



COMPLIANCE@WORK

An educational resource for Legislative Branch employees and employers to help understand workplace rights and legal responsibilities under the Congressional Accountability Act of 1995

TAKING TIME? AN EMPLOYEE'S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT OF 1993.

Employment
Law Series

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This year marks the twentieth anniversary of the enactment of the Family and Medical Leave Act of 1993 (FMLA). In the last two decades, the FMLA has matured, making it easier for managers and employees to understand its application to the workplace. This edition of Compliance@Work reviews the FMLA and answers some common FMLA questions.

SO, WHAT IS THE FMLA?

In short, the FMLA allows employees to take up to 12 weeks of unpaid, job-protected leave for one or more of the following reasons: (1) because of the birth, adoption or foster care placement of a son or daughter; (2) in order to obtain treatment for and recover from a serious medical condition, and (3) in order to care for a seriously ill family member. Additionally, under recent amendments to the FMLA, employees are entitled to take leave for certain qualifying reasons that arise when a spouse, son, daughter or parent is in active duty in the military or has been notified of an impending call or order to active duty and to take leave to care for a spouse, son, daughter, parent or next of kin who is a covered servicemember or veteran with a serious service-connected injury or illness.

While the FMLA does not require that leave be paid, it allows employees and employing offices to substitute available paid leave for unpaid FMLA leave and allows employees to take FMLA designated leave (whether paid or unpaid) without fear of being terminated because they have taken FMLA leave. Although employees who take FMLA leave may not always get the exact same job back, they must be returned to a position with equivalent benefits, pay, and other terms and conditions of employment.

WHO IS ELIGIBLE FOR FMLA LEAVE?

Under the Congressional Accountability Act (CAA), all Legislative Branch employees who have worked for any employing office for 12 months (need not be consecutive or for a single office) and worked 1,250 hours during the preceding 12 months are eligible for leave under the FMLA.

WHAT CAN THE FMLA BE USED FOR?

- The birth, adoption, or foster care placement of a child and to care for that child within one year of birth, adoption or foster care placement;
- To care for a spouse, child, or parent who has a serious health condition, including 26 weeks to care for a spouse, child, parent, or next of kin who is a service member or veteran with a serious service-connected injury or illness;
- A serious health condition that makes the employee unable to perform any of the essential functions of his or her job; or
- Any qualifying exigency that arises when a spouse, son, daughter, or parent is on covered active duty military service or has been notified of an impending call or order to such covered active duty, such as making family and child care arrangements for deploying military.



Office of Compliance
110 Second Street, SE
John Adams Building
Room LA 200
Washington, DC
20540-1999
P: 202.724.9250
F: 202.426.1913

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Note: On June 26, 2013, the U.S. Supreme Court struck down the definition of "spouse" in the Defense of Marriage Act (DOMA) as unconstitu-

tional (“Spouse” had referred only to a person of the opposite sex who is a husband or a wife). The term “spouse” is not clearly defined in the FMLA; however, as of the date of this publication, under the regulations implementing the FMLA provisions of the CAA, the term “spouse” is “a husband or wife as defined or recognized under State law for purpose of marriage in the State where the employee resides, including common law marriage in States where it is recognized.” Whether this definition of “spouse” is constitutional after the recent Supreme Court decision is unclear at this time.

WHAT CAN SUPERVISORS REQUEST IN SUPPORT OF AN FMLA REQUEST?

Employing offices can request and require that employees provide a completed certification form from a health care provider that contains certain specified information about themselves or about their family member with a qualifying serious medical condition. If an employee submits a complete certification signed by the health care provider, the employing office may not request additional information from the health care provider, but can, with the employee’s permission, contact the health care provider for purposes of clarification and authenticity of the medical certification.

Note: While this may seem invasive to employees, employers need enough information to make an informed decision on the application of the FMLA to a particular circumstance. Employees should also remember that they are required in most cases to work with their management in scheduling leave under FMLA to have the least disruption on their employing office’s operations.

EXAMPLES AND COMMON QUESTIONS IN FMLA DETERMINATIONS:

Intermittent Leave- John is the father of a two-year old girl who has a serious health condition requiring weekly medical treatments. John asks his boss for four hours off every Wednesday under FMLA to take his daughter to those treatments. Can John split his FMLA up into these four-hour blocks?

Answer: Yes. Generally, intermittent leave or reduced schedule leave can be provided when medically necessary for the employee’s own serious health condition or for the caretaking of certain family members with such a condition. FMLA authorizes this intermittent leave but requires notice and certification of leave, and requires employees (where possible) to schedule planned

treatments in a manner that does not unduly disrupt employer’s operations.

Returning from FMLA- Mary, a Legislative Branch employee, recently took three months of pregnancy leave under FMLA. Prior to her leave, she was working on several important projects and was the “go-to” person on multiple issues. While Mary was out, her duties were assumed by another staffer. When Mary returns, her boss places her in a significantly lower-level role with little responsibility but keeps her salary the same. Has management violated FMLA in the reassignment?

Answer: Yes. The FMLA requires that employees returning from leave be restored to the position they held prior to taking leave or to a position with equivalent benefits, pay, and other terms and conditions of employment. While the law recognizes that there may be times when an employer cannot restore an employee returning from leave to the identical position held prior to taking leave, it nevertheless does require placement into an “equivalent position.” Pay is only one of the considerations that determines equivalency. Other terms and conditions of employment must also be equivalent.

Military Deployments- Shira’s husband is deployed overseas with the Army for a year. Prior to the deployment, her husband would pick up the couple’s two children from preschool. While Shira has successfully juggled the child care issues, during a recent snow storm preschool was closed for several days and Shira was forced to stay home. Is this a FMLA covered issue?

Answer: Yes. FMLA now provides coverage in certain limited military deployment circumstances. An eligible employee caring for a covered military member’s child may use qualifying exigency leave to provide childcare on an urgent, immediate need basis, but not for routine everyday care, when the need to provide the care arises from the active duty or call to active duty status of the military member.



Did You Know?

Infertility treatments may be covered by FMLA in certain circumstances.

As with all medical absences, if the individual case meets the criteria of a serious health condition then it will be covered by FMLA. For instance, tests done to determine the cause of infertility may be covered when it is a test to determine whether there is a serious health condition. Missing a portion of a day to have an infertility treatment may not be covered, as that alone would not likely meet the definition of a serious health condition. Surgery needed to correct an underlying fertility problem and recuperation time needed after treatment could be FMLA eligible. Employers must review the specific circumstances to determine whether it is FMLA eligible.