

**GUIDE FOR IMPLEMENTING
THE FEDERAL FAMILY AND MEDICAL LEAVE ACT
IN STATE GOVERNMENT**

**Prepared by
Office of the State Employer
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The material contained in this guide is a revision and update of the 1995 material that was distributed by the Office of State Employer. Departments may find the material useful for implementing the provisions of the federal Family and Medical Leave Act. This material is intended to be used as a guide for implementing the Act and does not constitute legal advice with respect to factual circumstances.

Copies of documents supplied by the U.S. Department of Labor and enclosed may be obtained from their website <http://www.dol.gov/esa/whd/fmla/> or by contacting the regional office of the U.S. Department of Labor in Grand Rapids, or by contacting the:

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

A *Question and Answer (Q&A)* format has been used to provide information on those areas of the Act which departments must be familiar with when responding to employee requests for time off for an FMLA qualifying purpose. Where the designation “New” appears means that the information provided is based on any new opinion letters or court decisions. The Q&A is by no means exhaustive and you are advised that the answers may change based on the issuance of U.S. Department of Labor, Wage and Hour Division opinion letters and any future court decisions.

Where appropriate, reference is made to collective bargaining provisions; however, interpretation of specific collective bargaining agreements has not been attempted. Questions regarding collective bargaining agreements and the FMLA should be directed to the Office of State Employer.

The following forms are enclosed which can be duplicated for use by departments or obtained on the Department of Civil Service or the Office of the State Employer websites.

- State of Michigan, Department of Civil Service, Family Medical Leave of Absence Form CS-1787 (For HR Office use only – to initiate continued insurance coverage.)
- State of Michigan, Department of Civil Service, Application for Continuation of Insurances Form # CS-1767
- CS-1789 Certification of Health Care Provider (U.S. DOL form)
- CS-1790 Family Medical Leave Act (FMLA) Employee Request & Employer Response

Information contained in these sample forms is identified in the Act and regulations as necessary when designating time off as FMLA leave.

THE FAMILY AND MEDICAL LEAVE ACT

Compliance Guide

The Family and Medical Leave Act

COMPLIANCE GUIDE

Adapted from the US Department of Labor website:

<http://www.dol.gov/esa/regs/compliance/whd/1421.htm>

[The Family and Medical Leave Act](#) ("**FMLA**") provides certain employees with up to 12 workweeks of unpaid, job-protected leave a year, and requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave. This **Compliance Guide** summarizes the FMLA provisions and regulations¹, and provides answers to the most frequently asked questions. More detail on the FMLA may be found in the regulations ([29 CFR Part 825](#)).

Summary

The FMLA became effective August 5, 1993, for most employers and employees. (For those covered by a collective bargaining agreement (CBA) in effect on that date, the FMLA became effective on the expiration of the CBA or February 5, 1994, whichever was earlier.)

This law covers only certain employers; affects only those employees eligible for the protections of the law; involves entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; sets requirements for notice and certification of the need for FMLA leave; and protects employees who request or take FMLA leave. The law also includes [certain employer recordkeeping requirements](#).

Purposes of the FMLA

The FMLA allows employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. The FMLA seeks to accomplish these purposes in a manner that accommodates the legitimate interests of employers, and minimizes the potential for employment discrimination on the basis of gender, while promoting equal employment opportunity for men and women.

Employer Coverage

FMLA applies to all public agencies, including State, local and Federal employers, and local education agencies (schools).

For FMLA purposes, most Federal and Congressional employees are under the jurisdiction of the U.S. Office of Personnel Management (OPM) or the Congress.

Employee Eligibility

To be eligible for FMLA leave, an employee **must work for a covered employer and:**

- have worked for that employer for at least 12 months (need not be consecutive); and
- have worked at least 1,250 hours (use of leave credits does not count toward the 1,250 hours) during the 12 months prior to the start of the FMLA leave; and,
- work at a location where at least 50 employees are employed at the location or within 75 miles of the location.

