

FMLA QUESTIONS AND ANSWERS

Q: How much leave am I entitled to under FMLA?

If you are an “eligible” employee, you are entitled to a total 12 weeks of leave for certain family and medical reasons during a 12-month period. If your child, spouse, parent, or next of kin suffers a serious illness or injury incurred in the line of duty while serving on active duty in the Armed Forces which renders the servicemember medically unfit to perform the duties of his or office, grade, rank, or rating, as an eligible employee, you are entitled to up to 26 weeks of Servicemember Caregiver leave.

Q: Which employees are eligible to take FMLA leave?

Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months, and have worked for at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles, or work for a public employer.

Q: Do the 12 months of service with the employer have to be continuous or consecutive?

No. The 12 months do not have to be continuous or consecutive; all time worked for the employer within the last seven years is counted. While the 12 months of employment need not be consecutive, employment periods prior to a break in service of seven years or more need not be counted unless the break is occasioned by the employee’s fulfillment of his or her National Guard or Reserve military obligation (as protected under the Uniformed Services Employment and Reemployment Rights Act (USERRA)), or a written agreement, including a collective bargaining agreement, exists concerning the employer’s intention to rehire the employee after the break in service.

Q: Do the 1,250 hours include paid leave time or other absences from work?

No. The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included, unless the employer considers those hours in the definition of hours worked. Employers are required to uniformly apply their leave policies, which includes consideration of whether leave time constitutes hours worked for the purpose of determining the 1,250 hour requirement.

As a rule of thumb, the following may be helpful for estimating whether this test for eligibility has been met:

- 24 hours worked in each of the 52 weeks of the year; or
- over 104 hours worked in each of the 12 months of the year; or
- 40 hours worked per week for more than 31 weeks (over seven months) of the year.

Q: How is the 12-month period calculated under FMLA?

Employers may select one of four options for determining the 12-month period:

- The calendar year;
- Any fixed 12-month "leave year" such as a fiscal year, a year required by State law, or a year starting on the employee's "anniversary" date;
- The 12-month period measured forward from the date any employee's first FMLA leave begins; or
- A "rolling" 12-month period measured backward from the date an employee uses FMLA leave.

The County presently uses the rolling 12-month period method for all leave except Servicemember Caregiver Leave. Servicemember Caregiver leave is measured forward one year from the date the leave was first used.

Q. What is a serious health condition?

“Serious health condition” means an illness, injury, impairment, or physical or mental condition that involves either:

1. Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (*i.e.*, inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; or
2. Continuing treatment by a health care provider, which includes:
 - a. A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes:
 - 1) treatment two or more times by or under the supervision of a health care provider (*i.e.*, in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or,
 - 2) one treatment by a health care provider (*i.e.*, an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (*e.g.*, prescription medication, physical therapy); or,
 - b. Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or (3) Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or

- c. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or,
- d. Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

Q: Does the law guarantee paid time off?

No. The FMLA only requires unpaid leave. However, in most circumstances, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave, such as vacation or sick leave, for some or all of the FMLA leave period. When paid leave is substituted for unpaid FMLA leave, it may be counted against the 12-week FMLA leave entitlement if the employee is properly notified of the designation when the leave begins.

The County's policy requires the use of available paid leave.

Q: Does workers' compensation leave count against an employee's FMLA leave entitlement?

It can. 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 FMLA leave.

Q: Can the employer count leave taken due to pregnancy complications against the 12 weeks of FMLA leave for the birth and care of my child?

Yes. An eligible employee is entitled to a total of 12 weeks of FMLA leave in a 12-month period. If the employee has to use some of that leave for another reason, including a difficult pregnancy, it may be counted as part of the 12-week FMLA leave entitlement.

Q: Can the employer count time on maternity leave or pregnancy disability as FMLA leave?

Yes. 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 so long as the employer properly notifies the employee in writing of the designation.

Q: Who is considered an immediate "family member" for purposes of taking FMLA leave?

An employee's spouse, children (son or daughter), and parents are immediate family members for purposes of FMLA. The term "spouse" means a husband or wife as recognized under the state marriage laws. The term "parent" does not include a parent "in-law". The terms son or daughter do not include individuals age 18 or over unless they are "incapable of self-care" because of mental or physical disability that limits one or more of the "major life activities" as those terms

are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the ADA.

For purposes of Military Caregiver leave, “next of kin” is also considered a family member and “child” is your child regardless of his or her age.

Q: May I take FMLA leave for visits to a physical therapist, if my doctor prescribes the therapy?

Yes. FMLA permits you to take leave to receive “continuing treatment by a health care provider,” which can include recurring absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay or for treatment of severe arthritis.

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

No. You do not have to provide medical records. The employer may, however, request that you provide a complete and sufficient certification confirming that a serious health condition or need for other qualifying leave exists.

Q: Can my employer make inquiries about my leave during my absence?

Yes. 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 leave. Also, if the employer wishes to obtain another opinion, you may be required to obtain additional medical certification at the employer's expense, or recertification during a period of FMLA leave. The employer may have a Human Resources Professional contact the physician to authenticate and/or clarify the certification or recertification. The inquiry may not seek additional information regarding your health condition or that of a family member.

