

# The Family and Medical Leave Act and Employee Benefits

April 16, 2026

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# The Federal Family and Medical Leave Act (FMLA)

(29 CFR Part 825)



# FMLA Basics

## INTRODUCTION

The Family and Medical Leave Act (FMLA) provides for unpaid, job-protected leave to eligible employees who work for qualifying employers.

- 12 workweeks per 12-month period
  - » Applies to leaves for the employee's own serious health condition, parental bonding, to care for a family member with a serious health condition and qualifying exigencies
- 26 workweeks per 12-month period
  - » Applies to military caregiver leave

**Note:** Many states have leave laws that run concurrently with FMLA, often providing protections that are greater than FMLA. The general rule in such situations is to apply the greatest protection provided by the applicable laws.



# FMLA Basics - Covered Employers

(29 CFR § 825.104)

## Private Sector Employer

- Private employers that employ 50 or more employees for each working day in 20 or more calendar workweeks in the current or previous calendar year.
  - » Employee considered employed each working day of the calendar week if the employee works any part of the week
  - » Work weeks do not have to be consecutive

## Public Employers

- Public agencies considered covered employers regardless of the number of employees
- Public agencies include:
  - » Federal, state and local governments
  - » Local educational agencies (public and private elementary and secondary schools)

# FMLA Basics - Covered Employees

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(29 CFR § 825.110)

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## Eligible Employees

Works for covered employer

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Employed by the employer for at least 12 months

- Not required to be consecutive (considers employment periods prior to a break in service of up to seven years)
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Worked for at least 1,250 hours during the 12-month period immediately preceding the leave

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Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite

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Public agency and school employees are still required to meet the above eligibility requirements

# FMLA Basics - Qualifying Reasons For Leave

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(29 CFR § 825.112)

## Circumstances for FMLA Leave

- Birth of a child and to bond with the newborn child within one year of birth
- Placement with the employee of a child for adoption or foster care and to bond with newly placed child within one year of placement
- Care for the employee's spouse, son, daughter or parent with a serious health condition
- A serious health condition that makes the employee unable to perform the functions of the employee's job
- Qualifying exigency arising out of the fact that the employee's spouse, child or parent is a covered military member on active duty or has been notified of an impending call or order to active duty
- Care for a covered service member with a serious injury or illness if the employee is the spouse, child, parent or next of kin of the service member

**Equal Application:** Right to FMLA leave applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

# Serious Health Condition

(29 CFR § 825.113-115)

**Definition:** For purposes of FMLA, an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider (29 CFR § 825.113)

## Types of Serious Health Conditions

- **Inpatient care (29 CFR § 825.114):**
  - » An overnight stay in a hospital, hospice or residential medical care facility
  - » Any period of incapacity or subsequent treatment in connection with overnight stay
- **Incapacity and Treatment (29 CFR § 825.115):** A period of incapacity of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition that also involves: treatment of two or more times or treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment
- Any period of incapacity due **to pregnancy, or for prenatal care**
- Any period of incapacity or treatment for such incapacity due to a **chronic serious health condition**
- A period of incapacity which is **permanent or long-term** due to a condition for which treatment may not be effective but requires continuing supervision of health care provider
- Treatment for restorative surgery or a condition that would likely result in a period of incapacity of more than three consecutive days in the absence of treatment

# Military Leave

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(29 CFR § 825.122)

- Eligible employees may take FMLA leave for:
  - » Any “qualifying exigency” arising from foreign deployment of employee’s son, daughter, spouse or parent with the Armed Forces, or
  - » To care for a covered service member with a serious injury or illness if the service member is the employee’s spouse, child, parent or next of kin
- Qualifying exigency leave includes when a family member is on covered active duty or has been notified of an impending call to covered active duty
  - » Covered active duty means duty during deployment to a foreign country
- Covered service member means a current member of the Armed Forces, including a member of the National Guard or Reserves, or a covered veteran
  - » Includes both current service members and veterans who are undergoing medical treatment, recuperation or therapy for a serious injury or illness and were discharged within the previous five years



# Employee Notice

(29 CFR § 825.302-303)

- Employees must provide notice of their need for FMLA leave
- Notice is based upon the employer's customary policy for requesting leave unless unusual circumstances apply
- Notice can be oral or written



## Timing of Notice:

- **Foreseeable** – 30 days advance notice
- **Unforeseeable** – Provided as soon as possible and practical

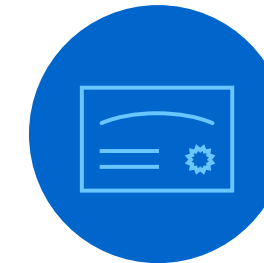


# Certification

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(29 CFR § 825.305)

- Employer may request employee certification to support need for FMLA leave
- Circumstances when certification may be required:
  - » Employee's own serious health condition
  - » Serious health condition of the employee's spouse, parent or child
  - » Military family leave
- Certification includes document or form completed by employee and health care provider if applicable
  - » Employee must provide the certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the circumstances to do so despite the employee's diligent, good faith efforts



Certification may not be required for leave to bond with a healthy newborn child or child placed for adoption or foster care.

