



## FMLA: Return to Work Certifications & ADA Reasonable Accommodations

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# Why Do I Need to Know About the FMLA?

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- ▶ Employees may share information with you that can trigger the protections afforded by the FMLA.
- ▶ Information you receive can be enough to put the district on notice that an employee is entitled to protections afforded by the FMLA.



# Why Do I Need to Know About the FMLA?

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- ▶ One of the main reasons employees file complaints with investigative agencies is because an employer did not respond to a request for leave.
- ▶ You are required to comply with the law and your failure to comply or inconsistent responses to situations protected by the FMLA can expose your school district and even you to liability.



# FMLA Basics

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- ▶ What is the Family Medical Leave Act?
  - ▶ Provides job-protected leave for certain qualifying events.
  - ▶ Protects employees from interference with job-protected leave and retaliation for taking job-protected leave.



# FMLA Basics

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- ▶ Who is a “covered employer”?
  - ▶ “[A]ny person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees within a 75 mile radius.”
  - ▶ Public elementary and secondary schools are covered employers without regard to the number of employees employed



# FMLA Basics

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- ▶ “As under the FLSA, individuals such as corporate officers ‘acting in the interest of an employer’ are individually liable for any violations of the FLMA requirements.”
- ▶ The majority of courts are interpreting this definition consistent with it’s plain reading, meaning that individuals can be personally liable



# FMLA Basics

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- ▶ FMLA rights cannot be interfered with
- ▶ This includes discrimination and retaliation
- ▶ Remedies include: compensation and benefits lost because of a violation including money and equitable relief – reinstatement, promotion, etc.
  - ▶ See 29 CFR 825.220



# FMLA Basics

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- ▶ Who is eligible?
  - ▶ 12 months of service
    - ▶ Need not be continuous 12 months
    - ▶ 7-year break in service = start over
      - Unless break in service caused by National Guard/Reservist duty
  - ▶ AND worked 1250 hours during the 12 months immediately preceding the leave
    - ▶ Must credit hours s/he “would have” worked but for military service
      - See 29 CFR 825.110





# FMLA Leave is available for:

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- ▶ The birth of a son or daughter of the employee and to care for the newborn child;
  - ▶ The placement of a son or daughter with the employee for adoption or foster care and to care for the newly placed child;
  - ▶ To allow the employee to care for the employee's spouse, son, daughter, or parent with a serious health condition;
  - ▶ A serious health condition of the employee that makes the employee unable to perform the functions of his or her job;
  - ▶ Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to achieve active duty) in support of a contingency operation; and
  - ▶ The need to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.
    - ▶ See 29 CFR 825.112
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# Definitions of Family Members

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- ▶ Spouse means husband or wife as defined or recognized under state law, including common law marriages which are recognized in Kansas.
    - ▶ Supreme Court decision – This will also include same sex marriages now.
  - ▶ “Parent” means a biological, adoptive, step or foster father or mother or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter.
    - ▶ The term does not include parents “in law.”
  - ▶ “Son” or “daughter” means a biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing in loco parentis, who is either under the age of 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time the leave commences.
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# Serious Health Condition

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- ▶ The current definition:
  - ▶ Illness, injury, impairment or physical or mental condition that involves in-patient care or continuing treatment by a health care provider
    - ▶ See 29 CFR 825.113



# Serious Health Condition

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- ▶ Issue: Can minor illnesses like the cold or the flu ever be serious health conditions?
  - ▶ Old rule: Not entirely clear because of conflicting DOL opinion letters, limited court precedent, and unclear regulations
  - ▶ Final rule: Minor illnesses protected if they meet the definition of “serious health condition”



