end of the six-week period, Janie asks to take two more weeks of FMLA leave; her employer may properly ask Janie for a recertification for the additional two weeks.

Joe takes eight weeks of FMLA leave for a back operation and intensive therapy, and gives his employer a medical certification that states that he will be absent for eight weeks. At the end of the eight-week period, Joe tells his employer that he will need to take three days of FMLA leave per month for an indefinite period for additional therapy; his employer may properly request a recertification at that time. Six months later, and in connection with an absence for therapy, the employer may properly ask Joe for another recertification for his need for FMLA leave.

**Q. Can employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?**

A. Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee’s own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for such conditions to submit a certification from the employee’s own health care provider that the employee is
able to resume work. Under the regulations, an employer may require that the fitness-for-
duty certification address the employee's ability to perform the essential functions of the
position if the employer has appropriately notified the employee that this information will
be required and has provided a list of essential functions. Additionally, an employer may
require a fitness-for-duty certification up to once every 30 days for an employee taking
intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding
the employee's ability to perform his or her duties based on the condition for which leave
was taken.

**Q. What happens if I do not submit a requested medical or fitness-for-duty
certification?**

A. If an employee fails to timely submit a properly requested medical certification (absent
sufficient explanation of the delay), FMLA protection for the leave may be delayed or
denied. If the employee never provides a medical certification, then the leave is not FMLA
leave.

If an employee fails to submit a properly requested fitness-for-duty certification, the
employer may delay job restoration until the employee provides the certification. If the
employee never provides the certification, he or she may be denied reinstatement.

**Miscellaneous Questions**

**Q. Can my FMLA leave be counted against me for my bonus?**

A. Under the regulations, an employer may deny a bonus that is based upon achieving a
goal, such as hours worked, products sold or perfect attendance, to an employee who takes
FMLA leave (and thus does not achieve the goal) as long as it treats employees taking
FMLA leave the same as employees taking non-FMLA leave. For example, if an employer
does not deny a perfect attendance bonus to employees using vacation leave, the employer
may not deny the bonus to an employee who used vacation leave for a FMLA-qualifying
reason.

Example:

Sasha uses ten days of FMLA leave during the quarter for surgery. Sasha substitutes paid
vacation leave for her entire FMLA absence. Under Sasha’s employer’s quarterly
attendance bonus policy, employees who use vacation leave are not disqualified from the
bonus but employees who take unpaid leave are disqualified. Sasha’s employer must treat
her the same way it would treat an employee using vacation leave for a non-FMLA reason
and give Sasha the attendance bonus.

**Q. My medical condition limits me to a 40 hour workweek but my employer has
assigned me to work eight hours of overtime in a week. Can I take FMLA leave
for the overtime?**
A. Yes. Employees with proper medical certifications may use FMLA leave in lieu of working required overtime hours. The regulations clarify that the hours that an employee would have been required to work but for the taking of FMLA leave can be counted against the employee’s FMLA entitlement. Employers must select employees for required overtime in a manner that does not discriminate against workers who need to use FMLA leave.

**Q. Can I use my paid leave as FMLA leave?**

A. Under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer’s applicable paid leave policy. The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA. If the employee does not choose to substitute applicable accrued paid leave, the employer may require the employee to do so.

Example:

Neila needs to take two hours of FMLA leave for a treatment appointment for her serious health condition. Neila would like to substitute paid sick leave for her absence, but her employer’s sick policy only permits employees to take sick leave in full days. Neila may either choose to comply with her employer’s sick leave policy by taking a full day of sick leave for her doctor’s appointment (in which case she will use a full day of FMLA leave), or she may ask her employer to waive the requirement that sick leave be used in full day increments and permit her to use two hours of sick leave for her FMLA absence. Neila can also take unpaid FMLA leave for the two hours.

**Q. Can I take FMLA leave for reasons related to domestic violence issues?**

A. FMLA leave may be available to address certain health-related issues resulting from domestic violence. An eligible employee may take FMLA leave because of his or her own serious health condition or to care for a qualifying family member with a serious health condition that resulted from domestic violence. For example, an eligible employee may be able to take FMLA leave if he or she is hospitalized overnight or is receiving certain treatment for post-traumatic stress disorder that resulted from domestic violence.