Leave Entitlement

A covered employer must grant an eligible employee up to a total of **12 workweeks of unpaid leave** in a 12 month period for one or more of the following reasons:

- for the birth of a son or daughter, and to care for the newborn child;
- for the placement with the employee of a child for adoption or foster care, and to care for the newly placed child;
- to care for an immediate family member (spouse, child, or parent -- but not a parent "in-law") with a serious health condition; and
- when the employee is unable to work because of a serious health condition.

Leave to care for a newborn child or for a newly placed child must conclude within 12 months after the birth or placement. (See [CFR Section 825.201](#))

Spouses employed by the same employer may be limited to a **combined** total of 12 workweeks of family leave for the for the [following reasons](#):

- birth and care of a newborn; and
- for the placement of a child for adoption or foster care, and to care for the newly placed child.

Intermittent/Reduced Schedule Leave

The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances. (CFR Section 203)

Intermittent/reduced schedule leave may be taken when [medically necessary](#)

- to care for a seriously ill family member, or because of the employee's serious health condition.
- Intermittent/reduced schedule leave may be taken to care for a newborn or newly placed adopted or foster care child only with the employer's approval.

Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA leave. Employees may not be required to take more FMLA leave than necessary to address the circumstances that cause the need for leave. Employers may account for FMLA leave in the shortest period of time that their payroll systems use, provided it is one hour or less. (See [CFR Section 825-205](#)).

Employees needing intermittent/reduced schedule leave for foreseeable medical treatment must work with their employers to schedule the leave so as not to unduly disrupt the employer's operations, subject to the approval of the employee's health care provider. In such cases, the employer may transfer the employee temporarily to an [alternative job](#) with equivalent pay and benefits that accommodates recurring periods of leave better than the employee's regular job.

Substitution of Paid Leave

Employees may choose to use, **or** employers may require the employee to use, accrued **paid** leave to cover some or all of the FMLA leave taken. Employees may choose the substitution of accrued **paid** vacation or personal leave for any of the situations covered by FMLA. In some circumstances, employers may require the substitution of accrued **paid** vacation or personal leave. The substitution of accrued sick or family leave is limited by the employer's policies governing the use of such leave.

Serious Health Condition

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or
- 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; or
- any period of incapacity due to pregnancy, or for prenatal care; or
- any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
- a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,
- any absences to receive multiple treatments (including any period of recovery therefrom) 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 (e.g., chemotherapy, physical therapy, dialysis, etc.).

Medical Certification

An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must allow the employee at least 15 calendar days to obtain the medical certification.

An employer may, at its own expense, require the employee to obtain a second medical certification from a health care provider. The employer may choose the health care provider for the second opinion, except that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be approved jointly by the employer and the employee. The "Certification of Health Care Provider" (form [CS-1789](#)) may be used to obtain the certifications.

Health Care Provider

Health care providers who may provide certification of a serious health condition include:

- doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
- podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice under State law;
- nurse practitioners, nurse-midwives, and clinical social workers authorized to practice under State law and performing within the scope of their practice as defined under State law;
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
- any health care provider recognized by the employer or the employer's group health plan's benefits manager; and,
- a health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country.

Maintenance of Health Benefits

A covered employer is required to maintain group health, dental, and vision insurance coverage, including family coverage, for an employee on FMLA leave on the same terms as if the employee continued to work.

Where appropriate, arrangements will need to be made for employees taking unpaid FMLA leave to pay their share of health, dental, and vision insurance premiums. For example, if the group health, dental, and vision plan involves co-payments by the employer and the employee, an employee on unpaid FMLA leave must make arrangements to pay his or her normal portion of the insurance premiums to maintain insurance coverage, as must the employer. Such payments may be made under any arrangement voluntarily agreed to by the employer and employee.

An employer's obligation to maintain health, dental, and vision benefits under FMLA stops if and when an employee informs the employer of an intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is exhausted. The employer's obligation also stops if the employee's premium payment is more than 30 days late and the employer has given the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received.

In some circumstances, the employer may recover premiums it paid to maintain health, dental, and vision insurance coverage for an employee who fails to return to work from FMLA leave. Contact Office of the State Employer for more information.

Other Benefits

Other benefits, including cash payments chosen by the employee instead of group health, dental, and vision insurance coverage, need not be maintained during periods of unpaid FMLA leave.