# Serious Health Condition

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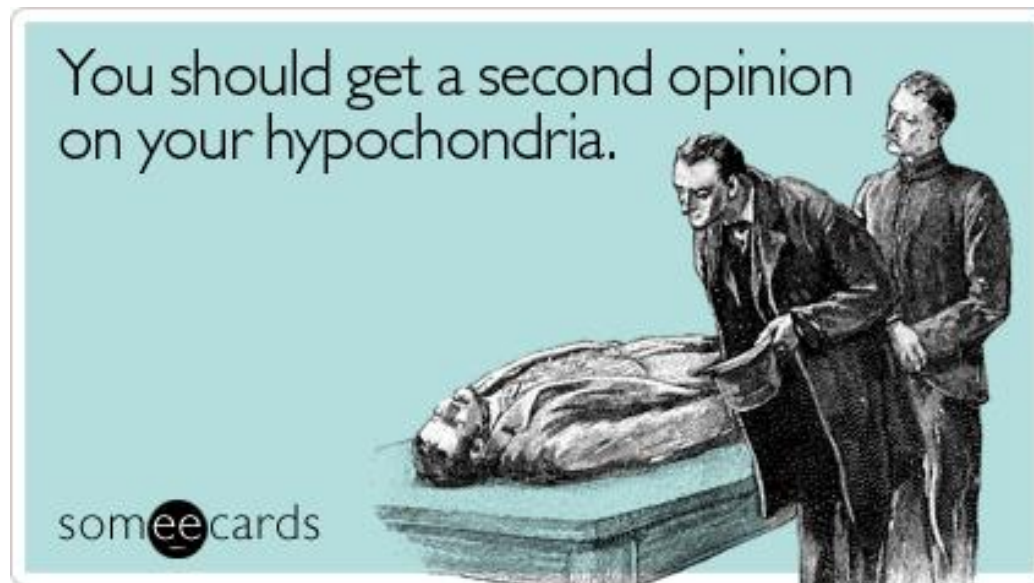
- ▶ What is a “serious health condition” in detail?
    - ▶ An illness, injury, impairment, or physical or mental condition that involves either **an overnight stay in a medical care facility , or continuing treatment by a health care provider** for a condition that either prevents the employee from performing the essential functions of the employee’s job or prevents the qualified family member from participating in school or other daily activities.
    - ▶ Subject to certain conditions, **the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.**
    - ▶ Examples of a “serious health condition” include heart attacks, most cancers, back conditions that require extensive therapy, strokes, spinal injuries, certain respiratory conditions, severe arthritis and injuries resulting from accidents. Pregnancy, morning sickness, prenatal care, childbirth and recovery from childbirth also qualify.
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# Chronic Condition

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- ▶ Another example of “continuing treatment” under the serious health condition definition
- ▶ Old definition requires “periodic” visits to a health care provider



# Chronic Condition

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- ▶ Issue: How often is periodic
  - ▶ Old rule: Unclear
  - ▶ Final rule: Periodic is at least twice a year; employees must visit their health care provider at least twice a year to have a chronic health condition



# Leave for Pregnancy or Birth

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- ▶ The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take leave for the birth, placement for adoption or foster care of a child.
    - ▶ 29 CFR § 825.112.
  - ▶ Only a husband—not a boyfriend or a fiancé who is the father of the child—may take leave to care for the pregnant mom because of her serious health condition
    - ▶ See 29 CFR 825.120
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# Leave for Pregnancy or Birth

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- ▶ A husband and wife who 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 birth and care of the employee's newborn child, for placement for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition.
  - ▶ This applies even if the husband and wife are employed at two different worksites.
  - ▶ If one spouse is ineligible for FMLA leave the other is entitled to a full 12 weeks of FMLA leave.
    - ▶ 29 CFR § 825.120, 121 and 201.



# Leave for Adoption or Foster Care

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- ▶ Leave for adoption or foster care may take place *before* actual birth or adoption
  - ▶ See 29 CFR 825.121



# Holidays – Counting as FMLA

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- ▶ If an employee takes a full week of FMLA and a holiday falls during that week, the employer may deduct the holiday from the employee's leave entitlement.



# Holidays – Less Than a Week Taken



- ▶ Issue: If an employee takes less than a week of FMLA leave and a holiday falls within the partial week of leave may the holiday be deducted from FMLA?
  - ▶ The holiday hours do not count against FMLA if the employee was not required to work on the holiday
- ▶ Example: I take FMLA leave on the Wednesday before Thanksgiving and am not required to work on Thursday or Friday – deduct one day of leave



# Intermittent or Reduced Leave Schedule

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- ▶ FMLA leave may be taken intermittently or on a reduced leave schedule.
  - ▶ If it is medically necessary to take care of a qualified family member who has a serious health condition or because of the employee's own serious health condition.
  - ▶ FMLA leave taken in connection with the birth, adoption or foster care of a son or daughter cannot be taken intermittently or on a reduced leave schedule unless the employee and employer agree.
  - ▶ Similarly, an employee using leave for a planned medical treatment must make "reasonable efforts" to schedule the treatment to not unduly disrupt the employer's operations. 29 CFR § 825.203.



