Section 300

Leave Circumstances

THE LEAVE REQUIREMENT

The federal Family and Medical Leave Act (FMLA) grants eligible employees up to 12 weeks of unpaid leave in a 12-month period, for the birth, adoption or foster care placement of a child, the employee's or a family member's serious health condition, or a qualifying exigency related to a covered family member's covered active duty or call to covered active duty. FMLA's military family leave rules also allow up to 26 weeks of unpaid leave in a single 12-month period for eligible employees to care for a covered family member recovering from a serious injury or illness incurred while on covered active duty in the armed forces, or which existed before the beginning of the member's covered active duty and was aggravated by service in the line of duty on covered active duty in the armed forces, or that manifested itself before or after the member became a veteran.

- Qualifying reasons for leave
- Definitions related to the qualifying reasons for leave
- Determination of the 12-week and 26-week period
- Exceptions to the 12-week and 26-week period
- Specific definitions related to serious health conditions and serious illness or injuries
- Special issues related to serious health conditions
- Leave and intermittent leave
- Methods for calculating the 12-month period
- Exceptions to the 12-month period

REASONS FOR LEAVE

There are six basic qualifying events that entitle employees to take leave under FMLA:

1. The birth of a son or daughter, and in order to care for that newborn child
2. The placement of a child under the age of 18 with the employee for adoption or foster care, and to care for that child

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3. To care for a spouse, daughter, son, or parent of the employee, if that person has a serious health condition
4. An employee's own serious health condition that makes the employee unable to perform the essential functions of his or her job
5. Because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the armed forces.
6. Up to 26 weeks of leave during any single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a covered military servicemember or veteran recovering from an injury or illness suffered while on active duty in the armed forces, that existed before the beginning of the member's active duty and was aggravated by service, or that manifested itself before or after the member became a veteran.

As will be discussed later, leaves taken for the first two reasons just listed (birth and foster/adoptive placement) are leaves intended to give the new parents time to "bond" with their child. The FMLA draws several distinctions between leave for "bonding" and leave for serious health conditions, or military family leaves.

LEAVE FOR BIRTH AND BONDING

Under FMLA, eligible employees can take a full 12 weeks of FMLA leave (assuming that they have had no other leave-qualifying events during the 12-month period) for the birth, and to be with a healthy newborn child (so-called "bonding leave"). Bonding leave is available to either men or women, and no medical certification is required. However, bonding leave must be completed within 12 months of the date of birth or placement. When both husband and wife work for the same employer, the full amount of leave is limited to an aggregate of 12 weeks.

Note: *The courts have expressed a clear intent that both men and women be eligible for FMLA leave to care for a newborn child. Employers should not under any circumstances question the right of a male parent to take FMLA leave for bonding.*

Intermittent leave for bonding. An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. (Note, however, that the employer's agreement is *not* required for intermittent leave required by the serious health condition of the mother or newborn child).

If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act (ADA)), and state law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

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LEAVE FOR ADOPTION AND FOSTER CARE PLACEMENT

Eligible employees are entitled to up to 12 weeks of FMLA leave for placement with the employee of a son or daughter for adoption or foster care.

Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may need leave time to attend required counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption.

Note: *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 for this purpose.*

Expiration of leave. An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If state law allows, or the employer permits, leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. The employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

Husband and wife employed by same employer. A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement.

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

If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.

SERIOUS HEALTH CONDITIONS

Much of the leave taken under the FMLA relates in some way to serious health conditions—either the employee's own or those of family members. The FMLA and 2009 final FMLA regulations provide guidelines on what constitutes a serious health condition. At times the FMLA's guidelines will not provide clear answers as to what constitutes such a condition. Ultimately, decisions as to whether, in a close situation, a condition falls under the FMLA's protection must be made on a case-by-case basis.

The definition of a "serious health condition" includes:

1. An illness, injury, impairment, or physical or mental condition that involves either inpatient care (i.e., an overnight stay in a hospital, hospice, or residential care facility); *or*
2. Continuing treatment by a healthcare provider.

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Continuing Treatment

The 2009 final FMLA regulations changed the definition of what qualifies as "continuing treatment" by a healthcare provider. Under the regulations, to qualify as "continuing treatment," the condition must involve:

- A period of incapacity of more than 3 consecutive, full calendar days, and any subsequent treatment or period of incapacity for the same condition that also involves either:

  —Treatment by a healthcare provider two or more times within 30 days of the first day of incapacity, unless extenuating circumstances exist; *or*

