



more Insight.





Who is an Eligible Employee?

- Employed for at least twelve months;
- Employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of leave; and
- Employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite.



Who is an Eligible Employee? (Con't)

Employment periods prior to break in service of seven years or more need not be counted in determining whether the employee has been employed for at least twelve months.



FMLA

- Types of leave covered:
 - The birth of a child, and the care of a newborn child;
 - The placement with the employee of a child for adoption or foster care;
 - To care for the employee's spouse, son, daughter, or parent with a "serious health condition";



FMLA (Con't)

- The employee's own serious health condition, which renders the employee unable to perform the functions of his or her job;
- Military Caregiver Leave; or
- Qualifying Exigency Leave



Serious Health Condition...

- Serious health condition is an illness, injury, impairment, or physical or mental condition involving:
 - (1) In-patient care (an overnight stay) at a hospital or other medical facility for any period of incapacity; or



- (2) Continuing treatment by a health care provider, which includes:
 - a) A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:



- i. Treatment two or more times by a health care provider; or
- ii. Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment;



- b) Any period of incapacity due to pregnancy or prenatal care;
- c) Any period of incapacity due to a chronic serious health condition;
- d) Any period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective; or



e) Any period of absence due to treatments after surgery or for a condition that, without the treatments would likely result in a period of incapacity of more than three consecutive calendar days



How is "spouse, son, daughter, or parent" defined for purposes of a Serious Health Condition?

a) Spouse. Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.



How is "spouse, son, daughter, or parent" defined for purposes of a Serious Health Condition? (Con't)

b) Parent. Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (c) of this section. This term does not include parents "in law."





Definitions Continued...

Son or daughter. For purposes of C) FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, 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 age 18, or age 18 or older and "incapable of selfcare because of a mental or physical disability" at the time that FMLA leave is to commence.



Definitions Continued...

(1) "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.



Definitions Continued...

(2) "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA),42 U.S.C. 12101 et seq., define these terms.



How is "In Loco Parentis" defined?

(3) Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.



- June 22, 2010, the U.S. Department of Labor clarified the definition of "son" and "daughter" under the FMLA as it applies to an employee standing in loco parentis to a child.
- The case law interprets in loco parentis to refer to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption.



This clarification makes it clear that an employee who assumes parental responsibilities for a child who is not that employee's biological child or legal dependent will be entitled to FMLA leave including domestic partners, grandparents, or other family members.



Interpretation does not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child. Nor does the statute restrict the number of parents a child may have under the FMLA.



- An employee who provides day-to-day care of her unmarried child but does not financially support the child, or an employee who will share equally in raising an adopted child with a same sex partner but does not have a legal relationship with the child, can both be eligible for FMLA leave.
- If a child's biological parents divorce and remarry, all four potential parents (biological and step-parents) are eligible for FMLA leave related to the child.



The Military Provisions... What is Covered Servicemember Leave, aka Military Caregiver Leave?

Permits spouse, son, daughter, or next of kin of a covered servicemember to take up to 26 workweeks of unpaid leave in a single 12-month to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, with a serious injury or illness.



The Military Provisions... What is Covered Servicemember Leave, aka Military Caregiver Leave? (Con't)

Now, included in the definition of a covered servicemember is a veteran "who is undergoing medical treatment, recuperation, or therapy, for a serious illness or injury" if the veteran was a member of the armed forces at any period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.



How is "Next of Kin" Defined?

- "Next of kin" is the nearest blood relative, other than the covered service-member's spouse, parent, son or daughter in the following order:
 - Blood relatives who have been granted legal custody of the service-member by court decree or statutory provisions
 - Brothers and sisters
 - Grandparents
 - Aunts and uncles
 - First cousins



How is "Serious Injury or Illness" Defined For Purposes of Covered Servicemember Leave?

"Serious injury or illness" means an injury or illness incurred by a covered servicemember on active duty or in line of duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.



Can an Employer Request Certification For Covered Servicemember Leave?

- Yes.
 - Optional Certification Form WH-385
- However, may not utilize second opinion or recertification process.