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# Increments of Leave

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- ▶ Old rule: An employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for use of leave, provided it is one hour or less
- ▶ Final rule: “The employer must account for leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee’s FMLA leave entitlement may not be reduced by more than the amount of leave actually taken”
  - ▶ See 29 CFR 825.205



# Amount of Leave

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- ▶ Except in the case of leave to care for a covered service member with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period.
- ▶ The employer is permitted to choose one of several methods of determining the 12-month period in which the 12 weeks of leave entitlement occurs:
  - ▶ The calendar year;
  - ▶ Any fixed 12-month "leave year" such as a fiscal year;
  - ▶ 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 any FMLA leave.
    - ▶ 29 CRF § 825.200.





# Running FMLA Leave Concurrently with Paid Leave

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- ▶ Generally, FMLA leave is unpaid.
- ▶ FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave.
  - ▶ If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued leave for FMLA leave through its leave policies. In this way FMLA leave and paid leave may run concurrently.

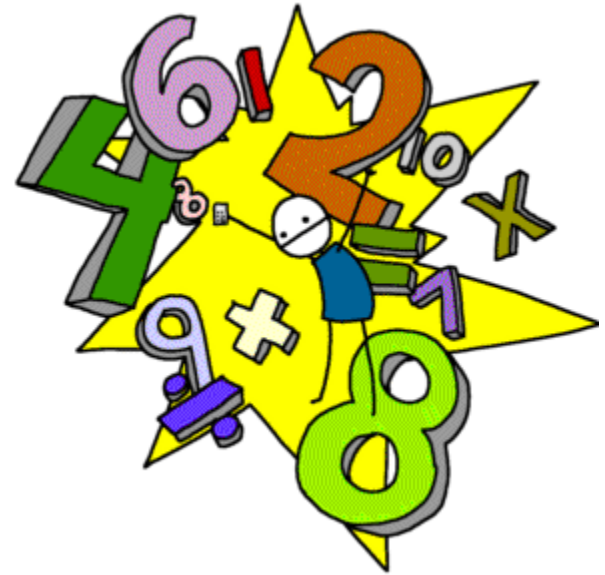




# Substitution of Paid Leave & Disability Benefits

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- ▶ Neither the employee nor the employer can require substitution of paid leave when the employee is receiving paid disability. However, where state law permits, the employer and the employee may agree to supplement the disability benefits with paid leave.
- ▶ So if disability only pays  $\frac{2}{3}$  of salary, the employer and employee can agree to substitute paid leave during this time.



# Employee Failure to Make Health Insurance Payments

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- ▶ If the employee fails to pay his or her portion of the health insurance premium during the leave, the employer may drop the employee's coverage after the employee's payment is over 30 days late. Before coverage can be dropped, the employer needs to send a written notice to the employee of his or her delinquency and advising the employee that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment is received.
- ▶ See 29 CFR 825.212



**Employee  
Notice**



**Medical  
Certification**



**Job  
Duties**



**General  
Notice**



**Eligibility and  
Rights & Responsibilities  
Notices**



**Designation  
Notice**

# **FMLA Notices**

# Employer General Notice

- ▶ Post FMLA notices in conspicuous places where notices to employees and applicants are usually posted
- ▶ Electronic posting that meet requirements above are okay – all employees and applicants must have access
- ▶ If employers have a handbook it must include the FMLA general notice
  - ▶ If not, all new employees must be given the notice
- ▶ If significant portion of work force is not literate in English translate the notice
- ▶ Fine for noncompliance: \$110
  - ▶ See 29 CFR 825.300



# FMLA Eligibility Notice – USDOL Form WH-381

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- ▶ Employer must provide employee the eligibility notice within five business days of the employee requesting leave or the employer acquiring knowledge leave may be FMLA qualifying, absent extenuating circumstances.
    - ▶ If not eligible, notice must give at least one reason (length of service, hours of work)
    - ▶ If paid leave cannot be substituted, leave can still be taken.
    - ▶ Include essential job functions if a fitness for duty certification is required.
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# Designation Notice – USDOL Form WH-382