Certain types of earned benefits, such as seniority or paid leave, need not continue to accrue during periods of unpaid FMLA leave provided that such benefits do not accrue for employees on other types of unpaid leave. For other benefits, such as elected life insurance coverage, the employer and the employee may make arrangements to continue benefits during periods of unpaid FMLA leave. An employer may elect to continue such benefits to ensure that the employee will be eligible to be restored to the same benefits upon returning to work. At the conclusion of the leave, the employer may recover only the employee's share of premiums it paid to maintain other "non-health" benefits during unpaid FMLA leave.

Job Restoration

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an "**equivalent**" job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using (but not necessarily during) FMLA leave.

"Key" Employee Exception

Under limited circumstances where restoration to employment will cause "substantial and grievous economic injury" to its operations, an employer may refuse to reinstate certain highly-paid, salaried "key" employees. In order to do so, the employer must notify the employee in writing of his/her status as a "key" employee (as defined by FMLA), the reasons for denying job restoration, and provide the employee a reasonable opportunity to return to work after so notifying the employee.

Notice

Employee Notice 29CFR825.302

Eligible employees seeking to use FMLA leave *may* be required to provide:

- 30-day advance notice of the need to take FMLA leave when the need is foreseeable;
- notice "as soon as practicable" when the need to take FMLA leave is not foreseeable ("as soon as practicable" generally means at least verbal notice to the employer within **one or two business days** of learning of the need to take FMLA leave);
- sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons (the employee need not mention FMLA when requesting leave to meet this requirement, but may only explain why the leave is needed); and,
- where the employer was not made aware that an employee was absent for FMLA reasons and the employee wants the leave counted as FMLA leave, timely notice (generally within **two business days** of returning to work) that leave was taken for an FMLA-qualifying reason.

Employer Notices 29CFR825.300

Covered employers must take the following steps to provide information to employees about FMLA:

- post a notice approved by the Secretary of Labor (**WH Publication 1420**) explaining rights and responsibilities under FMLA;
- include information about employee rights and obligations under FMLA in employee handbooks or other written material, including Collective Bargaining Agreements (CBAs); or
- if handbooks or other written material do not exist, provide general written guidance about employee rights and obligations under FMLA whenever an employee requests leave (a copy of [Fact Sheet No. 28](#) will fulfill this requirement); and

- provide a written notice designating the leave as FMLA leave and detailing specific expectations and obligations of an employee who is exercising his/her FMLA entitlements. The employer may use the "Family Medical Leave Act (FMLA) Employee Request & Employer Response" (form [CS-1790](#)) to meet this requirement. This employer notice should be provided to the employee within **one or two business days** after receiving the employee's notice of need for leave and include the following:
 - that the leave will be counted against the employee's annual FMLA leave entitlement;*
 - any requirements for the employee to furnish medical certification and the consequences of failing to do so;
 - the employee's right to elect to use accrued paid leave for unpaid FMLA leave and whether the employer will require the use of paid leave, and the conditions related to using paid leave;
 - any requirement for the employee to make co-premium payments for maintaining group health insurance and the arrangement for making such payments;
 - any requirement to present a fitness-for-duty certification before being restored to his/her job;
 - rights to job restoration upon return from leave;
 - employee's potential liability for reimbursement of health, dental, and vision insurance premiums paid by the employer during the leave if the employee fails to return to work after taking FMLA leave; and
 - whether the employee qualifies as a "key" employee and the circumstances under which the employee may not be restored to his or her job following leave.

*Provisional notice may be given that the leave will be counted against the employee's annual FMLA leave entitlement pending receipt of medical certification.

Unlawful Acts

FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by this law. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

Enforcement

FMLA is enforced by the Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration. This agency investigates complaints of violations. If violations cannot be satisfactorily resolved, the Department may bring action in court to compel compliance.

An eligible employee may bring a private civil action against an employer for violations. An employee is not required to file a complaint with the Wage and Hour Division prior to bringing such action.

Other Provisions

Some special rules apply to *employees of local education agencies*. Generally, these rules provide for FMLA leave to be taken in blocks of time when the leave is needed intermittently or when leave is required near the end of a school term (semester).

