

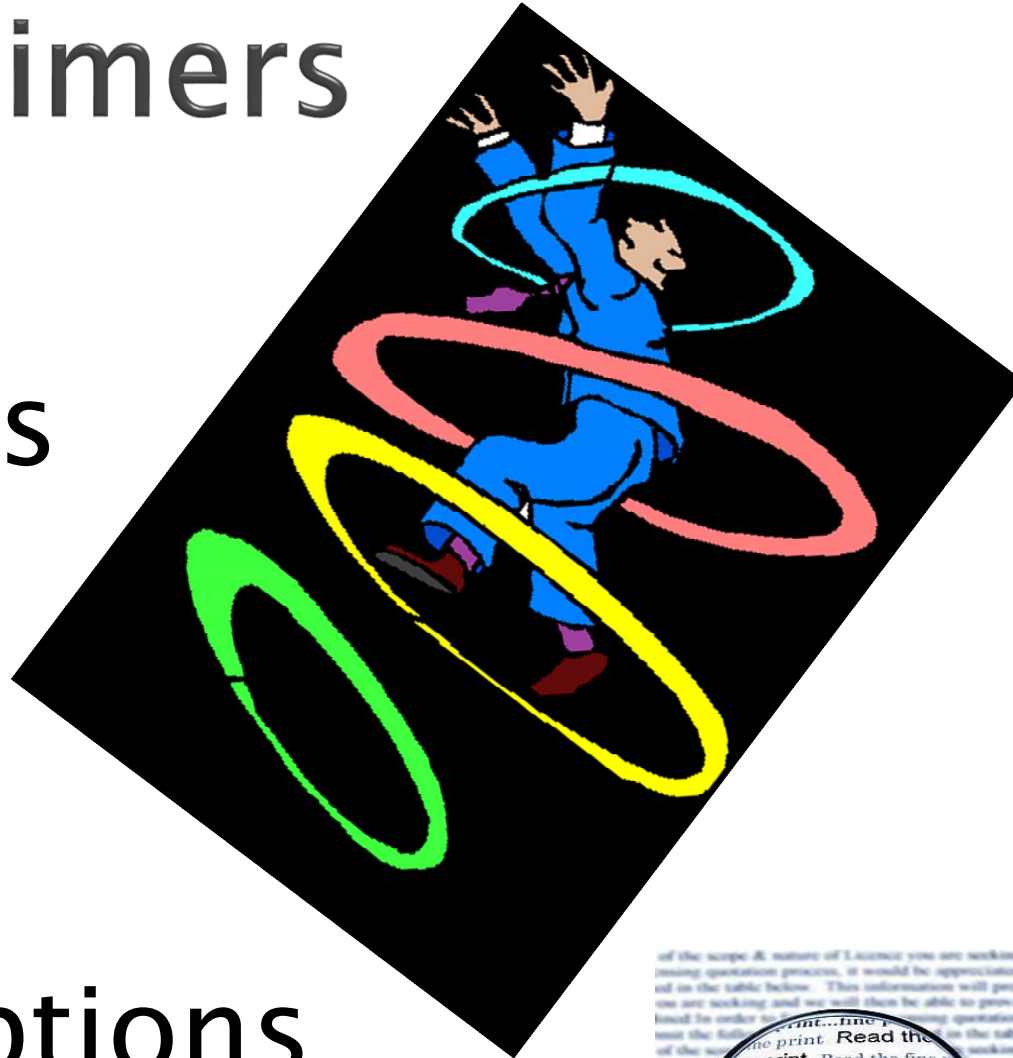
Family Medical Leave Act: The Basics

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March 2017

Disclaimers

► Hoops

► Exceptions



Family Medical Leave Act

- ▶ Took effect in 1993 for non-unionized employers and 1994 for unionized employers.
- ▶ More than 20 years later, we still dealing with all of the fine points!

Who is entitled to a leave?

- ▶ Applies to employees of government agencies, all elementary and secondary schools, and private employers with **50 or more employees**.
- ▶ Employee must have worked for current employer for at least 12 months during the past year.
 - *Wages v. Stuart Mgmt. Corp.*, (8th Cir. 2015)
 - She was pregnant and needed to have her hours reduced. One day before her 12 month anniversary she was fired. Court found she used non FMLA leave to fill the one day gap, and ruled she qualified for FMLA leave; she was the type of employee the FMLA was designed to protect.
 - *Hill v. Western Wayne Family Health Centers*, 2016 WL695572 (E.D. Mich., 2016)
 - The court found she was not eligible for a leave where she had not worked 12 months. (February 7– February 3rd)



Who is entitled ?

- ▶ Employee must have worked at least 1250 hours in the previous 12 months for the current employer.
- ▶ $20 \text{ hours} \times 52 \text{ weeks} = 1040 \text{ hours}$
- ▶ Usually some one who regularly works at least 25 hours a week



What can a FMLA leave be used for?