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- ▶ Employer must notify employee within 5 business days, absent extenuating circumstances, that the leave is designated as FMLA once the employer has sufficient information
- ▶ Employer must notify employee if leave is NOT designated as FMLA – insufficient information or non-qualifying reason
- ▶ If paid leave substitution is required--inform employee
- ▶ If fitness for duty certification is required prior to employment being restored--inform employee along with a list of essential functions of the job
  - ▶ See 29 CFR 825.301





# Designation Notice

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- ▶ If possible, inform the employee of hours, days, or weeks designated as FMLA leave
  - ▶ If the exact amount of leave is unknown, employee must be informed of the number of hours of leave counted against the FMLA entitlement upon request and no more often than every 30 days if leave was taken in that period
  - ▶ Eligibility notice and designation notice may be provided at the same time where the employer has adequate information to designate the leave as FMLA leave when the employee requests the leave
  - ▶ Notify employee when leave is exhausted
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# Failure to Provide Notice or Designate Leave

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- ▶ Failure to comply with notice requirements or designate leave could constitute interference with, restraint of, or denial of the use of FMLA
- ▶ Employee must demonstrate individualized harm
- ▶ If the employer fails to provide timely notice, employers may retroactively designate FMLA leave absent a showing of harm to the employee
- ▶ Example: Employer fails to issue me an eligibility notice -- I exceed my paid sick leave of 10 days and am fired – but I really was eligible for FMLA leave – I was harmed and I get my job back
  - ▶ See 29 CFR 825.301





# Employee Notice – Foreseeable Leave

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- ▶ If less than 30 days notice is given, employer may ask employee why
- ▶ As soon as practicable is “as soon as both possible and practicable, taking into account all the facts and circumstances”—same day as employee finds out (if during work hours) or next day
- ▶ Absent unusual circumstances employees must follow established call-in procedures as long as they are practicable – or they will delay or lose their FMLA rights



# Employee Notice – Foreseeable Leave

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- ▶ Employee need not mention the FMLA as long as he or she provides sufficient information to make the employer aware FMLA rights may be at issue
- ▶ For previously certified FMLA qualifying reason, employee must specifically reference the qualifying reason (my back is acting up again!)
- ▶ Employees must respond to inquiries about whether leave is FMLA qualifying or risk losing FMLA protection



# Employee Notice – Unforeseeable Leave

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- ▶ Employee provides notice as soon as practicable under the facts and circumstances
  - ▶ Follow employer's usual and customary notice requirements (not up to 2 days later)
  - ▶ Employee must provide sufficient notice absence may be FMLA protected
  - ▶ Saying you are sick is not enough
    - ▶ See 29 CFR 825.303



# Employee Notice – Unforeseeable Leave

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- ▶ For previously certified FMLA qualifying reason, employee must specifically reference the qualifying reason
- ▶ Employee must respond to employer's questions to determine eligibility
- ▶ Employee must follow usual call-in except in unusual circumstances or leave may be delayed or denied



# Medical Certifications

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- ▶ Employer may request them within 5 business days of receiving employee notice
- ▶ Employee has 15 days to submit a medical certification for foreseeable and unforeseeable leave
- ▶ Incomplete if more than one entry is not completed
- ▶ Insufficient if information is vague, ambiguous, or non-responsive
- ▶ Employer must explain additional info needed and give employees 7 days to cure the defect—more time if employee shows diligent good faith efforts



# Medical Certifications

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- ▶ Employee must provide the certification or give the health care provider necessary authorization as required by HIPAA so the health care provider can release a sufficient and complete certification
- ▶ Annual medical certification for serious health conditions lasting over a year – subject to authentication and clarification including a second and third opinion
  - ▶ See 29 CFR 825.305



# Contents of Medical Certifications

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- ▶ New forms for employee and family member's serious health condition
- ▶ In employees certification doctor must ID job functions employee cannot perform
- ▶ Changes to the certification form:
  - ▶ Health care providers specialization
  - ▶ Guidance on appropriate medical facts including that a diagnosis may be provided
  - ▶ Health care provider must certify need for intermittent or reduced schedule leave
  - ▶ See 29 CFR 825.306



