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# FMLA BASICS

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# Employer Coverage

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- Private sector employers with **50 or more employees in 20 or more weeks** during the current or preceding calendar year
- Public agencies and public and private elementary and secondary schools are covered employers without regard to the number of employees employed

# Employee Coverage

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- Worked at least **12 months** (need not be consecutive) as of the start of FMLA leave
- Worked at least **1,250 hours** during the 12 month period immediately preceding the beginning of FMLA leave (\*special rqmt. for airline flight crew)
- Worked at a site with **50 or more employees within a 75-mile radius**, measured by surface miles. This determination is made at the time the employee gives notice of the need for FMLA leave

# Qualifying Reasons for FMLA Leave

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- Birth or adoption of a child, placement of a child in foster care, or to care for a newborn
- Employee's serious health condition
- To care for a parent, spouse or child with a serious health condition
- Military caregiver/qualifying exigency

# Amount of Leave

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- **General Rule:** 12 weeks within a 12-month period
- **Military Caregiver Leave:** 26 weeks within a 12-month period beginning on the first day of such leave

# 12-Month Period

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## Four possible 12-month periods

- Calendar year
  - Any fixed 12-month period
  - 12-month period measured forward from the date an employee's first FMLA leave begins
  - Rolling 12-month period measured backward from the date an employee uses FMLA leave
- \* Special 12-month period for military caregiver leave
- \* If employer does not specify, the period that is most beneficial to an eligible employee will be used

# Reinstatement

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**Most employees are entitled to reinstatement to:**

- The **same position** or an **equivalent job** with equivalent pay, benefits and terms and conditions of employment (including privileges, perquisites and status). *Exception:* Employee would not have been employed at the time of reinstatement.

*Caution:* If an employee is unable to return to work following FMLA leave, or can return but with restrictions, employers should consider their obligations under the ADA, MHRA, and any other applicable law.

# Reinstatement

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- Certain “**Key Employees**” may be denied reinstatement if **restoration** of the employee (**not** the employee’s absence) will cause substantial and grievous economic injury to the employer’s operations.
  - \*Very detailed notice and timing requirements to invoke this exception! Be careful!
- A “**key employee**” is a salaried FMLA-eligible employee who is among the highest paid 10% of **all** employees within 75 miles of the employee’s worksite.

# FMLA Leave Usually is Unpaid

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- FMLA leave usually is unpaid.
- Employer may require employees to substitute accrued paid leave. In the absence of such a requirement, an employee can ordinarily choose whether to substitute paid leave.
  - *Workers' Compensation:* If the serious health condition is due to a work injury, substitution of paid leave may not be allowed.

# Parental Leave Under the FMLA

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- Available to **women and men**
- May **start any time** following the birth or placement of the child
- Must be **completed within 12 months** after the birth or placement
- Includes leave for related **pre-placement activities**

# Serious Health Condition

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- FMLA leave can be taken for an employee's own serious health condition or to care for an immediate family member (parent, spouse or child) with a serious health condition.
- For a family member, FMLA leave can be taken for physical and psychological care, and includes such things as transporting the family member to a health care provider.
- An employer can require documentation showing the family relationship, which can be as simple as a statement from the employee.

# Serious Health Condition

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- **Parent:** Includes a biological, adoptive, step and foster parent, as well as an individual who stood *in loco parentis* to an employee. It does **not** include parents-in-law.
- **Child:** Includes a biological, adopted, foster and step child, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or 18 or older and ‘incapable of self-care because of a mental or physical disability.’

# Serious Health Condition

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- **In Loco Parentis:** Has day-to-day responsibilities to care for or financially support a child or who had such responsibility for the employee when the employee was a child. A biological or legal relationship is **not** required.

# Serious Health Condition

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- **Spouse:** “[T]he other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either: (1) Was entered into in a State that recognizes such marriages; or (2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.”

This is referred to as the “place of celebration” rule and took effect on March 27, 2015.

# Serious Health Condition

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An illness, injury, impairment or physical or mental condition that involves “**inpatient care**” or “**continuing treatment by a health care provider.**” Definitions can be found at 29 C.F.R. § § 825.113-825.115 and in the written materials.