- Care for employee's own **serious health condition** that makes employee unable to perform job
- Care of a newborn or newly adopted child
- Care of a family member with a serious health condition
 - “Family members” is **spouse**, children under 18, and parents
- Service member leave

What is a serious health condition?

- ▶ Any condition that requires an **overnight** stay in a hospital.
 - Bonkowski v. Oberg Industries, Inc., 787 F.3d 190 (3rd Cir. 2015)
 - An employee who stayed in the hospital 14 hours the day after he walked off the job experiencing shortness of breath, failed to show he had a “serious health condition” because his illness did not involve “in patient care in a hospital...” within the meaning of the act. The court relied on a DOL regulation stating that inpatient care means an overnight stay.

What is a serious health condition?

- ▶ Any condition that requires more than 3 consecutive days of absence from work **and** continuing treatment.
 - Must need at least two visits to the doctor, one within 7 days and a second one within 30 days.
- ▶ Continuing treatment needed for chronic conditions such as asthma, epilepsy, diabetes, Alzheimer's, or cancer.
- ▶ Substance abuse treatment can be considered a serious health condition.



Who is a spouse?

- ▶ After *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the DOL rule that legally married couples, same sex or not, are covered under the FMLA in all states.



How long is the leave?

- ▶ 12 weeks of job-protected leave within a 12-month period:
- ▶ a “rolling” 12-month period measured backward – 12-month period measured backward from the date an employee uses any FMLA leave. Under the “rolling” 12-month period, each time an employee takes FMLA leave, the remaining leave entitlement would be the balance of the 12 weeks which has not been used during the immediately preceding 12 months.
- ▶ any fixed 12-months – 12-month period such as a fiscal year (for example, October 1 through September 30), a year starting on an employee’s anniversary date (for example, September 22 through September 21), or a 12-month period required by state law;



How long is the leave?

- ▶ the calendar year – 12-month period that runs from January 1 through December 31;
- ▶ the 12-month period measured forward – 12-month period measured forward from the first date an employee takes FMLA leave. The next 12-month period would begin the first time FMLA leave is taken after completion of the prior 12-month period; or

More 12-month period

- ▶ Employer elects (negotiates) the 12-month period.
- ▶ May change period if not in contract with 60-days notice as long as change is not to circumvent grant of FMLA leave and does not harm employee.



Special Leaves under FMLA

- ▶ Military Caregiver Leave
 - 26 weeks during a 12-month period for a covered service member with a serious injury or illness who is a spouse, son, daughter, parent, or next of kin.



Special Leaves under FMLA

► Exigency Service Member Leave

- 12 weeks available while Employee's spouse, son, daughter, or parent is on active duty or notified of an impending call or order to active duty
 - Short notice deployment
 - Military events and related activities
 - Childcare
 - Financial and legal arrangements
 - Counseling
 - Rest and recuperation
 - Post deployment activities
 - Activities agreed to by employee and employer



Intermittent Leave

- ▶ Any leave can be used intermittently if it is a qualified leave
- ▶ Examples:
 - Radiation or chemotherapy
 - Periodic doctor visits
 - Conditions that flare up periodically such as lupus, fibromyalgia, asthma, etc.



Notice Obligations

- ▶ Employer must prominently post DOL poster.
- ▶ If employer provides any written guidance concerning benefits or leave rights, information concerning FMLA entitlements and employee obligations must be included in the handbook or other document. 29 CFR 825.300(a)(3).
 - CBA should reference FMLA entitlement

Notice Obligations

- ▶ If an employee requests leave or employer believes leave qualifies for FMLA even if not notified, employer must notify employee in writing within 5 days of eligibility or ineligibility.
 - Employer must provide notice details expectations and obligations of employee, i.e. medical certification, etc., and consequences.
- ▶ Retroactive designation allowed with appropriate notice and no harm to employee.



Notice Obligations

- ▶ Employees must notify employer 30-days in advance if foreseeable or “as soon as practicable.”
- ▶ Employees do not have to specifically mention “FMLA”.
- ▶ Employers can ask that this notice be in writing.
- ▶ Employees must also follow the employer’s usual and customary notice and procedural requirements for requesting leave as long as they are not more stringent than permitted under the FMLA.

Medical Certifications

- ▶ Employers may require medical certification at time request is made or within 5 business days, or within 5 business days if the leave is unforeseen.
- ▶ Scope of certification limited to DOL's four [model certification forms](#). Information needed is only related to specific illness at issue.