Several States and other jurisdictions also have family or medical leave laws. If both the Federal law and a State law apply to an employer's operations, an employee is entitled to the most generous benefit provided under either law.

Employers may also provide, through their collective bargaining agreements, family and medical leave that is more generous than the FMLA leave requirements.

This was taken from one of a series of fact sheets highlighting U.S. Department of Labor Programs. It is intended as a general description only and does not carry the force of legal opinion. The FMLA does not modify or affect any Federal or State law which prohibits discrimination.

1) See the Federal Registers dated January 6, 1995, Vol. 60, No. 4, pages 2180-2279; February 3, 1995, Vol. 60, No. 23, page 6658; and March 30, 1995, Vol. 60, No. 61, pages 16382-16383.

U. S. DEPARTMENT OF LABOR FORM 1420

Your Rights Under the Family and Medical Leave Act of 1993

[English](#)
[Spanish](#)

SAMPLE of STATE FORMS

[CS-1789 Certification of Health Care Provider](#)

and

[CS-1790 Family Medical Leave Act \(FMLA\) Employee Request & Employer Response](#)

U.S. Department of Labor
THE FAMILY MEDICAL LEAVE ACT OF 1993
Fact Sheet #28

The Family and Medical Leave Act of 1993 Fact Sheet #28

As taken from: <http://www.dol.gov/esa/regs/compliance/whd/whdfs28.htm>

THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division, administers and enforces the Family and Medical Leave Act (FMLA) for all private, state and local government employees, and some federal employees. Most Federal and certain congressional employees are also covered by the law and are subject to the jurisdiction of the U.S. Office of Personnel Management or the Congress.

FMLA became effective on August 5, 1993, for most employers. If a collective bargaining agreement (CBA) was in effect on that date, FMLA became effective on the expiration date of the CBA or February 5, 1994, whichever was earlier. FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons. The employer may elect to use the calendar year, a fixed 12-month leave or fiscal year, or a 12-month period prior to or after the commencement of leave as the 12-month period.

The law contains provisions on employer coverage; employee eligibility for the law's benefits; entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; notice and certification of the need for FMLA leave; and, protection for employees who request or take FMLA leave. The law also requires employers to keep certain records.

EMPLOYER COVERAGE

FMLA applies to all:

- public agencies, including state, local and federal employers, local education agencies (schools), **and**
- private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year **and** who are engaged in commerce or in any industry or activity affecting commerce — including joint employers and successors of covered employers.

EMPLOYEE ELIGIBILITY

To be eligible for FMLA benefits, an employee **must**:

1. work for a covered employer;
2. have worked for the employer for a total of 12 months*;
3. have worked at least 1,250 hours over the previous 12 months*; and

4. work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles.

* See special rules for returning reservists under USERRA.

LEAVE ENTITLEMENT

A covered employer must grant an eligible employee up to a total of 12 workweeks of **unpaid** leave during any 12-month period for one or more of the following reasons:

- for the birth and care of the newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; **or**
- to take medical leave when the employee is unable to work because of a serious health condition.

Spouses employed by the same employer are jointly entitled to a **combined** total of 12 work-weeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition.

Leave for birth and care, or placement for adoption or foster care must conclude within 12 months of the birth or placement.

Under some circumstances, employees may take FMLA leave intermittently — which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.
- FMLA leave may be taken intermittently whenever **medically necessary** to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

Also, subject to certain conditions, employees **or** employers may choose to use accrued **paid** leave (such as sick or vacation leave) to cover some or all of the FMLA leave.

The employer is responsible for designating if an employee's use of paid leave counts as FMLA leave, based on information from the employee.