# Model Forms, Fact Sheets and Notices

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## FMLA Forms

<b>1. WH-1420</b>	FMLA Poster
<b>2. WH-380E</b>	Certification of Health Care Provider – Employee
<b>3. WH-380F</b>	Certification of Health Care Provider – Family member
<b>4. WH-381</b>	Notice of Eligibility, Rights & Responsibilities
<b>5. WH-382</b>	Designation Notice
<b>6. WH-384</b>	Certification of Qualifying Exigency
<b>7. WH-385</b>	Certification of Serious Injury/Illness – Military
<b>8. WH-385V</b>	Certification of Serious Injury/Illness – Veteran

**FIND FMLA FORMS →**

<https://www.dol.gov/agencies/whd/fmla/forms>

# FMLA Basics – Duration of Leave

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- Based on defined 12-month period or “leave year”
- Methods for determining 12-month leave year:
  - » Calendar year
  - » Any fixed period of 12 months
  - » Rolling forward – 12-month period measured forward from first date of leave
  - » Rolling backward – 12-month period measured backward from date employee uses FMLA leave
- Intermittent or reduced scheduled leave permitted under certain circumstances

## Length of Leave:

- Up to 12 weeks for qualifying leave
- Qualifying exigency leave
  - » Up to 15 days to spend time with an active service member on rest and recuperation leave
- Up to 26-weeks for military caregiver leave



# School Instructional Employees

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(29 CFR § 825.600-604)

Special rules apply for instructional employees of elementary and secondary schools (public and private) for purposes of intermittent or reduced scheduled leave

- Includes teachers, athletic coaches, driving instructors and special education assistants
- Special rules do not apply to teaching assistants and aides, or other auxiliary workers, whose primary duties are not instructional

# School Instructional Employees

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- If intermittent leave or reduced schedule is needed and the employee will be on leave for more than 20% of the total number of working days over the leave period, employer may require employee to choose between:
  - » Leave for a period of a duration no greater than the duration of the planned treatment, or
  - » Transfer temporarily to an available alternative position with equivalent pay and benefits **(29 CFR § 825.601)**
- Employees on leave at the end of the school year must be provided any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year. Leave periods during summer vacations do not count against the employee's FMLA entitlement **(29 CFR § 825.601)**
- In certain cases, for leaves commencing at the end of the academic term the employer may require the employee to remain out on leave through the end of the term
  - » Such periods are not counted against FMLA entitlement **(29 CFR § 825.603)**
- Restoration must be to an equivalent position **(29 CFR § 825.604)**

# Airline Flight Crew Employees

(29 CFR § 825.800-802)



## Special rules apply to airline flight crew members for calculating leave and determining leave eligibility

- Hours of service criteria – Employee must have worked or been paid during the previous 12 months for:
  - » Not less than 60% of applicable monthly guarantee, and
  - » Not less than 504 hours
- Duration of FMLA-qualified leave during 12-month period
  - » 156 days for military caregiver leave
  - » 72 days for other leave

# Employee Protections



- It is unlawful for an employer to discharge or discriminate against any employee for opposing any practice, or because of involvement in any proceeding, related to FMLA
- Employers may not discriminate against or interfere with employees who attempt to exercise their rights to take FMLA leave
  - » However, an employer is not prohibited from taking action against an employee for violating company policy when the employee is on FMLA leave

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# FMLA Impact on Benefits



# FMLA & Benefits

## INTRODUCTION

How an employer must handle an employee's benefits during an FMLA leave will depend on:

- The type of benefit
  - » Group health plan benefits are treated differently than non-group health plan benefits under the FMLA.
- The type of leave
  - » Most of the time, FMLA leave is unpaid. Sometimes benefits are handled differently if some or all of the FMLA leave is paid.
- The employer's leave policies and plan documents should include consistent provisions for how leaves of absence are handled.

**Note:** The FMLA provides legal protection for benefits, but an employer's plans and policies can be more generous. If a plan is subject to ERISA, the plan document and SPD should set out what happens to employees' benefits during leave and should align with any employer leave policy.





