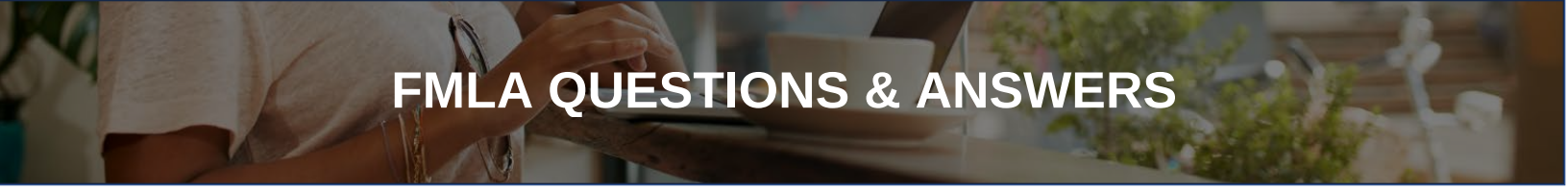


FMLA QUESTIONS & ANSWERS

Thank you for attending our May webinar: *Top 6 Avoidable Leave of Absence Mistakes*. We hope you find this checklist helpful for your business.

Want to learn more about PrimePay's HR Advisory Services product suite? Visit PrimePay.com/HRAdvisory today.

Introduction

HR Advisory's HR Live hotline receives thousands of questions from employers across the country requesting assistance on leave of absence issues. This eBook contains a sampling of our answers to some of the most frequently-asked questions.

Employer coverage under the FMLA.

Q: Who is a covered employer under the FMLA?

A: The FMLA applies to:

1. Private employers with 50 or more employees.
2. All public agencies and private and public elementary and secondary schools, regardless of the number of employees.

Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year.

Q: If my company has branches in five locations and none of them have over 50 employees, and only two of them are within 75 miles of each other, is the entire company eligible for FMLA leave or just the two branches?

A: While the company is a covered employer based upon the employee count nationally, the employees may not be eligible to take FMLA leave. Employees must work at a location where at least 50 employees are employed at the location or within 75 miles of the location.

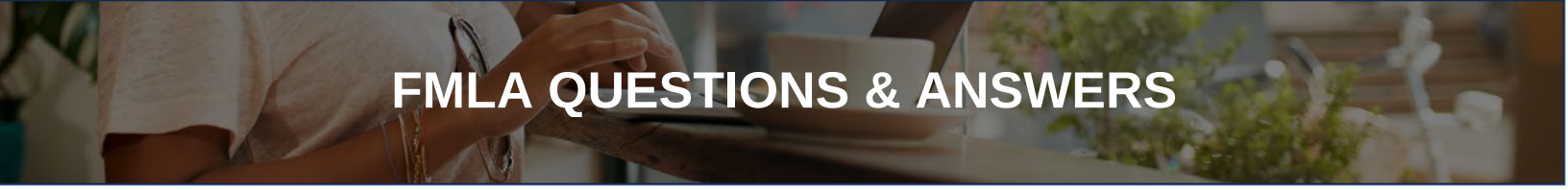
Therefore, only those working at a location within 75 miles where 50 or more employees exist would be considered eligible, and provided other criteria are met. However, many employers with similar conditions consider granting eligibility of the leave to all employees to provide a fair and consistent work environment with a "mirror" FMLA policy.

Employee eligibility.

Q: Who is an eligible employee under the FMLA?

A: Under the FMLA an eligible employee is an employee of a covered employer who meets all of the following criteria*:

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



FMLA QUESTIONS & ANSWERS

**There are different requirements for flight crew members not addressed here.*

Calculation methods.

Q: If an employee goes out on FMLA leave for 12 weeks, when is he or she eligible for another 12 weeks of FMLA leave?

A: The FMLA guarantees eligible employees the ability to take unpaid family or medical leave for up to 12 weeks every 12 months. The key is in how the employer designates the 12-month period. The FMLA allows employers to choose any one of the following methods for determining the 12-month period in which eligible employees may take up to 12 weeks of qualifying FMLA leave:

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

The FMLA allows employers to use any one of four different methods to determine the 12-month period for counting and tracking leave. Employers may choose any one of the four methods, but once the method is selected, the employer must use it consistently and uniformly for all employees.