Vague, ambiguous or nonresponsive medical certification form

- ▶ What if the certification is vague?
 - The employer should give the employee seven days to cure the defect in the form.
 - *Hansler v. Lehigh Valley Hosp. Network, (3rd Cir. 2015)*
 - The court ruled that the employer should (1) advise the employee the certification is insufficient, (2) state in writing what additional information is needed and (3) provide an opportunity to cure the defect.
- ▶ Employer (not direct supervisor) may contact employee's health care provider directly for clarification or authentication, but not for additional information.

Medical Certifications

- ▶ Employer may require second opinion at the employer's expense. If there is a disagreement between the second opinion and original request, employer may require a third certification from someone jointly agreed to by employer and employee which is binding.
- ▶ Employer may ask for recertification once every 30 days unless exceptions.
- ▶ Employer may require fitness for duty certification to return to work if done consistently.



Entitlements under FMLA

- ▶ Current benefits as if employee was still working
 - (health, dental, vision, etc.)
 - Employee can be required to pay employer back if employee does not return from the leave
- ▶ Same or equivalent job
 - *Eischen v. MonDay Community Correctional Instn, (S.D. Ohio 7/24/15)* A part time nurse had her hours reduced after notifying the employer she would be taking an FMLA leave for surgery. After taking the leave, she was never scheduled for any hours and the employer contended that there were less hours available for part time nurses. The court held that a jury could decide that the cut in hours was retaliation for taking a leave and the facts were sufficient to proceed to trial.
 - *Stewart V. Davita, 2015 U.S. Dist. LEXIS 86812 (Tenn. 7/1/15)*
 - No right to reinstatement, where 18 days after she went on FMLA leave, her job was eliminated and there was no open equivalent position at the company.



Intermittent leave exception: employer may transfer employee to equivalent job temporarily for accommodation purposes

If leave is during the last 5 weeks of a semester, employer can require instructional employee to stay out until the end of the semester.

Issue of if employer has to pay the employee if the employer requires employee to stay out until end of semester??? See CBA.



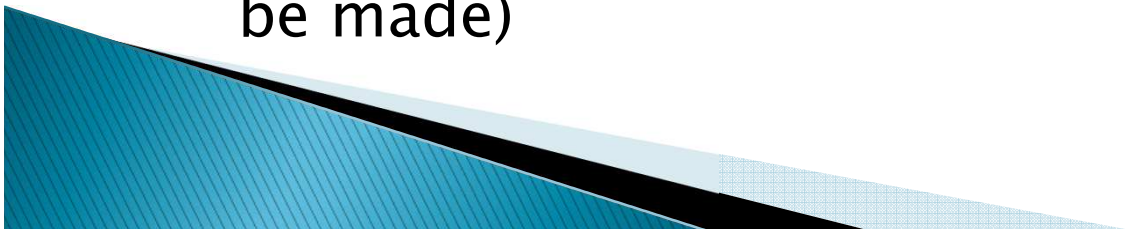
Substitution of Paid Leave

- ▶ FMLA is unpaid leave
 - FMLA entitles employees to a “maximum” of 12 weeks
- ▶ An employee may elect or employer may require the concurrent running of accrued paid leave if the leave fits within the normal use.
 - If you are out with an illness for 12 weeks and have 5 weeks of accrued sick leave, the employer may require you to or you may elect to use your sick leave concurrently with the FMLA leave because your sick leave is for use when you are sick.
 - Employer must notify you if they are requiring you to run accrued sick leave concurrently with FMLA leave.



Substitution of Paid Leave

- ▶ An employee cannot elect to use or be required to use accrued vacation or personal leave absent a contractual provision.
 - You cannot use and your employer cannot require you to use your vacation time when you are on FMLA due to illness if your employer does not normally allow a person to use vacation time to cover an illness. (Exceptions can be made.)
 - You cannot use and your employer cannot require you to use your accrued sick leave time when you are on FMLA because of the illness of your spouse if your sick leave policy does not allow you to use sick leave for the care of a sick spouse. (Exceptions can be made)



Calculating “12 weeks”

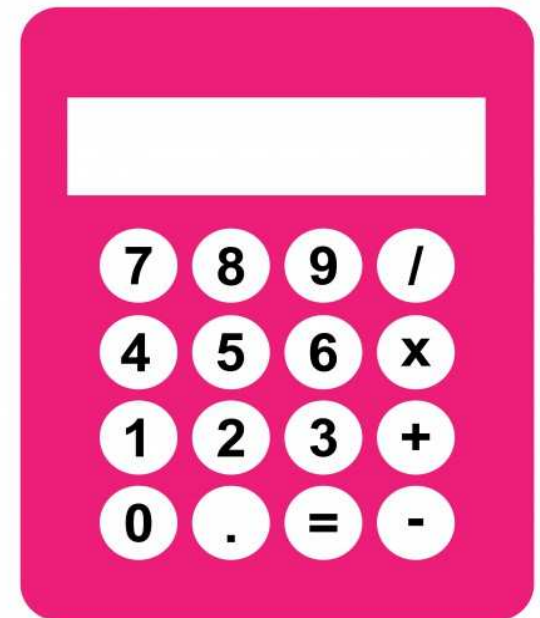
- ▶ If a holiday occurs during the time an employee is on FMLA leave, the full week still counts toward the employee’s total FMLA leave entitlement.
- ▶ If the employer’s business is temporarily closed and employees are generally not expected to report to work (i.e., school closings for holidays, vacations, seasonal breaks), those days do not count against the employee’s FMLA leave entitlement.