Employers can – and should – obtain a **medical certification** for requested FMLA leave due to a serious health condition. A sample form can be found on the Department of Labor’s website at [www.dol.gov](http://www.dol.gov).

# Serious Health Condition

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## Continuing Treatment

- Period of incapacity of **more than three consecutive, full calendar days PLUS**
  - Treatment **two or more times** by a health care provider or
  - Treatment **one time** by a health care provider which results in a **regimen of continuing treatment**
- Incapacity due to **pregnancy or prenatal care**
- Incapacity or treatment due to a **chronic serious health condition**

# Serious Health Condition

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## Continuing Treatment

- Incapacity that is **permanent or long-term** for a condition for which **treatment may not be effective**
- Absence for **multiple treatments** by a health care provider for
  - Restorative surgery after an accident/injury, or
  - A condition that would likely result in incapacity of more than three days in the absence of medical treatment (such as chemotherapy or dialysis)

# NOT Serious Health Conditions

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- The following are **not** serious health conditions: common cold, flu, ear ache, upset stomach, minor ulcer, headache (other than migraine), routine dental or orthodontia problems, and periodontal disease
- Routine physical examinations, eye examinations, and dental examinations do **not** qualify for FMLA leave
- Treatment initiated without a visit to a health care provider is not considered a regimen of continuing treatment.
- Cosmetic treatments are not serious health conditions unless complications develop or hospitalization is required

# Intermittent Leave/Reduced Schedule

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FMLA leave can be taken on an intermittent or reduced schedule/part-time basis if:

- Due to a **serious health condition** of the employee or an employee's spouse, parent or child, or to **care for a covered servicemember**, when there is a medical need that can best be accommodated through such a schedule.
- An **employer may require a medical certification** of the need for the intermittent leave/reduced schedule
- Due to a **qualifying exigency**

# Intermittent Leave/Reduced Schedule

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- **Not** allowed for parental leave following the birth of a healthy child or placement of a healthy child for adoption or foster care, **unless the employer agrees**
- For planned medical treatments, an employee must make a reasonable effort to **schedule such treatments so as not to disrupt unduly the employer's operations**
- An employer **may temporarily transfer** an employee if the intermittent leave/reduced schedule is due to planned medical treatment or parental leave. The alternate position does not have to have equivalent duties, but must have equivalent pay and benefits and be a position that can better accommodate the required schedule.

# Intermittent Leave/Reduced Schedule

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- Account for intermittent leave using **the shortest period of time** used to account for other forms of leave, provided it is **not more than one hour**
- Count the leave based on the employee's regular schedule. *Example:* A 40-hour employee who takes 8 hours of FMLA leave has used 1/5 of a week of FMLA leave.

# Qualifying Exigency Leave

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Eligible employees may take FMLA leave for a qualifying exigency involving the employee's spouse, child (of any age) or parent who is on covered active duty in a foreign country (or has been notified of an impending call or order to covered active duty in a foreign country) in the Armed Forces.

# Qualifying Exigency Leave

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## Qualifying Exigencies

- Short-notice deployment
- Military events/activities
- Childcare/school activities
- Financial/legal arrangements
- Counseling
- Rest/recuperation
- Post-deployment activities
- Parental care
- Other, if agreed to by employer

# Military Caregiver Leave

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Eligible employees may take **26 weeks** of FMLA leave during a 12-month period to care for a “**covered servicemember**” with a “**serious illness or injury**”

Definitions can be found at 29 CFR § 825.127 and in the written materials. “Serious illness or injury” is not the same as a “serious health condition.”

- The 12-month period starts on the first day of the leave and ends 12 months later, without regard to the employer’s normal FMLA 12-month period
- Eligible employees: spouse, son, daughter, parent, or next of kin

# Benefits While on FMLA Leave

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- With limited exceptions, **group health plan benefits** must be maintained on the same terms as if the employee continued to work.
- **Benefits accrued** pre-leave that are not used during the leave **may not be forfeited**.

# Employer Notice Requirements

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- Must **prominently post a notice of FMLA rights** that can readily be seen by employees and applicants, even if there are no eligible employees. The FMLA poster can be found on the DOL's website and at the back of the written materials.
- Must **include the FMLA notice in an employee handbook and other written materials** concerning employee benefits and leave rights. If those do not exist, must provide FMLA notice upon hire to new employees.