Qualifying reasons for employee leave.

Q: What are the reasons an employee can take FMLA leave?

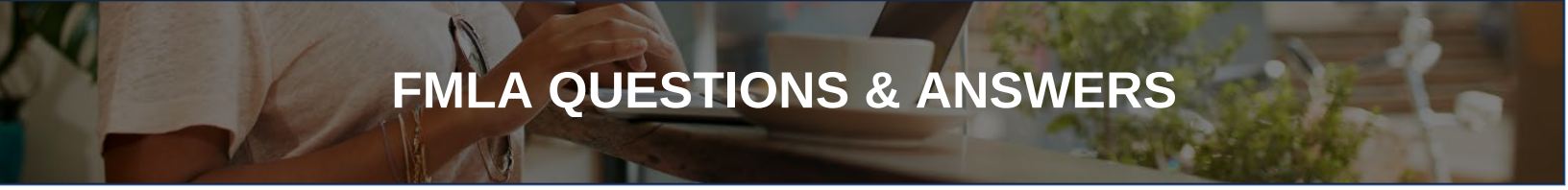
A: Employers covered by the FMLA are required to grant leave to eligible employees:

- For the birth of a child of the employee and in order to care for the newborn child.
- For the placement with the employee of a child for adoption or foster care.
- To care for the employee's child, spouse, or parent with a serious health condition.
- Due to a serious health condition of the employee.
- Because of any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a covered military service member on active duty, or has been notified of an impending call or order to covered active duty in support of a military contingency operation.
- To care for a covered service member or veteran with a serious injury or illness if the employee is the spouse, child, parent, or next of kin of the service member.

Employer and employee notice obligations.

Q: Can FMLA be designated retroactively?

A: Under the regulations, the responsibility is the employer's to recognize a serious health condition under the FMLA and notify the employee of his or her eligibility rights. (Most employees don't request FMLA specifically, but request leave). Then, the responsibility is the employee's to provide notice per the employer's usual and customary procedures. Typically,



FMLA QUESTIONS & ANSWERS

FMLA cannot be retroactively designated without the agreement of the employee, particularly when the employer fails to provide the appropriate notice. A best practice is to immediately send eligibility and medical certification (if applicable) forms to employees that may have a FMLA qualifying reason for leave to start the FMLA 12-week clock.

Q: How should we handle a situation where an employee on an approved family and medical leave has not kept in contact?
A: If the employee is on an approved leave under the FMLA and has provided the appropriate medical certification for the need for the leave, you should have provided the employee with the appropriate notification of the terms and conditions of the leave. Typically, as part of the designation notice when an employer approves leave, the employer requests that the employee remain in touch at reasonable intervals (such as monthly) and notify the employer in advance of when the employee will be returning to work. If your designation notice did not include that, then a best practice is to follow the steps outlined below.

Check the medical certification of the need for the leave. If the certification states that the employee will need the full 12 weeks of time off, then you can either:

1. Wait until the 12 weeks is about to expire and contact the employee to determine when he or she will be coming back to work and what documentation may be required, such as a return to work release from the doctor.
2. Place a courtesy call to the employee to see how he or she is doing, answer any questions he or she may have, and let him or her know that you are expecting him or her back to work at the end of the leave. If you hear nothing from the employee and the FMLA time expires, then contact your attorney for advice prior to assuming that the employee has voluntarily resigned. Do not process the termination because he or she did not return to work or notify you of an intent to return to work without making every effort to contact the employee and without consulting with your labor attorney.

If the certification states that the employee should be able to return to work prior to the 12-week expiration period, then contact the employee in advance of that return to work date to determine if you can expect him or her back to work. Let the employee know if additional paperwork is required, such as the doctor's release. If the employee is still unable to return to work, then notify the employee that you need updated certification for the leave extension. If you do not hear from the employee, then follow the same process stated above for handling terminations of employment for job abandonment after checking with counsel to minimize risk.

Serious health conditions under the FMLA.

Q: Is the flu or bad cold considered a serious health condition under the FMLA?
A: Under the FMLA a serious health condition is an illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care; or
- Continuing treatment by a health care provider.