# Group Health Plans

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## Maintenance of health coverage during FMLA leave

- “Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees.”
- An employer must maintain the same coverage and contributions to the group health plan as if the employee on FMLA leave were actively at work (applies to employee and dependent coverage)

# Group Health Plans

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- ➔ **If an employee covered by a group health plan goes on unpaid FMLA leave, a covered employer may:**
  - Allow an employee going on unpaid FMLA leave to either revoke or continue their health coverage during the FMLA leave, **or**
  - Require that the employee continue coverage but allow the employee to discontinue their contributions.
    - » The employer can do this only if they treat other non-FMLA leaves in the same manner.
    - » The employer must cover the full premium/contribution amount during leave but may recoup the employee's share of premiums when the employee returns to work.
  
- ➔ **If the employee continues coverage and the plan requires them to pay a portion of the premium during the FMLA leave, the employee may do so in the following ways:**
  - Foreseeable leave – May collect premiums in advance on pre-tax basis at employee's option if allowed under cafeteria plan. Pay-as-you-go and catch-up options also available.
  - Unforeseeable leave – Periodic post-tax payments (pay-as-you-go) sent to employer or collected on return to active work (catch-up).
  
- ➔ **Open enrollment rights apply to all eligible employees on FMLA leave**

# Group Health Plans

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## Employer's obligation to provide health coverage during an FMLA leave ends when:

Employee notifies the employer of their intention to not return to work;

Employment relationship would have ended if employee had not taken FMLA leave (e.g., position is eliminated for reasons unrelated to the leave);

Employee fails to return to work at the end of FMLA leave;

Employee exhausts FMLA leave entitlement but continues taking unprotected leave, if the plan's eligibility provisions provide for a loss of eligibility during non-FMLA leave;

Employee fails to pay their premium contribution within 30 days after due date – employer must provide written notice that payment was not received and coverage will be cancelled, at least 15 days before terminating coverage.

# FMLA & COBRA

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## COBRA continuation rights only apply at the end of FMLA leave

- This is true even if the employee does not timely pay their premiums, and regardless of whether coverage is cancelled during the FMLA leave.





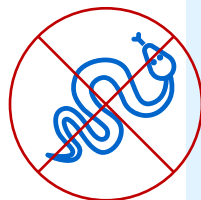
## A COBRA qualifying event related to FMLA leave occurs only if the following three circumstances exist:

- The employee, spouse or a dependent child is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave);
- The employee does not return to employment at the end of the FMLA leave; and
- The individual would, in the absence of COBRA continuation coverage, lose coverage under the group health plan before the end of the maximum coverage period.



# Group Health Plans

## Employer's obligation to provide health coverage during an FMLA leave ends when:

-  Employee notifies the employer of their intention to not return to work; **Employment ends; QE date is date of resignation**
-  Employment relationship would have ended if employee had not taken FMLA leave (e.g., position is eliminated for reasons unrelated to the leave) **Employment ends; QE date is date of termination**
-  Employee fails to return to work at the end of FMLA leave; **Employment ends; QE date is last day of FMLA leave**
-  Employee exhausts FMLA leave entitlement but continues taking unprotected leave, if the plan's eligibility provisions provide for a loss of eligibility during non-FMLA leave; **Employment continues; QE date is last day of FMLA protection**
-  Employee fails to pay premium contribution within 30 days after due date – employer must provide written notice that payment was not received and coverage will be cancelled, at least 15 days before terminating coverage. **Employment continues; nonpayment is not a QE**

# FMLA & Cafeteria Plan Elections

## Cafeteria Plan Elections during FMLA

## Group health plan (health, dental, vision, etc.)

## Non-health plan (life, disability, DCAP, etc.)

### Eligibility to continue elections

Employees must remain eligible

Employees can lose eligibility; check plan documents

### Election changes

An employee may revoke their elections at the start of FMLA leave

Employer may require elections to continue during **paid FMLA** leave, but **only** if employer requires elections to continue for employees on **paid non-FMLA** leave

An employee taking FMLA leave is entitled to revoke an election of non-health benefits under a cafeteria plan to the same extent as employees taking non-FMLA leave

### Payment for continued elections

**Paid leave:** Pre-tax payroll deduction the same as used for other paid leaves

**Unpaid leave:** Employer may offer three methods; must include in cafeteria plan document and offered when notifying employee of FMLA eligibility:

- Pre-payment for leave that is foreseeable: cannot be required; can allow pre-tax pre-payment for contributions owed in the same plan year that leave is taken
- Pay-as-you-go: after-tax payments by designated due date
- Catch-up: employer advances employee premium contributions during leave and collects missed payments upon employee's return; can be used as back-up method

# Special Rule: FMLA & Cafeteria Plan Elections

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## Reinstatement of election on return from FMLA leave (if benefits have been dropped):

### 30-day Safe Harbor:

- Leaves of 30 days or less – Reinstatement prior election (unless intervening status change)
- Leaves greater than 30 days – Plan must allow for reinstatement of prior elections and may allow the employee to make new elections for the remainder of the plan year

**Note:** Employers may only require employees to reinstate cafeteria plan elections upon return from unpaid FMLA leave if this is required for all unpaid non-FMLA leaves.