# Interaction of FMLA and ADA - Medical Certifications

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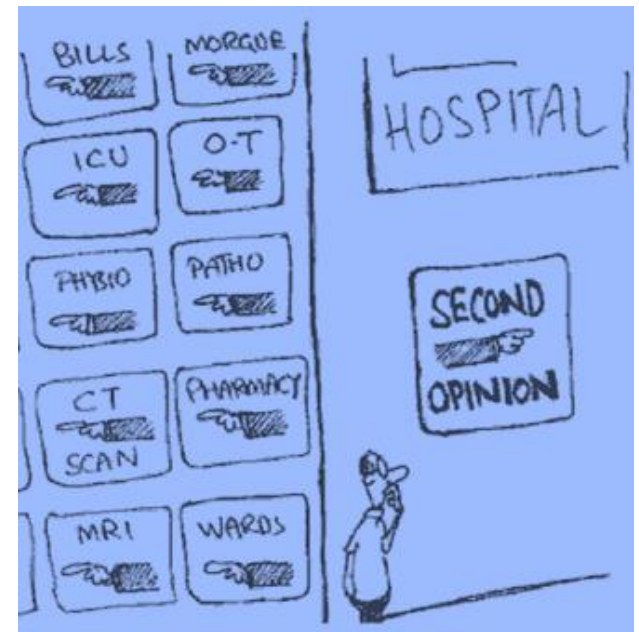
- ▶ When a serious health condition may also be a disability under the ADA or workers comp, employers may follow procedures under the ADA or workers comp for requesting medical information
- ▶ Info received under the ADA or worker comp inquiries can be used to make FMLA determinations





# Recertification

- ▶ No more often than every 30 days unless a minimum duration of inability to work is stated
- ▶ If the minimum duration of the condition is more than 30 days – employer must wait until minimum duration passes or 6 months
- ▶ Recertification in less than 30 days is allowed if employee requests an extension of leave, circumstances have changed, or facts cast doubt on validity of certification
- ▶ Employer may provide doctor with employee's pattern of absences and ask doctor if pattern is consistent



# Fitness for Duty Certification

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- ▶ No more “simple statement”—certification from doctor that employee is able to resume work
  - ▶ Employer may require that essential functions of the job are addressed – employer must provide them no later than in designation notice
  - ▶ May take place once every 30 days if employee used intermittent leave and reasonable safety concern exists
  - ▶ Follow authentication and clarification section in the recertification process
    - ▶ See 29 CFR 825.312
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# Light Duty Assignments

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- ▶ Final rule: An employee who voluntarily accepts a light duty assignment does not waive job restoration rights.
  - ▶ Light duty assignment does not count against FMLA.
  - ▶ Example: I take 4 weeks of FMLA leave and 10 weeks of a light duty assignment. At the end of the light duty assignment, I go back to my job or I can take the rest of my 8 weeks of FMLA leave.
  - ▶ BUT if I take 12 weeks of FMLA and am unable to go back to my old job, I can take a light duty position, but I will have no job restoration rights.
- 



**Q.**

**Does the employee have to specifically request FMLA leave before I have to notify HR?**

**A.**

No. Employees don't specifically need to cite the law or say they need "FMLA leave." It's the school district's responsibility to identify leave requests that could qualify as job-protected FMLA leave.



Q.

**How soon after an employee provides notice of the need for leave must an employer notify an employee that the leave will be designated and counted as FMLA leave?**

A.

Under the regulations, an employer must notify an employee whether the leave will be designated as FMLA within five business days of learning that the leave is being taken for a FMLA-qualifying reason.



Q.

**How can an employer verify that the employee qualifies for FMLA?**

A.

The FMLA allows employers to request certification of the need for the leave. The United States Department of Labor has forms on its website for employers' use.



**Q. Can employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?**

**A.** Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for such conditions to submit a certification from the employee's own health provider that the employee is able to resume work.



**Q.**

**How is the 12 month period measured – calendar year or rolling year?**



**A.**

For everything but the 26 week military caregiver leave, your school district's policy should state whether it is a set 12 month period of time (*i.e. a school or calendar year*) or a rolling year. For military caregiver leave, it is measured by the first date the leave begins. It looks forward, regardless of the school district's method for calculating other types of leave.

**Q.**

**May I take FMLA leave to both care for a covered servicemember and for another FMLA qualifying reason during this “single 12-month period?”**

**2 for 1**

**A.**

Yes. The regulations provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in this “single 12-month period,” provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period.

**Q.**

**Does the employee have to take the 12 weeks all at one time, or can he take it in smaller increments?**

**A.**

In most circumstances an employee can take FMLA leave intermittently, in blocks as small as one hour.