"**Serious health condition**" means an illness, injury, impairment, or physical or mental condition that involves either:

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

period of incapacity or subsequent treatment in connection with such inpatient care; **or**

- Continuing treatment by a health care provider which includes any period of incapacity (i.e., inability to work, attend school or perform other regular daily activities) due to:

(1) A health condition (including treatment therefore, or recovery therefrom) lasting more than three consecutive 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; **or**
- one treatment by a health care provider with a continuing regimen of treatment; **or**

(2) Pregnancy or prenatal care. A visit to the health care provider is not necessary for each absence; **or**

(3) A chronic serious health condition which continues over an extended period of time, requires periodic visits to a health care provider, and may involve occasional episodes of incapacity (e.g., asthma, diabetes). A visit to a health care provider is not necessary for each absence; **or**

(4) A permanent or long-term condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, terminal cancer). Only supervision by a health care provider is required, rather than active treatment; **or**

(5) Any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (e.g., chemotherapy or radiation treatments for cancer).

"Health care provider" means:

- doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctors practice; **or**
- podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice, and performing within the scope of their practice, under state law; **or**
- nurse practitioners, nurse-midwives and clinical social workers authorized to practice, and performing within the scope of their practice, as defined under state law; **or**
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; **or**
- Any health care provider recognized by the employer or the employer's group health plan benefits manager.

MAINTENANCE OF HEALTH BENEFITS

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.

In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

JOB RESTORATION

Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to **before** using FMLA leave, nor be counted against the employee under a "no fault" attendance policy.

Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly-paid "**key**" employees after using FMLA leave during which health coverage was maintained. In order to do so, the employer must:

- notify the employee of his/her status as a "key" employee in response to the employee's notice of intent to take FMLA leave;
- notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision;
- offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; **and**
- make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.

A "**key**" employee is a salaried "eligible" employee who is among the highest paid ten percent of employees within 75 miles of the work site.

NOTICE AND CERTIFICATION

Employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable.

Employers may also require employees to provide:

- medical certification supporting the need for leave due to a serious health condition affecting the employee or an immediate family member;
- second or third medical opinions (at the employer's expense) and periodic recertification; **and**
- periodic reports during FMLA leave regarding the employee's status and intent to return to work.

When intermittent leave is needed to care for an immediate family member or the employee's own illness, and is for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt the employer's operation.

Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense.

Also, covered employers must inform employees of their rights and responsibilities under FMLA, including giving specific written information on what is required of the employee and what might happen in certain circumstances, such as if the employee fails to return to work after FMLA leave.

UNLAWFUL ACTS

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

ENFORCEMENT

The Wage and Hour Division investigates complaints. If violations cannot be satisfactorily resolved, the U.S. Department of Labor may bring action in court to compel compliance. Individuals may also bring a private civil action against an employer for violations.

OTHER PROVISIONS

Special rules apply to **employees of local education agencies**. Generally, these rules provide for FMLA leave to be taken in blocks of time when intermittent leave is needed or the leave is required near the end of a school term.

Salaried executive, administrative, and professional employees of covered employers who meet the Fair Labor Standards Act (FLSA) criteria for exemption from minimum wage and overtime under Regulations, 29 CFR Part 541, do not lose their FLSA-exempt status by using any unpaid FMLA leave. This special exception to the "salary basis" requirements for FLSA's exemption extends only to "eligible" employees' use of leave required by FMLA.

The FMLA does not affect any other federal or state law which prohibits discrimination, nor supersede any state or local law which provides greater family or medical leave protection. Nor does it affect an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan. The FMLA also encourages employers to provide more generous leave rights.

FURTHER INFORMATION

The final rule implementing FMLA is contained in the January 6, 1995, Federal Register. For more information, please contact the nearest office of the **Wage and Hour Division**, listed in most telephone directories under U.S. Government, Department of Labor.

SAMPLE FORMS

[CS-1767 Application for Continuation of Insurances](#)

and

[CS-1787 Family Medical Leave of Absence Form](#)

(For HR Office use only – to initiate continuation of insurances only.)

QUESTIONS AND ANSWER GUIDE
For State of Michigan Employees

adapted from the
U.S. Department of Labor

QUESTIONS AND ANSWER GUIDE For State of Michigan Employees

**Adapted from
The U.S. Department of Labor**

The following Questions and Answers have been adapted from the U.S. DOL website (<http://www.dol.gov/elaws/esa/fmla/faq.asp>) and are only intended to provide guidance to State Departments in implementing the provisions of the Federal Family and Medical Leave Act ("FMLA" or "Act"). Answers are based on the provisions of the U.S. DOL's final regulations issued January 6, 1995 and effective April 6, 1995, and are subject to change based on letter opinions issued by the U.S. DOL, and court decisions. State Departments should refer to the Act and regulations for further clarification, as well as the Department of Civil Service's Web Site (<http://www.michigan.gov/mdcs>) and Regulations for non-exclusively represented employees and to collective bargaining agreements for exclusively represented employees.

