
The Nuts and Bolts of the FMLA

What does FMLA provide?

Who is eligible to use FMLA?

What is meant by “leave year”?

For what purposes can I take FMLA leave time?

What is a “serious health condition”?

What is not a “serious health condition”?

Is substance abuse a serious health condition?

Does FMLA cover foreseen and unforeseen absences?

Do I have to take my leave a week at a time or can I take it in smaller increments?

What are an employee’s notification requirements?

Must an employee specifically request “FMLA Leave”?

Am I required to get medical certification?

How often can my employer require medical certification?

What medical information must I submit to my employer?

What are my employer’s notification requirements?

Can my employer force me to use my FMLA?

Can an employer require an employee to use paid time off for FMLA leave?

What if the contract provides more leave than the FMLA?

What actions can the union take to enforce the FMLA?

What legal recourse do employees have?

What can an employee win in a successful case?

What are the time limits for filing a claim against my employer?

How can I contact the U.S. Department of Labor?

Sources: *The FMLA Handbook 2nd Ed.*, by Robert M. Schwartz; FMLA, Code of Federal Regulations; DOL, Opinion Letters

What does FMLA provide?

- 12 weeks of unpaid leave
- Continuation of group health plan benefits over the leave time.
- FMLA leave cannot be used as a negative factor in:
 - promotions,
 - disciplinary actions,
 - attendance bonuses
 - “no fault” attendance policies.
- Employee must be restored to former position or to one of equivalent pay, benefits and working conditions.

A Union Contract Can Expand and Strengthen Legal Provisions

Like the minimum wage, the FMLA imposes only the minimum standards that an employer must provide. Unions can expand FMLA entitlements by negotiating more favorable standards into their collective bargaining agreements.

Who is eligible to use FMLA?

The 4 eligibility requirements:

- 1) **You work for a “covered employer”**
Covered employers, include all private employers with 50 or more employees and all public employers, including federal, state and city and local agencies and schools.
- 2) **12 Months of Service**
This does not have to be consecutive.

Example: If you work 3 months in 1998, 2 months in 2000, and 7 months in 2003, you satisfy the 12-month requirement.

3) 1,250 Hours

Before taking the leave you must have “actually” worked a minimum of 1,250 hours during the 12 months just prior to taking your leave or absence. (about 25 hours per week over 12 months).

Not included in work hours: vacation days, periods on workers comp, disability or FMLA Leave. Union business time is counted only if it is *paid by the employer.*

4) 50 Employees within 75 Miles

At the time you request leave, or incur an FMLA absence, the total number of workers employed at your worksite within a 75-mile radius must be 50 or more. All employees on the payroll are counted, even those employed less than 1 year.

To access the FMLA regulations outlining eligibility go to FMLA Regulation.825.110 at: www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.110.htm

What is meant by the “leave year”?

The 12-month period during which you can take a leave is called “the leave year”. Department of Labor regulations allow the *employer* to select one of four methods of leave year although this is a mandatory subject of bargaining under the National Labor Relations Act. This means employers are required to negotiate this matter with the union.

- ➔ The calendar year.
 - ➔ Another fixed year.
 - ➔ The 12-month period measured forward from the date an employee starts their leave.
4. The 12-month period measured backward from each date an employee uses FMLA leave.

Some employers opt for #4 called the “rolling backward” method. Unlike the other 3 choices this prevents employees from taking more than 12 consecutive weeks of leave. A number of employers still prefer using a “fixed” year because it is easier to administrate

For what purposes can I take FMLA leave time?

Absences are covered for eligible employees when they involve:

- 1) The birth of a son or daughter, and to care for the newborn child.
- 2) Placement in your home of a son or daughter for adoption or foster care.
- 3) To care for, or give *psychological comfort* to your:
 - Sons & Daughters. Sons and daughters include biological, adopted, or foster children, stepchildren, and legal wards under 18. Children older than 18 are covered if they are unable to care for themselves due to disability.

The definition parent under the FMLA is broad in incorporates the legal term *In loco parentis*. This means you are considered a parent of a child if you provide him or her with provide day-to-day care and financial support. No legal relationship is necessary.
 - Spouses, (through statutory or common-law marriage – Michigan does not recognize common law marriage).
 - Parents. Biological, adoptive, foster parents and a mother or father who stood in *loco parentis* when you were a child.
- 4) Because of a serious health condition that makes you unable to perform your job.

What is a “serious health condition”?