Is Covered Servicemember Leave Tracked the Same as Other Leave Under the FMLA?

- No.
- The 12-month period to be used for tracking this leave begins when the employee starts using his or her leave.
 - An employee is not entitled to more than 26 weeks of FMLA leave during the 12-month period that commences with the need for leave.



Is Covered Servicemember Leave Tracked the Same as Other Leave Under the FMLA? (Con't)

- 26-week entitlement may be utilized for each servicemember and for each illness or injury incurred.
- Leave may be taken on an intermittent or reducedschedule basis.



What is Qualifying Exigency Leave?

- Additional qualifying reason available for employee to take standard 12-week leave.
- Permits an employee to take FMLA leave for any "qualifying exigency . . . arising out of fact that spouse, son, daughter, or parent of the employee is on "covered active duty" (or has been notified of impending call or order to active duty) in the Armed Forces."
- Leave may be taken on intermittent or reduced-schedule basis.



What is Qualifying Exigency Leave? (Con't)

- Covered Active Duty for regular Armed Forces members means duty during deployment of the member with the Armed Forces to a foreign country.
- But, Covered Active Duty for *members of the reserves* components of the Armed Forces means duty during deployment of the member to a foreign country under a call or order to active duty in a contingency operation.



What is a Qualifying Exigency?

- Short-term notice deployment
 - Entitled to up to seven days of leave for this purpose
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements



What is a Qualifying Exigency? (Con't)

- Counseling
- Rest and recuperation
- Post-deployment activities
- Additional activities provided that employer and employee agree



Can an Employer Request Certification for Qualifying Exigency Leave?

- Yes.
 - Optional Certification Form WH-384
- May not utilize second opinion or recertification process.



Employee Notice Requirements

- 30 days notice if foreseeable; if unforeseeable as much notice as reasonably practicable
- Absent extenuating circumstances, employees must follow employer's usual and customary call-in procedures for calling in absences and requesting leave.
 - Where employee does not comply with employer's usual procedure, and no unusual circumstances justify the failure to do so, the employer may delay or deny FMLA leave.



Employee Notice Requirements (Con't)

- Calling in sick without more is insufficient to trigger notice.
- If employee was previously provided FMLA-protected leave, employee must reference qualifying reason for leave when notifying employer.



Employer Notice Requirements (Con't)

- Must an Employer Provide an Employee with Specific Eligibility Notice?
- Yes.
 - Form WH-381 [Part A]
 - This notice informs the employee as to whether the employee meets the statutory eligibility criteria.



Employer Notice Requirements (Con't)

- Eligibility notice must be provided within five business days after the employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason.
- If the employee is not eligible for leave, the notice must state at least one reason why the employee is not eligible.
- During the leave year, must only provide another eligibility notice if the employee's status has changed.



more Insight.

Rights and Responsibilities Notice

- What is the Rights and Responsibilities Notice?
- Form WH-381 [Part B]
 - Details the specific expectations and obligations of the employee and explains any consequences of the employee's failure to meet these obligations.



Rights and Responsibilities Notice (Con't)

- Must be provided each time the eligibility notice is provided to an employee.
 - Typically provided to the employee within five business days of the start of the employee's leave.



What is the Designation Notice?

- Form WH-382
 - Informs the employee whether the particular leave requested will be designated as FMLA leave.
 - Designation notice must be provided within five business days after the "the employer has sufficient information to determine whether the leave is being taken for an FMLA-qualifying reason."



What is the Designation Notice? (Con't)

- Regulations also require employer to inform employee
 if possible of the number of hours, days or weeks,
 that will be designated as FMLA leave.
 - When amount of leave needed is unknown, information must be provided upon employee's request, but no more often than every 30 days.
- The designation notice must also include a statement of the employee's essential job functions if the employer will require that those functions be addressed in a fitness-for-duty certification



Can an Employer Retroactively Designate FMLA Leave?

- Yes.
 - The final rule removed categorical penalty provisions and clarified that only where an employee suffers individualized harm because the employer failed to follow the notification rules may the employer be held liable.
 - Incorporating this standard, the final rule provided that employers may now retroactively designate leave, provided there is no individualized harm to the employee caused by doing so.