  —Treatment by a healthcare provider at least once that results in a regimen of continuing treatment under the supervision of the healthcare provider (The requirement for treatment by a healthcare provider means an in-person visit to that healthcare provider. The first (or only) in-person treatment visit must take place within 7 days of the first day of incapacity).
- Any period of incapacity because of pregnancy or prenatal care.
- Any period of incapacity because of a chronic, serious condition. A chronic, serious health condition is one that requires periodic visits, at least twice a year, for treatment by a healthcare provider or by a nurse under direct supervision of a healthcare provider, which continues over an extended period of time (including recurring episodes of a single underlying condition), and which may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy).
- A period of incapacity that is permanent or long-term because of a condition for which treatment may not be effective (e.g., Alzheimer's disease)
- Any period of absence to receive multiple treatments by a healthcare provider (e.g., for reconstructive surgery after an accident or injury) or for a condition that would likely result in a period of incapacity of more than 3 consecutive, full days if untreated, such as for cancer (chemotherapy) or kidney disease (dialysis)

Absences due to pregnancy, prenatal care, or chronic conditions qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a healthcare provider during the absence, and even if the absence does not last more than 3 consecutive, full calendar days.

For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's healthcare provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Incapacity. The term "incapacity" means inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment, or recovery.

Treatment. Covered "treatment" includes (but is not limited to) 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. 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 (e.g., oxygen).

A regimen of continuing treatment that includes 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 healthcare provider, is *not*, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave. See requirements for **Continuing Treatment** above.

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Healthcare provider. The FMLA's final 2009 regulations define a "healthcare provider" as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices or any other person determined by the U.S. Department of Labor (DOL) to be capable of providing healthcare services.

Others "capable of providing healthcare services" include podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as shown by X ray to exist) who are authorized to practice in the state and perform within the scope of their practices as defined under state law.

Also included are nurse practitioners, nurse-midwives, clinical social workers, and physician assistants who are authorized to practice under state law and who perform within the scope of their practices as defined under state law, and Christian Science practitioners listed with The Church of Christ, Scientist, in Boston, Massachusetts.

Finally, the FMLA's definition of a covered healthcare provider includes any healthcare provider from whom an employer or the employer's group health plan's benefits manager will accept certification to substantiate a claim for benefits. For employees or their covered family members who are located outside of the United States, the FMLA allows certification by healthcare providers previously listed who practice in a country other than the United States, who are authorized to practice in accordance with the law of that country, and who are performing within the scope of their practice as defined under such law.

Definitions: Family Members—Serious Health Conditions

Depending on the type of FMLA leave taken, the definition of a covered family member, serious health condition, healthcare provider, and other critical terminology will differ. For example, for the purpose of most FMLA leave for a serious health condition, a covered son or daughter is a person under the age of 18 (or over the age of 18 and incapable of self-care). However, for military family leave the covered son or daughter may be "of any age" (since a person must be 18 or older to serve in the military). Employers that administer leave programs must be aware of these critical differences in definitions.

Documentation may be required. The FMLA's 2009 final regulations allow that an employer may require the employee giving notice of the need for leave to provide reasonable documentation of family relationships or a statement of family relationships. The documentation may take the form of a statement from the employee, a birth certificate, a marriage license, etc. The employer may review such documentation, but the employee is entitled to have any official documents returned to him or her.

Spouse. "Spouse" means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized.

The 2009 final FMLA regulations clarify that a *husband* is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition." According to the preamble to the final regulations, this clears up prior confusion as to whether boyfriends or fiancés were eligible for such leave—they *are not.*

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> ***Policy issue—domestic partners:*** *A growing number of organizations are offering benefits such as healthcare coverage to domestic partners. Such an organization will have to determine whether it also wants to offer leave comparable to FMLA leave to domestic partners. In addition, a number of jurisdictions have antidiscrimination laws based on sexual orientation. In those states, employees may raise claims of discrimination if they are excluded from leave because of sexual orientation. If this situation occurs, consult legal counsel.*

Parent. "Parent" means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was a child. This term does not include parents in-law. Persons who are *in loco parentis* include those with day-to-day responsibilities to care for and financially support 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.

The *in loco parentis* provision is most often applied in situations involving a grandparent or stepparent who raised the child. This definition focuses on who actually took the responsibility to raise the child. Nevertheless, even if a biological parent never acted in a parental capacity, the biological connection is sufficient to automatically warrant leave.

The definition of parent does not include parents-in-law, although some state FMLA laws do expand the definition of parent to include parents-in-law.

> ***Policy issue:*** *The FMLA does not cover parents-in-law for care of a serious health condition. If you do extend coverage to parents-in-law, be careful. Pay docking, which is discussed in* **Section 500** *of this guide, only protects employers who grant leave within the legal definitions of coverage. Accordingly, if you dock an exempt employee for time off to care for a parent-in-law you may be jeopardizing that employee's exempt status.*

Son or daughter. For purposes of FMLA leave taken to care for a family member with a serious health condition, "son or daughter" means a biological, adopted, step, or foster child; a legal ward; or a child of a person standing *in loco parentis* who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

Incapable of self-care. "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). ADLs include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. IADLs include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. "Physical or mental disability" has the same meaning as is defined by the ADA.