According to the Department of Labor (DOL) serious health condition means an illness, injury, impairment, or physical or mental condition that involves any of the following:

- Any period of incapacity or treatment connected with inpatient care (ex., an overnight stay) in a hospital, hospice, or residential medical care facility.

- A period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider.
- Any period of incapacity due to pregnancy, subsequent childbirth disability or prenatal care.
- Any period of incapacity (or treatment as a result) due to a chronic serious health condition (ex. asthma, diabetes, epilepsy, etc.).
- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (ex. Alzheimer's, stroke, terminal diseases, etc.).
- Any absences to receive multiple treatments (including any period of recovery from) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (ex. chemotherapy, physical therapy, dialysis, etc.).

Under specific circumstances, the common flu or a really bad cold may be considered a serious health condition under the FMLA. The employer may require the employee to submit a certification from a health care provider to support the employee's need for leave protection under the FMLA when dealing with such cases.

Q: An employee has requested intermittent FMLA. She has frequently been taking unscheduled time off due to illness and doctor's appointments. The medical certification from her physician states that she will have flare ups and additional appointments based on medical findings. She has yet to be diagnosed with a specific medical condition. Because there is no diagnosis, do we approve the intermittent FMLA? Can FMLA designation be postponed until a diagnosis is received?
A: If the employee's physician has completed the FMLA medical certification form affirming that she is under the physician's care and identifying that the employee has a serious health condition requiring time off as needed for the condition, the intermittent FMLA should likely be designated because the requirements for FMLA have been met.

If the certification is not clear as to how much time off is needed, the designation may be delayed, but then you must explain to the employee what clarification is needed and allow the opportunity to provide the updated certification. This may not include diagnosis unless there is a bona fide business reason (ex. safety). Otherwise, once FMLA is granted, if the employee is out frequently, beyond what the certification provides for, an updated certification can be requested.

Structuring leave.

Q: Is there a minimum number of days employees need to be out before FMLA leave is triggered? For example, an employee found out yesterday that he needs to have surgery today and will be out five to eight days for recovery.
A: Employers may exercise their discretion in determining at what point it is appropriate to notify an employee of FMLA rights when the employee has not actively requested FMLA.

A single absence of a few days may not meet the requirements of FMLA if it is not related to a serious illness, but absent confirmation of that, it doesn't hurt to provide employees with notice of their rights. In this specific circumstance, absence for a surgery may fall under the FMLA requirements. It would be considered a best practice to provide notice of rights to the employee

in the event the employee needs additional time off later for the same condition. Additionally, if there is a pattern of absences for illness or other covered reasons, this may raise a flag that FMLA rights may be triggered. Keep in mind that FMLA can be used intermittently in amounts as small as the employer's other leave policies permit.

Paid time off policies and FMLA leave.

Q: Can we require that employees exhaust their vacation and sick time at the beginning of an approved medical leave of absence?

A: FMLA leave is unpaid and in most circumstances employers may require employees to concurrently take paid leave, such as accrued vacation or sick leave, or employees may elect to do so. Some employers have short-term disability plans or paid parental leave that can be used to augment this unpaid time off. In cases where the employee is receiving payments while on leave, the requirement to substitute paid leave does not apply. Where state law allows, however, employers and employees may agree to supplement paid leave with disability plan or other wage replacement benefits.

Reinstatement.

Q: For reinstatement after FMLA leave, does it matter if an employee is reinstated to the same position at the same pay rate but the shift is different?

A: Under the FMLA's reinstatement provisions, an employee is generally entitled to return to the same shift or an equivalent work schedule.

An employer must restore an employee returning from FMLA leave to the same position the employee held when leave commenced or to an equivalent position with equal benefits, pay, and other terms and conditions of employment. An employee is entitled to reinstatement even if the employee has been replaced or the position has been restructured to accommodate the employee's absence.

An equivalent position must have substantially similar duties, conditions, responsibilities, privileges, and status as the employee's original position. In addition, the employee:

1. Must be reinstated to the same or a geographically proximate worksite (for example, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if the employee had continued to be employed.
2. Is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.
3. Must have the same or an equivalent opportunity for bonuses, profit sharing, and other similar discretionary and nondiscretionary payments.

The FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal

needs upon return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

It is not considered a best practice to alter an employee's job while he or she is on FMLA leave, unless there is a bona fide business reason (such as mass layoff). Note that even then, it is best to review changes with counsel to minimize risk.

Q: Can we replace an employee on an approved leave of absence with a temporary employee who is now doing the job? We are finding that the temporary employee is doing a better job in the position.
A: Given the fact that you have placed the employee on an approved FMLA leave and that leave period has not expired, then under the FMLA you must provide the employee with the job and benefits protection for the duration of the approved leave. The requirement under the law is to return the employee to his or her original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

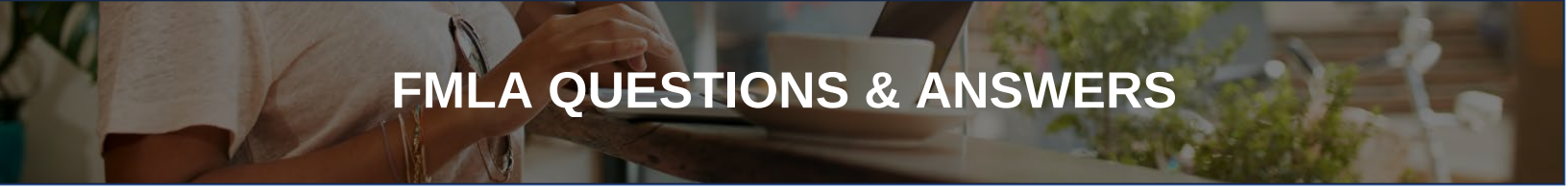
When your employee returns from leave, consider sharing with him or her the work that the temporary employee did during his or her absence and what you liked about the work so that the employee has an opportunity to learn from and provide that same level of performance.

Q: When an employee is out for medical purposes or restrictions, can we refuse to allow the employee to return to work until we receive a doctor's note saying she is able to return?
A: Yes. As a condition of restoring an employee whose leave was caused by the employee's own serious health condition resulting in the employee being unable to physically perform his or her job, you may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

Intermittent FMLA.

Q: Does intermittent FMLA need to be designated and documented like a continuous FMLA leave? How do we keep track of the time off from work?
A: Under the FMLA employers are required to designate time off as covered once the employee has provided appropriate certification that there is a Serious Health Condition or other eligible reason for leave and to record the time taken as FMLA. This is irrespective of whether the leave is continuous or intermittent.

In addition to the recordkeeping requirements to record FMLA leave, intermittent leave should be tracked in order to stay up to date on an employee's FMLA entitlement, so additional leave may be properly granted and designation of additional leaves (or denial) may occur based on the employee's prior usage. A best practice is to have the employee notify his or her supervisor or payroll when time taken falls under FMLA, so it may be tracked on a spreadsheet or in an electronic timekeeping system.



FMLA QUESTIONS & ANSWERS

Workers' compensation.

Q: Does workers' compensation leave count against an employee's FMLA leave entitlement? How do temporary disability plans fit within the FMLA?
A: When employees need time off because of a medical or disability-related issue, including a work-related injury, the FMLA may apply. For example, an injury that requires hospitalization or incapacitates an employee for more than three days and requires continuing treatment by a healthcare provider generally qualifies as a serious health condition under the FMLA.

Although the FMLA allows an employer to apply workers' compensation leave on its own, this is not a best practice. In most states, workers' compensation laws do not require benefits be maintained during a leave of absence and may not have job reinstatement rights. An employee should be afforded all rights to leave, reinstatement, and benefits up front to ensure compliance for the company and to maximize the support for the employee.

FMLA penalties.

Q: What are the penalties for failing to comply with the FMLA regulations?
A: Failure to post a notice for employees outlining the basic provisions of the FMLA (for covered employers) can result in a $110 civil penalty for each separate offense. Employers are also subject to the following penalties for the failure to designate the leave in a timely manner, Including:

- Compensation and benefits lost by reason of the violation.
- Actual monetary losses sustained as a direct result of the violation.
- Other penalties, such as reinstating or promoting the employee.

Employers should never assume that because the employee did not "request" FMLA that notice need not be provided. Ultimately, the responsibility is on the employer to recognize notice of eligibility (or that the employee is NOT eligible) must be provided.