Must the Employer Notify the Employee if the Leave is Not Designated as FMLA?

- Yes.
 - The designation notice must notify the employee if the leave is not designated as FMLA leave due to insufficient information or a nonqualifying reason.
 - The designation notice must also include a statement of the employee's essential job functions if the employer will require that those functions be addressed in a fitness-for-duty certification.



Medical Certification Process

- Optional Certification Forms WH-380E and WH-380F
 - One form for employee's own serious health condition; second form for family member's serious health condition.



May an Employer Use Information Required for Disability Plans or Workers' Comp Benefits to Determine Whether Leave Qualifies Under FMLA?

- Yes.
 - If an employer has a disability benefit plan that requires an employee to provide more or different medical information than permitted under the FMLA's medical certification requirements, an employer can require an employee to provide such information as long as the employer makes clear that the failure to provide this additional information only jeopardizes receipt of disability benefits not entitlement to unpaid FMLA leave.
 - Same rule applies in case of workers' comp benefits.



When an Employer Determines That a Medical Certification is Incomplete or Insufficient, May the Employer Deny Leave?

- Yes, but . . .
 - When an employer determines a certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and allow the employee seven calendar days to cure the deficiency.



When an Employer Determines That a Medical Certification is Incomplete or Insufficient, May the Employer Deny Leave? (Con't)

If employee refuses to cooperate, the employer may deny leave.



May an Employer Contact the Health Care Provider Directly?

- Yes.
 - When an employer receives a completed medical certification form, it may directly contact the health care provider for purposes of clarification and authentication of the certification as long as the requirements of HIPAA medical privacy regulations are met.



May an Employer Contact the Health Care Provider Directly? (Con't)

If employee chooses not to provide HIPAA release, and has not provided information sufficiently clear for employer to determine that leave qualifies for FMLA protection, the request may be denied.



May an Employer Contact the Health Care Provider Directly? (Con't)

- Where certification is incomplete or insufficient, cannot contact the healthcare provider directly for seven calendar days unless the employee foregoes the opportunity to cure any deficiencies.
- The contact with the health care provider cannot be made by the employee's direct supervisor.



Authentication v. Clarification, What Is the Difference?

- Authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the provider who signed the document; no additional medical information may be requested.
 - Employee's permission is not required.



Authentication v. Clarification, What Is the Difference? (Con't)

- Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.
 - Any contact for these purposes must comply with the requirements of the HIPAA Privacy Rule.



When May an Employer Request Recertification?

- Every 30 days unless the medical certification indicates that the minimum duration is more than 30 days.
 - If a longer period is provided, certification cannot occur before the time period expires, unless circumstances change, or an employer has reason to doubt the validity of the initial certification.



When May an Employer Request Recertification? (Con't)

- In all cases employer may request recertification every six months, even where certification states a longer period.
- May request a new "initial" certification, and thus, obtain a second and third opinion if there is a reason to doubt the validity of the certification, each leave year for conditions that last longer than one year.



Does Time Spent Working Light Duty Count Against an Employee's FMLA Entitlement?

- No.
 - Time spent performing "light duty" work does not count against an employee's FMLA leave entitlement.
 - Reinstatement rights are not affected by a "light duty" assignment either.



Can an Employer Require the Substitution of All Forms of Accrued Paid Leave for Unpaid FMLA Leave?

- Yes.
 - The FMLA allows the employer to require that all forms of accrued paid leave be taken concurrently with any FMLA leave, including comp time and PTO.



Can an Employer Require the Substitution of All Forms of Accrued Paid Leave for Unpaid FMLA Leave? (Con't)

Terms and conditions of employer's paid leave policies apply and must be followed by employee in order to substitute any form of accrued paid leave.



Can an Employer Require the Substitution of All Forms of Accrued Paid Leave for Unpaid FMLA Leave? (Con't)

Employer must notify employee of any additional requirements for use of paid leave with the rights and responsibilities notice (*i.e.*, in text of rights and responsibilities notice, attach copy of paid leave policy to the notice, or provide a cross-reference to a leave policy in an employee handbook).