Under DOL regulations, a serious health condition is an illness, injury, impairment, or physical or mental condition that involves one or more of the following 6 reasons:

1. Pregnancy, (includes appointments for pre-natal care, and severe nausea.)
2. Inpatient hospital/mental institution care, (i.e. involving an overnight stay).
3. An injury, illness, or condition lasting more than three (3) consecutive calendar days that involves continuing treatment by a *health care provider*, see below.

Must meet both tests below:

- 1) Makes you incapacitated, that is you are unable to perform one or more of the “essential” functions of your position.
- 2) Involves *continuing medical treatment*, see below.

4. A chronic serious health condition. This is a condition which continues over an extended period of time, requires periodic visits for treatment and generally causes episodic periods of incapacity (i.e. severe arthritis, back injuries requiring surgery or extensive therapy).

Any period of incapacity due to chronic serious health condition is protected by the FMLA whether you miss work for an hour, a week, or longer. You do not have to see a health care provider during each absence.

5. A long term or permanently disabling health condition, (i.e. a terminal illness such as AIDS).

6. A condition requiring multiple treatments to prevent a period of incapacity of more than three consecutive days, (i.e. therapy for carpal tunnel syndrome, chemotherapy for cancer, or dialysis for kidney disease).

What is meant by “continuing medical treatment”?

- Two or more treatments by a health care provider or
- Treatment by a health care provider on one occasion which results in a regimen of continuing supervised treatment.

This includes:

- therapy involving special equipment or
- a course of prescription medication.

This does not include:

- instructions to take over-the-counter medications, drink fluids, exercise, or rest.

Who is a Health Care Provider?

Someone who can diagnose or treat serious health conditions without supervision. Treatment by a nurse or physician’s assistant under the direct supervision of a health care provider or a physical therapist on referral by a provider qualifies as treatment by a health care provider.

What is not a serious health condition?

Health conditions generally **not** covered under FMLA include:

- Colds
- Routine dental or orthodontic problems
- Earaches
- Flu, upset stomachs
- Headaches (other than migraine)

- Minor ulcers

Is substance abuse a serious health condition?

Alcoholism and drug addictions often satisfy requirements of a chronic serious health condition. A U.S. Department of Labor exception, however, removes protection from employees who are absent from work as a direct result of the use of a substance abuse, e.g. overdose, hangover etc. On the other hand treatment for a chronic substance abuse qualifies for FMLA protection.

Does FMLA cover foreseen and unforeseen absences?

The FMLA recognizes both foreseen (planned) absences and unforeseen (emergency-type) absences. Notification requirements differ depending on whether the absence is unforeseen or foreseen.

- **Unforeseen Leave/Absence**

In cases of unexpected absence, an employer cannot deny an eligible employee FMLA coverage provided that timely notice was given (1 to 2 business days from the time you knew the absence would occur). The employee is eligible if they meet the eligibility requirements and the absence involves a serious health condition for themselves or covered family member.

- **Foreseen Leave/Absence**

FMLA leave must be granted to an eligible employee for planned absences involving a serious health condition for themselves or covered family member provided proper notice is given. Proper notice for planned FMLA leaves is 30 days advanced notice or as soon as practical, usually considered 1 to 2 business days from the time you knew the absence would occur.

An employer may require employees to use established internal procedures for taking a **foreseen/ planned** leave provided sufficient notification to employees. (This rule does NOT apply to unforeseen leaves.) However, failure to follow such internal procedures will not permit an employer to disallow or delay an employees taking FMLA leave if the employee gives timely verbal or other notice.

When FMLA leave is needed for planned medical treatment, an employee is required to try to schedule the leave so that it does not “unduly disrupt” the employer’s operations. If the employee is unable to reschedule, your leave must be allowed. This rule does not apply to unforeseen leaves.

Do I have to take my leave a week at a time or can I take it in smaller increments?

Besides a traditional leave of a week or more at a time, the law allows for other scheduling arrangements. They are:

- **Intermittent Leave**

When deemed “*medically necessary*” by the employee’s or family member’s health care provider, eligible employees can use FMLA leave in separate blocks of time, i.e. an hour, a day, a week.

This can include coming in late or early departures or taking a couple hours from your shift to attend to a serious health condition.

Example: In an extreme case, an employee afflicted with chronic colitis who normally works 5 days a week could be absent for as many as 60 days a year for the disorder. They can miss half days, quarter days and less, if medically necessary. The employee can not be penalized for this in any way.

The employer’s right to transfer due to intermittent leave.

