



Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act (“FMLA”) became effective on August 5, 1993, with amendments effective January 16, 2009. The FMLA is a federal law that provides for up to twelve weeks of unpaid leave per year for an employee who is unable to work because of a “serious health condition.” FMLA leave may be used also for the birth or adoption of a child, or to care for a spouse or an immediate family member. A twelve-week cap is the total cumulative leave available to an employee under the FMLA each year, even if the leave is taken for more than one reason.

Employers covered by the FMLA must maintain any pre-existing group health insurance coverage for the employee during the leave and must reinstate the employee to the same or an equivalent job when the leave ends. (Equivalent jobs are described later in this *Legal Advisory*.)

Like the ADA, the FMLA may provide additional protection to an employee with a work-related injury. As a result, employers should be familiar with their rights and responsibilities under the FMLA when making employment decisions that involve workers’ compensation claimants.

Covered employers and eligible employees

The Act covers all employers with 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year. An employee will be eligible for FMLA if he or she has been employed by a “covered employer” for at least twelve months (which need not be consecutive), and has been employed by the employer for at least 1,250 hours of service during the twelve months preceding the commencement of the leave. Finally, in order to be eligible,

an employee must also be employed at a worksite where 50 or more employees are employed by the employer within a 75-mile radius of that worksite.

Conditions covered by the FMLA

The FMLA defines a “serious health condition” as an illness, injury, impairment, or physical or mental condition that involves inpatient care or “continuing treatment” by a health care provider. Continuing treatment by a health care provider includes one or more of the following:

1. A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:
 - treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or
 - one treatment by a health care provider (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy);
2. Any period of incapacity due to pregnancy or prenatal care;
3. Any period of incapacity or treatment for a chronic, serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity;
4. Any period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer’s disease or a severe stroke);
5. Any period of absence to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three consecutive days in the absence of the treatment (e.g., cancer, arthritis, kidney disease).

Some examples of “serious health conditions” include: heart conditions requiring bypass operations, back conditions requiring extensive therapy or surgical procedures,

¹The amended Act provides an exception to this 12-week maximum leave by extending 26 weeks of FMLA leave for employees who are the spouse, son, daughter, parent or next of kin of a covered service member, to care for that service member who is injured in the line of duty. The 2008 amendments to the FMLA also extend 12 weeks of unpaid leave to employees “because of any qualifying exigency” related to their spouse, son, daughter or parent’s active duty service.

severe morning sickness due to pregnancy, treatment for allergies, treatment for stress, prenatal care, and treatment for substance abuse. Specifically excluded are: routine physical examinations, eye examinations, dental exams, cosmetic treatments, and colds, flu, or earaches.

While both the FMLA and the ADA may provide protection to a disabled employee, each case must be analyzed carefully. It is possible for a health condition to be a “serious health condition” under the FMLA, but not a “disability” under the ADA, and vice versa. For example, an employee could take time off work under the FMLA because of continuing treatment of a broken leg, yet the temporary nature of the injury, combined with the prospect of full recovery, could mean that the injury does not impair a major life function and therefore is not an ADA-covered disability. On the other hand, some employees may suffer from a “disability” as defined by the ADA, but because that condition does not require continuing treatment or inpatient care, the employee has no entitlement to leave under the FMLA. An example would be a visible cosmetic disfigurement.

Absences or leaves covered by the FMLA

An employee who, because of a serious health condition is “unable to perform the functions of his or her position,” may take leave for self-care. The employee is considered “unable to perform the functions of his or her position,” if he or she is unable to work at all or is unable to perform any of the “essential functions” (as defined by the ADA) of the employee’s position. Even if an employee is generally still able to perform his or her job, but must take intermittent time off due to a “serious health condition,” the individual would be eligible for FMLA leave. For example, if an employee needed time off for therapy sessions, he would be considered “unable to perform the functions of the job” during those periods and could take the time necessary to receive therapy or treatment. In those cases, the employee does not reach the twelve-week limit until the intermittent leave time adds up to twelve weeks.