Questions and Answers

Q1: How much leave is an employee entitled to under FMLA?

If an employee is "eligible" under FMLA, the employee is entitled to 12 weeks of leave for certain family and medical reasons during a 12-month period.

Q2: How is the 12-month period calculated under FMLA?

Although employers may select one of four options for determining the 12-month period, the State of Michigan's policy is to begin the 12-month period the first time FMLA leave is taken after the completion of any 12-month period.

Q3: Does the law guarantee paid time off?

No. The FMLA only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave, such as vacation or sick leave, for some or all of the FMLA leave period. When paid leave is substituted for unpaid FMLA leave, it may be counted against the 12-week FMLA leave entitlement if the employee is properly notified of the designation when the leave begins.

Q4: Does workers' compensation leave count against an employee's FMLA leave entitlement?

It can. FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

Q5: Can the employer count leave taken due to pregnancy complications against the 12 weeks of FMLA leave for the birth and care of an employee's child?

Yes. An eligible employee is entitled to a total of 12 weeks of FMLA leave in a 12-month period. If the employee has to use some of that leave for another reason, including a difficult pregnancy, it may be counted as part of the 12-week FMLA leave entitlement.

Q6: Can the employer count time on maternity leave or pregnancy disability as FMLA leave?

Yes. Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave so long as the employer properly notifies the employee in writing of the designation.

Q7: If an employer fails to tell employees that the leave is FMLA leave, can the employer count the time they have already been off against the 12 weeks of FMLA leave?

In most situations, the employer cannot count leave as FMLA leave retroactively. Remember, the employee must be notified in writing that an absence is being designated as FMLA leave. If the employer was not aware of the reason for the leave, leave may be designated as FMLA leave retroactively only while the leave is in progress or within two business days of the employee's return to work.

Q8: Who is considered an immediate "family member" for purposes of taking FMLA leave?

An employee's spouse, children (including step-children), and parents are immediate family members for purposes of FMLA. The term "parent" does not include a parent "in-law". The terms son or daughter do not include individuals age 18 or over unless they are "incapable of self-care" because of mental or physical disability that limits one or more of the "major life activities" as those terms are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA).

Q9: May an employee take FMLA leave for visits to a physical therapist, if their doctor prescribes the therapy?

Yes. FMLA permits an eligible employee to take leave to receive "continuing treatment by a health care provider," which can include recurring absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay or for treatment of severe arthritis.

Q10: Which employees are eligible to take FMLA leave?

Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months (need not be consecutive or continuous employment), and have worked for at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles.

Q11: Do the 1,250 hours include paid leave time or other absences from work?

No. The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.

NEW: However, in Ricco v Potter, 377 Fed. 3rd. 599 (2004) declared that where an Arbitrator awards an employee reinstatement as part of a "make whole" award for an unlawful termination, an employer must give the grievant credit towards the FMLA's hours-of-service requirement for hours worked.

Q12: How does an employee determine if they have worked 1,250 hours in a 12-month period?

The employee's individual record of hours worked would be used to determine whether 1,250 hours had been worked in the 12 months prior to the commencement of FMLA leave. As a rule of thumb, the following may be helpful for estimating whether this test for eligibility has been met:

- 24 hours worked in each of the 52 weeks of the year; or
- over 104 hours worked in each of the 12 months of the year; or
- 40 hours worked per week for more than 31 weeks (over seven months) of the year.

Q13: Does an employee have to give the employer medical records for leave due to their own serious health condition, or the serious health condition of an immediate family member?

No. An employee does not have to provide medical records. The employer may, however, request that, for any leave taken due to a serious health condition, the

employee provide a medical certification confirming that a serious health condition exists.

Q14: Can the employer require an employee to return to work before FMLA leave is exhausted?