Needed to care for. The medical certification provision that an employee is "needed to care for" a family member with a serious health condition encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety or is unable to transport himself or herself to the doctor, etc.

Covered care. "Covered care" also includes providing psychological comfort and reassurance, which would be beneficial to a covered child, spouse, or parent with a serious health condition who is receiving inpatient or home care. The term also includes situations in which the employee may be needed to fill in for others who are caring for the family member or to make arrangements for changes in care, such as transfer to a nursing home.

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The 2009 final FMLA regulations state that the term “needed to care for” does not mean that the employee must be the only individual or family member available to care for the family member or covered servicemember (29 CFR 825.124). However, the preamble to the final rules does indicate an intention by DOL to limit the type of care that can be given, stating “… FMLA leave may only be taken to care for the family member with a serious health condition or the covered servicemember with a serious illness or injury. An employee may not use FMLA leave to work in a family business, for example ...” (*Federal Register,* November 17, 2008 (Vol. 73, No. 222, p. 67953)).

This revision to the regulations allows for a more expansive reading of which employees are “needed to care for” covered family members. Although DOL intended on limiting the type of care to be given, it may be difficult for employers to regulate what, exactly an employee on leave is doing.

Leave for Treatment of Substance Abuse

Substance abuse may be a serious health condition if one of the tests for establishing a “serious health condition” is met. However, FMLA leave may be taken only for treatment of substance abuse by a healthcare provider or by a provider of healthcare services on referral by a healthcare provider. Absence because of the employee’s use of the substance, rather than for treatment, does *not* qualify for FMLA leave. This distinction is important.

Treatment for substance abuse does not prevent an employer from taking employment action against an employee. However, an employer may not take action against an employee because the employee has exercised his or her right to take FMLA leave for treatment. If the employer has an established policy, applied in a nondiscriminatory manner, communicated to all employees, and that provides under certain circumstances an employee may be terminated for substance abuse, the employee may be terminated pursuant to that policy even if the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse.

Pregnancy

A mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. Some state laws also provide special leave for pregnant employees who are disabled by their pregnancy (e.g., California). Check your state maternity and pregnancy leave laws in **Section 800** of this guide to see if your state has such requirements.

Under FMLA, a mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a healthcare provider during the absence, and even if the absence does not last for more than 3 consecutive calendar days (29 CFR 825.120(4)). A husband is also entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated, if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition.

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Practice tip regarding pregnancy: *Many courts have noted that pregnancy-related conditions are treated differently under the FMLA than other medical conditions, and have declined to require employees to provide medical documentation that morning sickness and other pregnancy-related conditions are incapacitating. However, in cases where the employee's physician specifically states that the employee's morning sickness is not severe enough to prevent her from working, courts have upheld the employer's decision to deny leave. Employers facing requests for leave from pregnant employees should not deny leave if the employee refuses to provide a medical certification. However, in cases where the employee volunteers the certification, and the certification states that the employee can work, it is probably appropriate to deny the leave.*

Pandemic Illness

According to the Health and Human Services (HHS) Interagency Public Affairs Group on Influenza Preparedness and Response and a consortium of federal agencies, including DOL, employers may take specific measures to combat the spread of illness during a pandemic illness. (See PandemicFlu.gov for more information on HHS' pandemic guidance.)

The following is a summary of some of the guidance given by HHS on managing employee medical certification and leave during a pandemic.

Practice tip*—Note that overall, employers should be guided in their relationship with their employees not only by federal employment law, but also by their own employee handbooks, manuals, and contracts (including bargaining agreements), and by any applicable state or local laws.*

Preparing a pandemic plan. Employers must prepare a plan of action specific to the workplace, given that a pandemic influenza outbreak could affect many employees. It would also be prudent to notify employees (and if applicable, their bargaining unit representatives) about decisions made under this plan or policy at the earliest feasible time. Also, remember that any employment decision mandating that certain employees stay home must comply with federal laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status.

Leave for caregivers. Covered employers must abide by the FMLA as well as any applicable state FMLA laws giving leave to employees to care for sick children or family members. The FMLA entitles eligible employees to leave for specified family and medical reasons, *which may include the flu where complications arise that create a "serious health condition" as defined by the FMLA.*

There is currently no federal law covering employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents that have been dismissed from school or child care. However, given the potential for significant illness under some pandemic influenza scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families.

Documenting illness. An employer may require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work. However, employers should consider that during a pandemic, healthcare resources may be overwhelmed, and it may be difficult for employees to get appointments with doctors or other healthcare providers to verify they are well or no longer contagious.

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