Intermittent leave may be recorded in the smallest time increments that an employer allows for other kinds of leave, rather than using the smallest increment which the timekeeping system can record. However, if the employer accounts for other kinds of leave in minimum increments of greater than an hour, the employer is required to account for FMLA leave in increments of no greater than one hour.

The FMLA requires that employees taking intermit-

tent leave make a “reasonable effort” to schedule their leave in a way that does not unduly disrupt the employer’s business. In an intermittent leave situation, the FMLA permits an employer to temporarily transfer the employee to another position, as long as that position has equivalent pay and benefits.

Paid or unpaid leave

An eligible employee may elect, or the employer may require the employee, to substitute his or her paid accrued vacation, personal, or medical/sick leave for unpaid FMLA leave taken for the serious health condition of an immediate family member or for the employee’s own serious health condition. In all circumstances, it is the employer’s responsibility to designate leave, paid or unpaid, as qualifying for FMLA and to give notice of the designation to the employee. For example, an employer may designate a period of workers’ compensation disability as FMLA leave, even if the employee is receiving temporary total disability benefits or temporary partial disability benefits. It is important to remember that the employee must be notified that the period of compensated disability is being designated as FMLA leave.

Any rights that are more generous under State law would still apply (e.g. in Wisconsin, the employee has the choice of whether or not to substitute paid leave for the unpaid leave time during the time that Wisconsin Family and Medical Leave Act also applies). An employer is not required to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

Notice requirements

The FMLA has very detailed regulations outlining the Act’s notice requirements. Employers must provide a general notice to employees through a poster or handbook, for example, or upon hiring if other written materials are not available. Electronic distribution is acceptable.

The notice requirements are very detailed, and employer must carefully read and comply with the regulations to satisfy those requirements. Once leave is requested or the employer becomes aware of a potential FMLA-qualifying condition, the employer must provide, within five business days of obtaining knowledge of the potential FMLA leave:

- a. an eligibility notice, and a rights and responsibilities notice;
- b. a designation notice, along with list of essential

functions that the employee’s doctor will be required to address with fitness-for-duty certification.

If no harm or prejudice has resulted to the employee from failure to timely designate leave as FMLA leave, an employer may retroactively designate leave as counting against an employee’s FMLA leave entitlement. The employee also has notice requirements to meet. The employee must provide 30 days advance notice if the leave is foreseeable. If the leave is not foreseeable, notice must be given as soon as practicable. Verbal notice is sufficient, and the employee need not specifically mention the FMLA. However, employees must follow their employers’ call-in or reporting procedures to report such absences, unless unusual circumstances are present.

Medical certification and fitness for duty exams

Employers may request medical certification to substantiate a “serious health condition” of an employee requesting leave, and to verify that the employee is able to resume work after the leave.

In order to qualify the employee for leave under the FMLA, the health care provider may be required to certify that the employee is unable to perform the essential functions of the employment position and the medical necessity for such leave.

If the certification is incomplete, an employer may explain in writing what is lacking and give the employee seven days to cure the deficiency. An employer may directly contact the employee’s health care provider, for purposes of **authentication** or **clarification**, after the employer has provided an opportunity for the employee to cure any deficiencies in the certification.

- **“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 health care provider who signed the document.
- **“Clarification”** means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.

The employer’s representative who contacts the health care provider must be a health care provider himself or herself, human resource professional, leave administrator or management official. The employer representa-

tive contacting the health care provider regarding the employee’s medical condition or leave may not be the employee’s direct supervisor.

The requirements of the Health Insurance Portability and Accountability Act (“HIPAA”) apply to employer communications with employee health care providers for FMLA purposes, and an employee may prohibit his or her health care provider from communicating with the employer. If the clarification or authentication is not provided by the employee, and the employee declines to authorize direct communication by the employer with the health care provider for such purposes, the employer may deny the requested FMLA leave.

Employers may **not** ask for any information beyond that allowed on the medical certification form. Additional exchange of information is allowed under the amended Form WH-380, Certification of Health Care Provider for Employee’s Serious Health Condition. The certification form allows for detailed description of symptoms and diagnosis of the health condition although providing that information in any specific format or detail is not required. The certification form can be found on the U.S. Department of Labor’s website at www.dol.gov.