Subject to certain limitations, the employer may deny the continuation of FMLA leave due to a serious health condition if an employee fails to fulfill any obligations to provide supporting medical certification. The employer may not, however, require an employee return to work early by offering a light duty assignment. Note: In situations where the employee's FMLA runs concurrently with a Workers' Compensation claim, failure to accept light duty or favored work may stop the employee's disability benefit payments. In this circumstance, the employee would be entitled to use their sick leave to cover their FMLA qualifying absence.

Q15: Are there any restrictions on how an employee spends their time while on leave?

Employers with established policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. Otherwise, the employer may not restrict an employee's activities. The protections of FMLA will not, however, cover situations where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.

Q16: Can the employer make inquiries about an employee's leave during their absence?

Yes, but only to the employee. The employer may ask questions to confirm whether the leave needed or being taken qualifies for FMLA purposes, and may require periodic reports on the employee's status or medical recertification and intent to return to work after leave. Also, if the employer wishes to obtain another opinion, may be required to obtain additional medical certification at the employer's expense during a period of FMLA leave. The employer may have a health care provider representing the employer contact the employee's health care provider, with the employee's permission, to clarify information in the medical certification or to confirm that it was provided by the health care provider. The inquiry may not seek additional information regarding the employee's health condition or that of a family member.

Q17: Can the employer refuse to grant FMLA leave?

If an "eligible" employee has met FMLA's notice and certification requirements and has not exhausted their FMLA leave entitlement for the year, an employee may **not** be denied FMLA leave.

Q18: Will an employee lose their job if they take FMLA leave?

Generally, no. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this law. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. Under limited circumstances, an employer may deny reinstatement to work - but not the use of FMLA leave - to certain highly paid, salaried ("key") employees. Note: Taking FMLA leave will not shield an employee from any disciplinary action which would have been imposed had the employee been at work.

Q19: Are there other circumstances in which the employer can deny FMLA leave or job reinstatement?

In addition to denying reinstatement in certain circumstances to "key" employees, employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as, for example, due to a general layoff. Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave.

Employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated "12 month period" no longer have FMLA protections of leave or job restoration

Under certain circumstances, employers who advise employees experiencing a serious health condition that they will require a medical certificate of fitness for duty to return to work may deny reinstatement to an employee who fails to provide the certification, or may delay reinstatement until the certification is submitted.

Q20: Can an employer discharge an employee for complaining about a violation of FMLA?

No. Nor can the employer take any other adverse employment action on this basis. It is unlawful for any employer to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under FMLA.

Q21: Does an employer have to pay bonuses to employees who have been on FMLA leave?

The FMLA requires that employees be restored to the same or an equivalent position. If an employee was eligible for a bonus before taking FMLA leave, the employee would be eligible for the bonus upon returning to work. The FMLA leave may not be counted against the employee. For example, if an employer offers a perfect attendance bonus, and the employee has not missed any time prior to

taking FMLA leave, the employee would still be eligible for the bonus upon returning from FMLA leave.

On the other hand, FMLA does not require that employees on FMLA leave be allowed to accrue benefits or seniority. For example, an employee on FMLA leave might not have sufficient sales to qualify for a bonus. The employer is not required to make any special accommodation for this employee because of FMLA. The employer must, of course, treat an employee who has used FMLA leave at least as well as other employees on paid and unpaid leave (as appropriate) are treated.

Q22: Under what circumstances is leave designated as FMLA leave and counted against the employee's total entitlement?

In all circumstances, it is the employer's responsibility to designate leave taken for an FMLA reason as FMLA leave. The designation must be based upon information furnished by the employee. Leave may not be designated as FMLA leave after the leave has been completed and the employee has returned to work, unless:

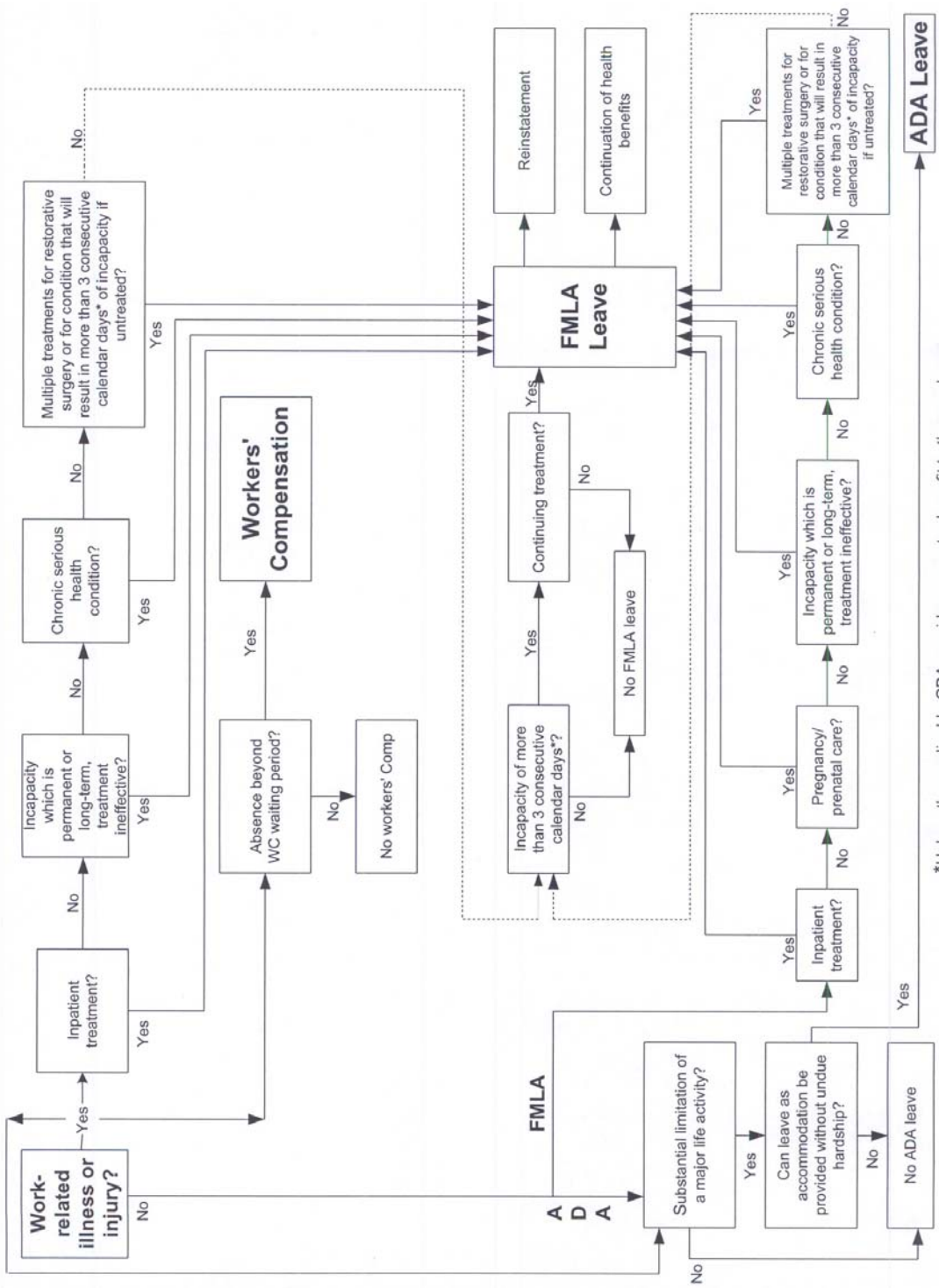
- the employer is awaiting receipt of the medical certification to confirm the existence of a serious health condition;
- the employer was unaware that leave was for an FMLA reason, and subsequently acquires information from the employee such as when the employee requests additional or extensions of leave; or,
- the employer was unaware that the leave was for an FMLA reason, and the employee notifies the employer within two days after return to work that the leave was FMLA leave.

Q23: Can an employer count FMLA leave an employee takes against a no fault absentee policy?

No.

For more information, please contact the nearest office of the US Department of Labor, Wage and Hour Division.

FMLA and ADA FLOWCHART



*Unless the applicable CBA provides a greater benefit to the employee.