If an intermittent leave is foreseeable because of planned medical treatment, the employer can temporarily transfer the employee to another position that will more easily accommodate the absences. The alternative job cannot violate the collective bargaining agreement, impose a hardship, reduce the worker’s pay, or be instituted in order to discourage employee from taking the leave.

- **Reduced Schedule Leave**

If an eligible employee has a serious health condition, (or his/her covered family member has a serious health condition), *and* a health care provider deems it *medically necessary*, the employer must provide this employee work on a part-time basis.

The hours of time reduced from the worker’s regular schedule can be deducted as family medical leave time by the employer, (i.e. employee might work 1/2 time for 24 weeks).

Exceptions for Intermittent and Reduced Schedule Leaves:

Childbirth, Newborn Care, Adoption, and Foster Placement

- Only by mutual consent of employer and employee can intermittent and reduced schedule leave be taken after the birth of a child (provided no serious health condition exists).
- If both the husband and wife work for the same employer the employer can limit the total leave for childbirth, newborn care, adoption or foster care placement leave to 12 weeks per year for both parents. If a child or spouse has a serious health condition, such cerebral palsy, both husband and wife can take up to 12 weeks per leave year.

What are an employee's notification requirements?

Under the act, workers can take both a foreseen and an unforeseen leave but must provide proper notice to their employer.

Unforeseen (Unexpected) Leave: In unexpected leaves an employee must provide notice to the employer "as soon as practical", in most cases that is within 2 days.

Foreseen (Planned) Leave: for a "foreseeable" leave a worker must give at least 30 days advanced notice, or if "foreseeable" is less than 30 days ahead, he or she must give notice "as soon as practical". (This usually means within 2 business days of your knowledge of a need for an FMLA leave.)

The employee must consult with the employer in order to make a reasonable effort to schedule the leave so as not to unduly disrupt the employer's operations.

An employer may also require an employee to comply with internal procedures for requesting leave (complete written forms, contacting HR Dept.). However, failure to follow such internal procedures will not permit an employer to disallow or delay an employees taking FMLA leave if the employee gives timely verbal or other notice.

To whom in management must the employee give notice?

Under the FMLA, employees are required to notify their "employer" when requesting leave. The FMLA uses the following, very broad definition of employer: "any person who acts directly or indirectly in the interest of an employer to any of the employer's employees." This means that notification may be made to a first level management up to a CEO.

As previously noted, an employer may require employees to use established internal procedures for taking a **foreseen/ planned** leave, provided sufficient notification to employees. However, failure to follow such internal procedures will not permit an employer to disallow or delay an employees taking FMLA leave if the employee gives timely verbal or other notice.

Must an employee specifically request "FMLA leave"?

No, but employees are required to provide enough information about an absence so that the employer is aware that it falls under FMLA. Once a covered employee has done this, it is up to the employer to provide information on rights and responsibilities under FMLA. The employer may also request more information to determine if the absence is an FMLA absence. (Note: under FMLA, an employee is not required to provide a diagnosis.)

Can someone else call in for an employee?

Under the law an employee may have someone else call in if she or he is “incapacitated”.

Am I required to get medical certification?

Yes, an employer can require an employee to submit medical certification, signed by the employee’s health care provider, verifying that she or he suffers from a serious health condition and is unable to work. The certification can be in the form of a questionnaire provided by the employer. The employee is responsible for the costs of obtaining the initial certification.

- But** A direct request must be made to the employee,
The employee must be allowed a minimum of 15 calendar days to return form,
- > A supervisor, company nurse, or labor relations official may not contact the employee’s (or family member’s) provider,
 - > FMLA medical certifications must be maintained as confidential medical records in files separate from the usual personnel files.
 - > Whenever the employer finds a certification incomplete, they shall advise the employee and “provide a reasonable opportunity to cure any such deficiency”.

What if the employer questions a medical certification?

If an employer has reason to doubt an employee’s medical certification, the employee can be required, at the employer’s expense, to get a second opinion. This opinion cannot be from a health care provider the employer hires on a regular basis.

If the second opinion is different from the first, the employer can require, and must pay for, a third opinion. This provider must be chosen jointly by the employee and the employer. The decision of the third health care provider is final.

A Warning Regarding Falsification of Records

An employee may be fired if the employer can prove that he or she falsified FMLA documents or medical records.

How often can my employer require medical certification?

Section §825.308(a) and Section §825.308(b) of the FMLA regulations address this issue. Section (a) states that..

