

RISK COMMUNIQUÉ

The Family and Medical Leave Act – Management Liability/Risk Management for Employment Practices

The Family and Medical Leave Act of 1993 (FMLA) applies to all public agencies, as well as state, local and federal employers, schools and private-sector employers with 50 or more employees. FMLA provides certain employees with up to 12 work-weeks 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 Communiqué provides analysis and risk management guidelines for adhering to the FMLA.

Summary of the Family and Medical Leave Act

FMLA is designed to help employees balance their work and family responsibilities by allowing them to take reasonable **unpaid** leave for certain family and medical reasons. It also seeks to accommodate the legitimate interests of employers and promote equal employment opportunity for men and women.

Employers covered under the FMLA must provide an eligible employee with up to 12 weeks of unpaid, job-protected leave each year for any of the following reasons:

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

A “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition that involves either:

- any period of incapacity or treatment connected with inpatient care (e.g., overnight stay) in a hospital, hospice, or residential medical-care facility, and any period of incapacity of subsequent treatment in connection with such impairment care; or
- continuing treatment by a health care provider that includes any period of incapacity (e.g., inability to work, attend school or perform other regular daily activities) due to any of the following situations:
 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:
 - two or more treatments by or under the supervision of a health care provider; or
 - one treatment by a health care provider with a continuing regimen 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 that 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., 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 that would likely result in a period of incapacity of more than three days if not treated (e.g., chemotherapy or radiation treatments for cancer)

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In order for an employee to be eligible for FMLA benefits, the employee **must** meet **all** of the following requirements. He or she must:

- work for a covered employer
- have worked for the employer for a total of 12 months
- have worked at least 1,250 hours over the previous 12 months
- 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

Additional Provisions of the Family and Medical Leave Act

Spouses Working for the Same Employer

- Spouses working for the same employer are entitled to a combined total of 12 work-weeks of family leave within the designated 12-month period for the birth, adoption or foster care placement of a child with the employees, for aftercare of the newborn or newly placed child, and to care for a parent (but not in-law) with a serious health condition.

Intermittent Leave

- Under certain circumstances, intermittent leave (which means taking leave in blocks of time) may be taken by reducing the employee's normal daily or weekly work schedule.

Accrued Paid Leave

- Subject to certain conditions, accrued paid leave (such as sick or vacation leave) may be chosen by the employee or employer to cover some or all of the FMLA leave. When paid leave is substituted for unpaid FMLA leave, it may be counted against the 12-week FMLA entitlement if the employee is properly notified of the designation when the leave begins.

Notice and Certification

- Employees 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.
- Additionally, employees may be required to provide medical certification supporting the need for leave, a second or third medical opinion (at the expense of the employer), and periodic reports during FMLA leave regarding the employee's status and intent to return to work.

Maintenance of Health Benefits

- A covered employer is required to maintain group health insurance for an employee on FMLA leave. The employer may recover premiums it paid if that employee fails to return to work from FMLA leave.

Job Restoration

- An employee must be restored to his/her original job upon return from FMLA leave, or to an equivalent job, pay, benefits, and employment terms and conditions.

What Leaders Need to Do to Adhere to the Family and Medical Leave Act

Recommendations for leaders include, but are not limited to:

- Create and implement a personnel policy specifically regarding FMLA.
- Take steps to prevent wrongdoing, as it is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA (i.e., discharge or discriminate against an employee exercising rights under the FMLA).
- Rely on legal counsel with labor and employment law experience to address FMLA matters.
- Utilize internal resources or an outside third-party consultant and/or attorney to conduct training for all personnel on FMLA and all its provisions.