Can Employer Disqualify an Employee From Bonuses Where Employee Fails to Reach That Goal Due to FMLA Leave?

- Yes.
 - Employer is permitted to disqualify employee from receiving bonuses predicated on the achievement of a specific goal (i.e. perfect attendance, hours worked) where the employee fails to reach that goal due to FMLA leave, as long as the employer treats employees on equivalent leave status for a reason that does not qualify as FMLA leave in an identical fashion.



Reinstatement

- Employees must be reinstated to an equivalent position
- Qualification: an employee is not entitled to any greater rights than if he/she had remained continuously employed



Can an Employer Require the Health Care Provider To Address the Essential Job Functions of an Employee in a Fitness-for-Duty Certification?

- Yes.
 - So long as the employer provides a list of essential functions no later with the designation notice and advises the employee in the designation notice that the certification must address the employee's ability to perform the essential functions of the job.



What is Intermittent or Reduced Schedule Leave?

- Intermittent Leave: leave taken in separate blocks of time due to a single qualifying reason
- Reduced Schedule Leave: A change in the employee's schedule --- reducing hours per workweek or per workday



When Can It Be Used

- Medical Necessity Employee's own; family member's; or covered servicemember's
- Qualifying Exigency
- Birth or Placement of a Child Only if employer agrees



Must an Employee Make a Reasonable Effort to Schedule Intermittent or Reduced-Schedule Leave?

- Yes.
 - Employees must make a "reasonable effort" (as opposed to a mere attempt) to schedule leave so as not to disrupt unduly the employer's operations.
 - If healthcare provider determines a medical necessity for particular treatment time, the medical determination prevails.



Can Employees On Intermittent Or Reduced Schedule Leave Be Transferred Or Reassigned?

- Yes. If the leave is foreseeable, an employer may require the employee to work in an equivalent position that better accommodates the leave.
- Equivalent = pay and benefits; not equivalent duties



Increments of Leave

- Employer must account for the leave using increments no greater than the shortest amount of leave used for other forms of leave (but in no case is more than one hour required)
- Generally, the amount of leave counted against an employee cannot exceed the amount of time actually taken



Calculating Leave Used

- Actual workweek is the basis of leave entitlement
- For example, if a 40 hour/week employee takes off 8 hours per week, then 1/5 of a workweek is used
- If a full-time employee who normally works 8 hours per day only works 4 hours per day, then ½ a workweek is used



What Time Period Must an Employer Utilize When Determining Leave Entitlement for an Employee Who Works Variable Hours?

Employers are required to use the 12-month average of hours worked prior to the commencement of the employee's FMLA leave in calculating the leave entitlement.



Can an Employer Count the Entire Period an Employee is Absent From Work as FMLA Leave Where the Employee is Unable to Begin or End Work Midway Through a Shift?

- Yes.
 - Where it is physically impossible for an employee using intermittent leave or working a reduced-schedule to commence or end work midway through a shift, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.



Can an Employer Count the Entire Period an Employee is Absent From Work as FMLA Leave Where the Employee is Unable to Begin or End Work Midway Through a Shift? (Con't)

For example, if an airline pilot only needs two hours of FMLA leave for a doctor's appointment, but cannot make it to the flight before it takes off, the employer can count entire shift against his FMLA entitlement.



Do Overtime Hours Not Worked by an Employee Count Against 12-Week Entitlement?

- It depends.
 - If the employee would have been required to work the overtime hours but cannot do so because of a FMLA-qualifying condition, the employee may be charged FMLA leave for hours not worked.



Do Holidays Count Against 12-Week Entitlement?

- It depends.
 - If leave is taken in a period greater than or equal to one workweek, any included holidays count against the 12-week entitlement.
 - If the leave is taken in increments less than one workweek, the leave counts against FMLA entitlement only if employee would have been required to work on the holiday.



May an Employee Settle Past Claims Without Permission from the DOL?

- Yes.
 - Regulations explicitly state that employees and employers should be permitted to voluntarily agree to settlement of past claims without having to first obtain permission or approval of DOL or a court.