- “... an employer may request re-certification no more often than every 30...” unless
- (1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or
 - (2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

But it is important to read further to paragraph (b) which states:

(b)(1) If the minimum duration of the period of incapacity **specified on a certification** furnished by the health care provider is more than 30 days, the employer may not request re-certification until that minimum duration has passed

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request re-certification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

Section (c) states:

- (1) The employee requests an extension of leave;
- (2) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or
- (3) The employer receives information that casts doubt upon the continuing validity of the certification.

It is therefore advised that when health care providers complete the medical certification form they include a start and end date for the intermittent leave. Employers will usually not contest a 6-month period of time.

For the full text of §825.308 go to:

http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.308.htm

What medical information must I submit to my employer?

If your employer requests that you submit medical certification to verify a serious medical condition they can only demand the information detailed on the U.S. Department of Labor Form WH-380. This allows the employer to learn about the general nature of your condition and the estimated amount of time you will be out of work. Under FMLA final regulations you are not required to furnish a medical diagnosis.

According to Section 306(b) of the revised FMLA regulations :

*“Form WH-380, as revised, or another form containing the same basic information, may be used by the employer; however, **no additional information may be required.**” (emphasis added)*

To access a copy of form WH-380 go to:

www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf

To get short or long term disability, you must comply with the plan requirements:

If an employee wants to be paid under the employer's temporary disability plan (short term or long term disability pay plan), then they must comply with the certification requirements of the plan. This may include providing a diagnosis and medical release. Check your employer's the policy and procedures on this. The employer can run the short term or long term disability and an FMLA leave concurrently (at the same time) but an employee can not be forced to use the employer's temporary disability plan and can opt for using only FMLA, provided they are eligible to use FMLA.

What are the employer's notification requirements?

Under FMLA regulations, covered employers have five basic notification duties. They are:

1) Display FMLA Posters

If an employer has not posted a notice outlining rights and responsibilities, then an employee cannot be denied leave for failing to provide timely notice. This poster must be prominently displayed where workers can see it.

To access a poster go to: www.dol.gov/esa/regs/compliance/posters/fmla.htm

2) Describe the FMLA in employee handbooks or benefit documents

If no handbook or benefit document then employer must provide notice each time an employee takes FMLA leave.

3) Notify employees who are ineligible for FMLA leave (“§110 (d) notice”)

Employers must notify workers that they are ineligible because:

- Employees have less than 12 months or
- Employees do not have the 1250 hours prior to leave.

4) Notify eligible employees, in writing, of specific FMLA rights and responsibilities (“§301 notice”)

Written notification must be given to eligible employees within two business days of the time they request time off for FMLA reasons. Extenuating circumstances excluded or if this is employee's second FMLA absence in 6 months. See box below.

Notification must include:

- 1) if time will be deducted from the 12 week entitlement;

- 2) any requirements for medical certification including consequences for failure to provide certification;
- 3) your right to substitute paid leave and whether your employer will require you take paid leave;
- 4) any requirements to make health care payments;
- 5) any requirements to present a fitness for duty report when returning;
- 6) your rights to reinstatement
- 7) your potential liability for health insurance premiums if you do not return from your leave.
- 8) whether you are designated a “key employee” (salaried, indispensable, and within the top 10% paid employ)

For the Dept of Labor’s sample notification form go to:

www.dol.gov/esa/forms/whd/WH-381.pdf

5) Notify employees, in writing, whenever leave is designated as FMLA leave or if employer substitutes paid for unpaid FMLA leave (“§208 notice”)

Employers can deduct time from an employee’s 12 week entitlement absences due to a serious health condition as defined in the act *but the employer must give the employee notice within 2 business days of when the employee requested time off for FMLA reasons*, extenuating circumstances excluded.

If the employee fails to inform the employer of the FMLA reasons for an absence the leave may be denied.

Provided the employer has received sufficient information to do so, the employer must notify the employee within two business days from the date the employee requested leave when the employer is substituting paid time for an unpaid time leave or is designating paid time off as FMLA leave.

Preliminary Designation

An employer can make a *preliminary designation* when the reasons for the FMLA leave are known but the employer has not been able to confirm that the leave qualifies under FMLA, or where the parties are waiting for a medical opinion. They must notify the employee of this before the leave begins.

Retroactively Designated FMLA

Also, if an employer only learns after the employee returns from leave, or during a leave that the absence qualifies as FMLA, the employer may retroactively designate time off as FMLA. This must be done promptly (within 2 business days of the employee’s return to work).