Q: Can my employer refuse to grant me FMLA leave?

If you are an “eligible” employee who has met FMLA's notice and certification requirements (and you have not exhausted your FMLA leave entitlement for the year), you may not be denied FMLA leave.

Q: Can my employer require me to return to work before I exhaust my leave?

Subject to certain limitations, your employer may deny the continuation of FMLA leave due to a serious health condition if you fail to fulfill any obligations to provide supporting medical certification. The employer may not, however, require you to return to work early by offering you a light duty assignment. (However, an employer may reassign you on those times that you are able to work, if you are on intermittent or reduced schedule leave).

Q: Are there any restrictions on how I spend my time while on leave?

Employers with established policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. Otherwise, the employer may not restrict your activities. The protections of FMLA will not, however, cover situations where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.

Q: Will I lose my job if I take FMLA leave?

Generally, no. It is unlawful for any employer to interfere with or restrain or deny 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. Under limited circumstances, an employer may deny reinstatement to work - but not the use of FMLA leave - to certain highly-paid, salaried (“key”) employees.

Q: Are there other circumstances in which my employer can deny me FMLA leave or reinstatement to my job?

In addition to denying reinstatement in certain circumstances to “key” employees, employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or who otherwise had their employment terminated had they continued to work during the FMLA leave period as, for example, due to a general layoff.

Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave.

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.

Under certain circumstances, employers who advise employees experiencing a serious health condition that they will require a medical certificate of fitness for duty to return to work may deny reinstatement to an employee who fails to provide the certification, or may delay reinstatement until the certification is submitted.

Q: Can my employer fire me for complaining about a violation of FMLA?

No. Nor can the employer take any other adverse employment action on this basis. It is unlawful for any employer to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under FMLA.

Q: Does an employer have to pay bonuses to employees who have been on FMLA leave?

That depends. The 2009 Final Regulations state that bonuses based on achieving a specific goal such as perfect attendance, products sold or hours worked may be denied if the employee did not meet the goal due to FMLA leave. The caveat is that non-FMLA leave takers must be treated the same way.

Q: Under what circumstances is leave designated as FMLA leave and counted against the employee's total entitlement?

In all circumstances, it is the employer's responsibility to designate leave taken for an FMLA reason as FMLA leave. The designation must be based upon information furnished by the employee. Leave may not be designated as FMLA leave after the leave has been completed and the employee has returned to work, except if:

- the employer is awaiting receipt of the medical certification to confirm the existence of a serious health condition;
- the employer was unaware that leave was for an FMLA reason, and subsequently acquires information from the employee such as when the employee requests additional or extensions of leave; or,
- the employer was unaware that the leave was for an FMLA reason, and the employee notifies the employer within two days after return to work that the leave was FMLA leave.

Q: Can my employer count FMLA leave I take against a no fault absentee policy?

No.

Q: Are families of active duty servicemembers in the regular Armed Forces eligible for qualifying exigency leave?

No. The statute passed by Congress providing these new military family leave entitlements only extended the right to take FMLA leave because of a qualifying exigency to family members of National Guard and Reserves, and certain retired military. By law, the Department of Labor does not have the authority to extend the entitlement to take FMLA leave because of a qualifying exigency to family members of servicemembers in the Regular Armed Forces.

Q: How must Servicemember Caregiver leave is allowed and how is it calculated?

An employee whose spouse, child, parent or "next of kin" (nearest blood relative) is seriously ill or injured while on active military duty can take up to 26 weeks of leave during a single 12 month period to care for him or her. The time off is calculated per service member, per injury. An employee can split the time to care for multiple family members, but cannot exceed the 26 week cap in the 12-month period calculated from when the leave begins.

Q: What types of activities qualify for Exigency Leave?

Eligible employees to take up to 12 weeks of job-protected leave in the applicable 12-month period for any “qualifying exigency” arising out of the active duty or call to active duty in support of a contingency operation of a spouse, son, daughter or parent who are members of the National Guard, Reserves or a retiree who is called to active duty.

- 1) Short notice deployment
- 2) Military events and related activities
- 3) Child care and school activities
- 4) Counseling
- 5) Rest and recuperation
- 6) Post-deployment activities
- 7) Other activities resulting from deployment

Q: What is “in support of a contingency operation”?

A contingency operation includes those in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or results in the call or order to, or retention on, active duty of members of the uniformed services on the basis of national security, or during a war or national emergency declared by the President or Congress, and subject to applicable amendments to federal law.

Q: What is “active duty or call to active duty status”?

Active duty or call to active duty status refers to a member of the National Guard or Reserves or certain retired military who is under a call or order to active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

Q: How is leave designated if it qualifies as both military caregiver leave and leave to care for a family member with a serious health condition?

For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that an employer must designate the leave as military caregiver leave first. The Department believes that applying military caregiver leave first will help to alleviate some of the administrative issues caused by the running of the separate “single 12-month period” for military caregiver leave.

The regulations also prohibit an employer from counting leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition against both an employee’s entitlement to 26 workweeks of military caregiver leave and 12 workweeks of leave for other FMLA-qualifying reasons.