# Eligibility Notice

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- **Eligibility Notice:** Generally, must be provided within **five business days** of the employee's request for leave.
  - States whether the employee is eligible for FMLA leave and, if not, at least one reason why the individual is not eligible.
- **Rights and Responsibilities Notice:** Provided at the same time.
  - States expectations and obligations of the employee and consequences for failing to meet such obligations.

Required forms can be found on the DOL website.

## Request for Medical Certification

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- Employer may request a medical certification **at the time the employee gives notice** of the need for leave or **within five business days** thereafter (in the case of unforeseen leave, within **five business days** after the leave begins)
- Employee must return the certification within **fifteen days** (subject to limited exceptions)

The DOL website provides certification forms for the various types of FMLA leaves.

# Request for Medical Certification

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- **Complete Certification:** Employer cannot request additional information from the health care provider.
- **Incomplete or Insufficient Certification:** Employer may state in writing what additional information is needed. Employee then has seven calendar days (subject to exceptions) to cure the defect.
- **Clarification or Authentication Needed:** Give employee an opportunity to cure deficiencies. Then, the employer (through HR professional, leave administrator, management or health care provider - **not** the employee's supervisor) can contact the health care provider. \*Comply with HIPAA

# Request for Medical Certification

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- **Doubts Validity:** Employer can get a second opinion, paid for by employer
- **1<sup>st</sup> & 2<sup>nd</sup> Opinions Differ:** Employer can get a final and binding third opinion, paid for by employer

# Designation Notice

- **Designation Notice:** Generally, must be provided to an employee within **five business days** after gathering sufficient information to determine whether the leave is for an FMLA-qualifying reason. It must state:
- Whether the leave will be counted as FMLA leave
  - The amount of leave counted as FMLA leave, if possible
  - Whether paid leave must be substituted
  - Whether a fitness-for-duty certification will be required for reinstatement

*Note regarding retroactive notice:* Try to timely designate FMLA leave. If necessary, retroactive notice can be done (with appropriate notice to the employee), as long as the failure to timely designate does not harm the employee.

# Fitness for Duty Certification

- Can be requested for an employee who has taken FMLA leave due to the **employee's serious health condition**
- Employee must have been **notified in the Designation Notice** that it would be required
- Policy & practice for obtaining must be **uniformly applied**
- Can only seek information regarding the **condition that necessitated FMLA leave**
- If it will address the **ability to perform essential job functions**, specifically state that this will be required in the designation notice and provide a list of such functions with the designation notice or earlier

# Employee Notice Requirements

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- If need for leave is **foreseeable** - **30 days** notice (can be verbal)
- If **not** foreseeable or practicable - **as soon as practicable**. If employer asks, employee must explain why earlier notice was not practicable.
- Employee **does not need to specifically reference** the FMLA. Merely **calling in sick**, however, does **not** trigger an employer's FMLA obligations.
- Employer can **inquire further if necessary** to determine whether requested leave is for an FMLA-qualifying reason.

# Employee Notice Requirements

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- Employees generally may be required to comply with **employer's usual and customary notice requirements**, as long as they are not more strict than FMLA notice requirements
- **Insufficient notice** may result in **delay or denial** of FMLA leave

# Recordkeeping

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- FMLA-related records must be maintained for at least three years. These include:
  - Basic payroll & identifying information
  - Dates FMLA leave is taken – designate as FMLA
  - Hours of leave, if less than full day
  - Copies of employer and employee notices
  - Policies and documents regarding benefits and paid/unpaid leaves
  - Premium payments of employee benefits
  - Records of disputes

\*Special requirements for airline flight crew employees

# Confidentiality

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- Records and documents containing medical information must be kept confidential, separate from the usual personnel files. If GINA or ADA applies, comply with those requirements.
  
- *Exceptions:*
  - Supervisors/managers can be told of necessary restrictions and accommodations
  - First aid and safety personnel may be informed if emergency treatment may be required
  - Government investigation of FMLA or other legal compliance

# Thank You!

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If you would like a copy of this PowerPoint presentation, please give me your business card and indicate the request on your card.

If you have any follow-up questions, please feel free to contact me at:

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