If the employer disputes the certification provided by the employee, the employer may require a second opinion. If the second opinion differs from the first, the employer may require a third opinion from a jointly designated provider. The opinion of the third provider is binding. The employer must pay for the second and third opinions.

Employers may request a new certification every leave year if the medical condition extends beyond one year. An employer generally may not request recertification more often than every 30 days, and in all cases the employer has the right to request recertification every six months if the condition is ongoing.

If an employee is on a workers’ compensation absence, and the employer is allowed to request additional information from the employee’s workers’ compensation health care provider for purposes of the workers’ compensation benefits, the employer may consider this additional information to determine the employee’s entitlement to FMLA-protected leave. Any information received pursuant to other benefit plans or employment-related disability policies may be considered in determining the employee’s entitlement to FMLA-protected leave. An employee’s entitlement to FMLA leave is not affected by the employee’s failure to provide information required for receipt of non-FMLA benefits.

At the end of a FMLA leave, an employer may require an employee to present certification from a health care provider stating that the employee is able to resume work. The employer may require that the fitness-for-duty certification addresses the ability to perform essential functions of the job. The employer must notify an employee at the time the designation notice is provided that a fitness-for-duty certification will be required to return to work, and also provide the employee at that time with a copy of the essential functions of the employee's job that the fitness-for-duty exam will address.

The request for the fitness-for-duty certification must be pursuant to a uniform policy already in place.

An employer may require a fitness-for-duty certification if it has reasonable job-related safety concerns related to an employee returning to work from intermittent leave.

Reinstatement after the FMLA leave

On return from FMLA leave, an employee must be reinstated to the same position the employee held when leave commenced, or to an equivalent position. An "equivalent position" is a position with equivalent benefits, pay, and other terms and conditions of employment. There are some exceptions to the right to reinstatement, including an economic lay-off during the FMLA leave, elimination of a shift, or completion of a project for which the employee was specifically hired. In addition, there is an exception for "key employees" and for employees who have given an unequivocal statement that they intend not to return to work. A "key employee" is a salaried FMLA-eligible employee who is among the ten percent highest paid of the employer's employees within 75 miles of that worksite.

After the twelve weeks of unpaid leave expire, the employer's responsibilities under the FMLA are satisfied if the employee is not able to return to his or her pre-injury position. Employers should be aware, however, that the ADA may require them to extend the leave, if additional time would constitute a "reasonable accommodation." Similarly, reasonable accommodation under the

ADA might require the employer to return the employee to a modified position, or a vacant position for which the employee is qualified.

While leave cannot be counted against an employee under a "no fault attendance policy," the employee may be denied a bonus or award based on perfect attendance or hours worked, if the defined goals were not met due to FMLA leave. Employees taking FMLA leave must be treated the same as employees taking other kinds of leave.

Light Duty

In the workers' compensation context, the employer must also consider the economic benefits of returning an employee to work in a light-duty position. If the employee is offered a suitable light-duty position within the twelve weeks of FMLA leave and refuses that position, the employer must still provide the remainder of the twelve weeks of FMLA leave, and reinstate the employee as described above. Any time the employee spends performing light duty work is not counted against their protected FMLA leave entitlement. However, the employer and insurer do not have to continue workers' compensation wage-loss benefits if the employee refuses suitable light-duty work during the twelve weeks of FMLA leave.

Conclusion

The FMLA is a significant piece of federal legislation that must be considered by employers dealing with employee absences or leaves for medical reasons, including any period of disability due to a work-related injury. The FMLA requirements must be considered in addition to the requirements of the ADA and state leave laws.

This *Legal Advisory* is not intended to provide a complete review of the FMLA's requirements. Its intent is to notify employers that the FMLA is in effect and does impact how employers handle periods of disability resulting from work injuries. Employers are encouraged to consult an attorney specializing in employment law to help them set up leave policies that comply with the FMLA.



The Work Comp Experts

SFM Companies
3500 American Blvd. West, Suite 700
Bloomington, Minnesota 55431-4434

© 2009 SFM
All rights reserved

www.sfmic.com

lit-la-0209