Q.

**Are there special rules that apply to instructional employees' ability to take intermittent leave?**



A.

If the intermittent leave (including service member caregiver leave) is foreseeable based upon planned medical treatment and would last longer than 20% of the total number of working days during the leave period, the school district may require the employee to choose either: 1) to take leave for a period or periods of particular duration, not greater than the planned treatment of the illness; or 2) transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates the leave schedule.

Q.

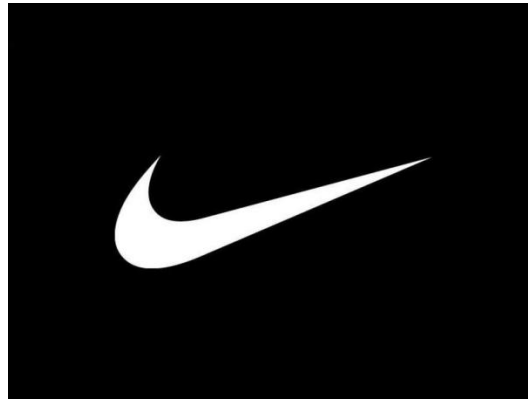
**Are there special rules that apply to instructional employees' ability to take leave near the end of the academic term?**

A.

There are special rules if the leave begins more than 5 workweeks before the end of the academic term, less than 5 workweeks before the end of the academic term, and less than 3 workweeks before the end of the academic term.



**Q. Can the employer require the employee to take paid leave concurrent with FMLA?**



**A.** Yes; employers can and should require concurrent leave to minimize business disruption (unless the FMLA absence is for worker's compensation, which cannot require the use of paid leave).



Q.

**Can the school district require the employee to pay for health insurance premiums while on FMLA leave?**

A.

The school district should continue to pay its portion, if any, of the health insurance premium. The school district can require the employee to pay for his or her portion and if he or she fails to do so, the coverage may lapse. If the employee fails to return to work at the end of the leave, the school district is entitled to recoup its portion of the premium from the employee.



**Q.**

**What if the leave qualifies as a serious health condition of an employee's family member and military caregiver leave?**

**A.**

Designate it as military caregiver leave.



**Q. What is the school district's obligation when the employee's leave is exhausted?**

**A.** If the employee is able to return to work, the employer must restore him or her to the same or "equivalent position." There are few, narrowly defined, exceptions. If the employee is not able to return to work, he or she is not entitled to job restoration under the FMLA, BUT, the school district needs to examine whether additional leave would be a reasonable accommodation under the Americans with Disabilities Act.



**Q.** What does the FMLA prohibit?



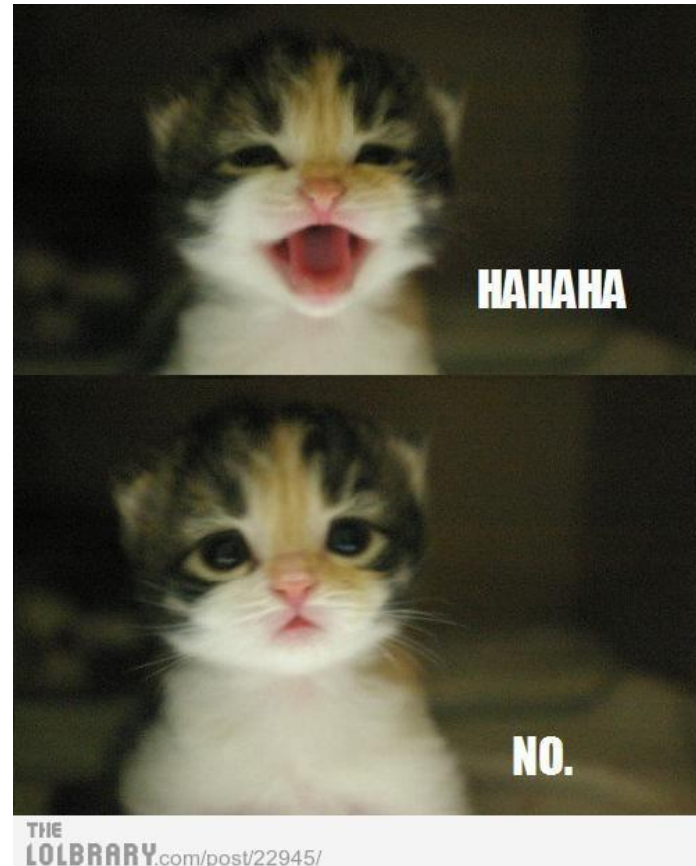
**A.** It is unlawful to interfere with, restrain, deny the exercise of or deny an attempt to exercise any rights under FMLA. “Interference” does not require intent. It can be inadvertent, but there is still STRICT LIABILITY! It is also unlawful to terminate or otherwise retaliate against an employee for taking FMLA leave and to retaliate against any person that opposes a practice that violates the FMLA.