More calculations...

- ▶ Only the leave actually taken from the employee's work day may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee normally works 5 days a week and takes 1 day off for FMLA leave purposes, the employee would use $1/5$ of a week of FMLA leave.
- ▶ Or, if an employee normally works 8 hour days and is on a reduced leave schedule working 4 hour days for FMLA purposes, the employee would use $1/2$ week of FMLA leave each week.

Calculating!!!

- ▶ If you are out starting on a Wednesday and normally work 8 hour days on Monday through Friday, your FMLA leave technically starts on Wednesday. You will have used 3/5 of a week during the first week



Calculating!!!

- ▶ If an employee normally works part-time, the amount of FMLA leave entitlement is determined on a pro rata basis.
 - For example, if an employee normally works 30 hours per week and takes 10 hours off for FMLA purposes, the employee would use 1 / 3 of a week of FMLA leave.
- ▶ If an employee works a variable schedule week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period is used for calculating the employee's normal workweek.



Pregnancy under the FMLA

- ▶ Up to 12 weeks to care for a newborn and prenatal care
- ▶ First 6 weeks are considered “illness” unless there are extenuating circumstances.
 - C-section is considered illness for 8 weeks

Paid sick leave may be used for the part of the 12 week FMLA leave that the employee is sick

- ▶ Paternity leave is available
 - If both parents work for the same employer, the total entitlement for both is a combined total of 12 weeks

Workers Compensation/FMLA

- ▶ FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as family medical leave.



Americans with Disabilities Act

- ▶ Provide job protection to qualified individuals with permanent or long-term disabilities who are capable of performing their essential job functions with or without a reasonable accommodation.



FMLA vs ADA

- ▶ The FMLA protects your right to take time off from your job and keep your benefits when you need to take time off in accordance with the hoops.
- ▶ The ADA protects your ability to work and can keep you from being fired if you are able to perform your job with reasonable accommodations in accordance with the hoops.



Common Employer Transgressions

- ▶ Employer asking for too much medical information
- ▶ Employer discontinuing benefits
- ▶ Employer not returning employee to same or substantially similar position
- ▶ Employer counting breaks into 12-week calculation



Common Employee Transgressions

- ▶ Failure to give notice of the leave
- ▶ Failure to request a leave
- ▶ Failure to return the medical certification
- ▶ Failure to keep HR informed on status and return date



Application

- ▶ 1 – Employee is out of work for 3 days because of the flu. FMLA or not?
- ▶ 2 – Employee is out of work for 3 days due to the flu and spends a night in the hospital due to dehydration. There is no follow-up visit to a doctor. FMLA or not?
- ▶ 3 – Employee is out of work for 4 days because of the flu.
- ▶ 4 – Same as #3 and there is a visit to the doctor during the flu and a follow-up visit to a doctor within 30 days. FMLA or not?



Application

- ▶ 5 – Employee is out 3 days, but employee is diagnosed with diabetes instead of the flu.
- ▶ 6 – What if the employee has worked for the employer for only 6 months or has worked only 800 hours in the past 12 months?



Application

- ▶ 1 – Employee is pregnant. She wants to start her FMLA leave two weeks before her due date in order to do some shopping and set up the nursery. Would it be covered by FMLA?
- ▶ 2 – Employee is pregnant and the doctor has put the member on bed rest due to complications with the pregnancy. FMLA or not?
- ▶ 3 – Employee has 7 prenatal appointments before the birth of her child. Can the employer count this as FMLA?
- ▶ 4 – Same as #2. Can the employee take 12 weeks of FMLA after the birth of the child?



Application

- ▶ 5 – Employee wants to take 12 weeks of FMLA for the birth of her child. Employee's husband wants to take 12 weeks of paternity leave under the FMLA. They have different employers.
- ▶ 6 – Same as #5 but they work for the same employer.



Application

- ▶ Employee has been diagnosed with high blood pressure and diabetic complications due to the stress of his employment and tensions with his supervisor. Employee is requesting accommodations of either 6 months off from work or a new supervisor. Is this covered by the ADA or FMLA?

Summary

- ▶ Use DOL forms!
- ▶ Questions?