The 6 month rules under §301

If the employer has:

- 1) already given you §301 notice in the last 6 months,
- 2) if the specific information in the original notice applies to subsequent leave,
- 3) employee handbook or benefit document clearly stating that medical certification or a fitness report will be required,

Then the employer may:

simply give you verbal notice of a medical certification requirement or a fitness for duty requirement.

Can my employer force me to use my FMLA?

If an employee is taking time off of work and such time off falls under the FMLA provisions (the employee has a serious health condition), the employer could deduct that time from the 12 weeks entitlement. For example, FMLA time could run at the same time an employee is out for a workers comp injury.

On the other hand if an eligible employee is taking time off for an FMLA qualifying reason, he or she can insist that it be covered by FMLA.

Can an employee use of vacation pay or medical leave pay to cover unpaid FMLA leave?

Yes, under the law an employee may elect to use *accrued* vacation, personal paid days, or other such paid days off to cover FMLA leave. An employee may only use medical sick leave pay if the absence qualifies under the employer's policy/contract language. Unless your contract states otherwise, this usually means that paid medical leave can only be taken for the employee's own serious health condition.

Can an employer require an employee to use paid time off for FMLA leave?

Yes, unless barred by a union contract, an employer can require an employee to cash out any paid time off accrued. This time off must be both *earned and available for use*, (i.e. you can not be forced to use paid medical leave or vacation time you have not yet earned). Also, if an employee receives payment or partial payment from any disability insurance (including workers compensation), an employer will not be able to require use of other paid time off.

Note: Your employer must inform you that paid leave is being imposed within 2 days of your giving proper notice.

What if the contract provides more leave than the FMLA?

FMLA regulation 825.700 (a) states that employees are entitled to policies or practices that provide employees more favorable benefits than the FMLA's minimum requirements. Section 825.700(a) specifically states:

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan.

What actions can the union take to enforce the FMLA?

Educate members as to their rights under the FMLA and provide training to union representatives involved in grievance handling and bargaining. FMLA benefits can be expanded through negotiating FMLA related contract language. See FMLA websites for links providing sample contract language.

Grievances can be filed using any contract language that incorporates the FMLA language in your contract. If this is not in your contract the union can use language that states the employer will comply with federal and state law. The union may also enforce FMLA rights by filing a grievance under the "just cause" or (discipline/discharge) provisions in your contract if people receive discipline for FMLA qualifying time off.

The union also has the option of contacting an attorney regarding the grievant's legal right to sue the employer as well as personally sue the manager who made the decision to discipline/terminate/deny leave in violation of the FMLA. Keep in mind awards can be sizable. Attorney could collect legal fees, doctors could collect expert witness fees and the grievant could collect double damages if they win.

Unions have also filed and won class action cases against employers who fail to comply with the FMLA.

What legal recourse do employees have?

The employee has the choice of:

- 1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

- 2) Filing a private lawsuit pursuant to section 107 of FMLA.
- 3) If a union member an employee can pursue grievances under provisions in their contracts that may cover FMLA issues.

What can an employee win in a successful case?

Under the law if there are one or more violations an employer may be required to:

- Remove all discipline for FMLA absences from the employees records,
- Pay employment benefits or other compensation denied or lost due to FMLA violation, (including denied “attendance bonuses”),
- Pay any actual monetary loss sustained by the employee as a direct result of the violation, (i.e. cost of home health care for an ill parent),
- Pay lost wages (up to 12 weeks, with interest),
- Reinstatement or promote an employee,
- Pay employee’s attorney fees and expert witness fees in court cases,
- Pay double damages unless they can demonstrate they acted in good faith and had reasonable grounds for believing that they did not violate the law.

Note: damages for emotional distress are not granted under FMLA.

What are the time limits for filing a claim against my employer?

Employees have 2 years to file a claim against their employers, in cases of “willful” violations the time limit is 3 years.

How can I contact the U.S. Department of Labor?

The U.S. Department of Labor, Wage and Hour Division administers the Family Medical Leave Act. They can be contacted locally and nationally at:

Detroit

211 W. Fort 48226 (Main Office)

(313) 226-7447
Grand Rapids 2920 Fuller, NE 49505
(616) 456-2004
Washington, D.C. (202) 219-8727
(Main Office in Washington, D.C)

Web site on FMLA

U.S. Department of Labor, Employment Standards Administration, Wage and
Hour Division

www.dol.gov/esa/whd/fmla/

Sources: *The FMLA Handbook 2nd Ed.*, by Robert M. Schwartz; *FMLA, Code of Federal
Regulations; DOL, Opinion Letters*