**Q.**

**Can I use the employee's absence for FMLA leave as a consideration in his or her performance evaluation?**

**A.**

**No.**



Q.

**I have a new employee who crossed the 12 month employment threshold while on non-FMLA leave. Is the employee eligible for FMLA leave?**

A.

Yes. A Florida court recently found in determining whether an employee has worked 12 months for FMLA purposes, you must look at whether the employee was on the payroll for any part of a week, including periods of paid or unpaid leave (such as sick leave). *Porcillo v. Vistar Corp.*, No. 3:08-1090, 2010 U.S. Dist. LEXIS 8143 (M.D. Fla., Feb. 1, 2010).

Q.

**May I terminate an employee who has requested FMLA leave prior to the employee becoming FMLA eligible?**

A.

A South Carolina district court recently found an employer committed FMLA retaliation by firing an employee who gave notice in the 11<sup>th</sup> month of employment that they would take FMLA leave upon obtaining eligibility. *Gleaton v. Monumental Life Ins. Co.*, No. 2:09-1667, 2010 U.S. Dist. LEXIS 7587 (D.S.C., 2010).

**Q.**

**Can I count pre-eligibility leave against an employee's FMLA leave entitlement?**

**A.**

The new FMLA regulations indicate the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement counts toward his 12-week FMLA entitlements.



# Consequences for Inconsistent or Misapplication of FMLA

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- ▶ Employees getting more than 12 weeks of leave in a year
- ▶ Complaint with the Department of Labor
- ▶ Investigation
- ▶ Litigation
- ▶ Damages – In the event of a violation, the FMLA authorizes an award of damages – *not only against the employer, but also against responsible individuals.*
  - ▶ The damages can include:
    - ▶ Lost wages;
    - ▶ Employment benefits (for instance, if an employee is fired for taking leave he or she had a right to take under the FMLA and is out of work for an extended period);
    - ▶ Attorneys fees;
    - ▶ Reinstatement and promotion;
    - ▶ Damages for related claims.

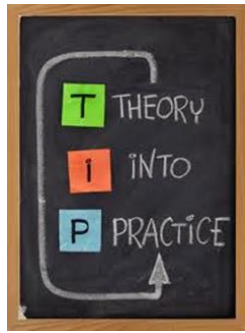


# What Next?

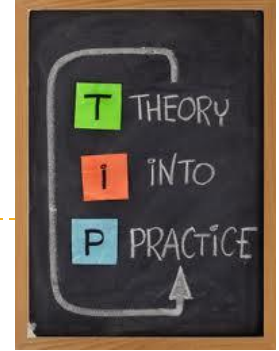
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- ▶ If you become aware of any employees under your supervision who might qualify for FMLA leave, contact HR.
- ▶ What if you are HR?
  - ▶ CONGRATULATIONS!!!





# Practical Tips



## Alert HR when an employee:

- ▶ Advises that he or she is undergoing a medical procedure, regardless of whether it will require time away from work;
- ▶ Appears to have a chronic situation requiring continual time away from work or if an employee is absent more than 3 days from the work place;
- ▶ Advises that they need to be out of the work place for personal medical reasons;
- ▶ Advises that they need to be out of the work place to care for a medical condition of a spouse, parent or child;
- ▶ Advises that they need to be out of the work place for the birth of a child, or adoption of a child, or the placement of a foster child; or
- ▶ Advises that another employee is ill.



# What if I have an employee on FMLA?

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- ▶ If you have someone under your supervision who is receiving HR-approved FMLA leave
    - ▶ Allow employees to take leave that has been approved by HR.
    - ▶ Do not consider FMLA leave as a negative factor in any employment action, such as hiring, firing, promotion or discipline.
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Questions / Comments?

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