# FMLA & Health FSA Elections

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An employee on FMLA leave has the right to continue their enrollment in the health FSA (that is, to incur and submit expenses for reimbursement) during the FMLA leave period.



## If an employee is on an unpaid FMLA leave, the employer can:

- Allow the employee to revoke their health FSA election during their FMLA leave period, or
- Require health FSA coverage to continue during their FMLA leave but the employee must be allowed to discontinue their health FSA contributions.



## If an employee chooses to continue enrollment in the health FSA while on FMLA leave, contributions can be collected in several ways:

- Pre-pay (cannot be the only option)
- Pay-as-you-go, or
- Catch-up employee health FSA contributions missed during FMLA leave, when the employee returns.

# Special Rule: Dependent Care FSAs

DCAPs reimburse expenses that enable an employee (and spouse, if applicable) to **work, look for work, or attend school full time.**

Because employees on leave are generally not considered gainfully employed, **dependent care expenses incurred during FMLA (or other) leave are usually not eligible for reimbursement.**

DCAP **eligibility** is typically governed by the **cafeteria plan document; qualified expense reimbursement** is governed by **IRS rules.**

## DCAP Options During FMLA Leave:

### Continue DCAP Participation

Employee must be allowed to remain enrolled in the DCAP during FMLA leave **if the plan permits continuation during comparable non-FMLA leaves.**

A DCAP can still only reimburse **employment-related expenses**; in most cases, expenses incurred during leave will **not qualify** for tax-free reimbursement.

An IRS safe harbor allows reimbursement of non-employment-related expenses incurred during a **temporary leave of up to two consecutive weeks.**

### Revoke or Suspend DCAP Elections

Even if the employee does not lose eligibility under the plan, an employee **may revoke or change their DCAP election at the start of FMLA leave** if the leave causes dependent care expenses to no longer qualify for tax-free reimbursement.

This election change is permitted because the leave creates a **loss of eligibility for qualified expenses**, even if formal plan eligibility technically continues.

## DCAPs Upon Return from FMLA Leave:

- Employers must allow reinstatement of prior elections
- Employers may apply the 30-day safe harbor, requiring reinstatement for leaves  $\leq 30$  days (unless intervening status change applies), but allowing new elections for leaves  $> 30$  days

# Maintenance of Other Benefits during FMLA

## Benefit Coverage

## Requirements

Cash in lieu of health coverage

Not required unless paid during other non-FMLA leaves

Vacation/sick pay/PTO accrual

Not required unless accrued during other non-FMLA leaves

Non-health benefits such as life or disability coverage

Not required, but may be maintained during the term of the FMLA leave **if permitted by contract and included in the plan's eligibility provisions**

- Helps preserve reinstatement rights upon return from leave
- Employer may require employee to pay employee portion of any premiums during leave, or advance the employee's portion of premium during leave and upon employee's return, recover contributions made on employee's behalf

# FMLA Leaves Due to a Disability

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## Disability Plans:

- Disability that will qualify under an employer's STD or LTD plan will often also be a "serious health condition" that triggers FMLA
- Some self-funded disability plans may qualify as "paid leave" for FMLA leave substitution and benefits payment purposes

## Life Insurance:

- Some life insurance contracts include a waiver of premium provision that allows an employee to skip paying life insurance premiums during a period of disability
  - » Usually there is a waiting period (typically 6-9 months)
    - This will likely be different than the waiting period/elimination period to qualify under LTD or STD plans
    - Premiums must be paid during the waiting period
  - » Definition of disability may be more restrictive (such as "inability to perform any gainful occupation") than LTD or STD, and the definition of serious health condition under FMLA

***Remember: before canceling an employee's life or disability coverage during FMLA leave, make sure you can reinstate it immediately upon return!***

# Summary

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The FMLA provides specific job and benefit protections for employees going out on FMLA leave

2

Reinstatement of employee welfare benefits is required when an employee returns from FMLA leave (if benefits were discontinued)

3

Make sure non-health benefit contracts allow for immediate reinstatement of benefits upon an employee's return from FMLA leave





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