

FMLA - Question & Answer/Definitions

1. **What is the Family and Medical Leave Act (FMLA)?**

The Family and Medical Leave Act is a federal law which became effective on Aug. 5, 1993. It provides certain employees with up to 12 workweeks of unpaid, job-protected leave a year and requires group health benefits be maintained during the leave. The U.S. Department of Labor has issued detailed regulations interpreting the FMLA.

2. **Which employers must provide this leave?**

All public employers and private employers who have 50 or more employees are required to provide FMLA leave. However, not all employees of a covered employer are covered.

3. **Which employees are covered?**

Covered employees are those who have worked for the employer:

- a minimum of one year;
- a minimum of 1,250 hours (an average of 25 hours per week) during the 12 months prior to the start of the FMLA leave; and
- are employed at a location where at least 50 employees are employed at the location or within a 75-mile radius.

Each state, city, county and school district is considered an employer under FMLA for purposes of counting the number of employees to determine if an employee is “eligible” for FMLA leave. Therefore, if an agency in a city, for example, has fewer than 50 employees but the city as a whole employs 50 or more employees, the employee will be eligible.

4. **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, on-the-job, for the employer. Paid leave, including workers' compensation, and unpaid leave, including FMLA leave, are not included.

5. **What am I entitled to under FMLA?**

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:

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

(See [Appendix A](#) for a definition of a “serious health condition.”)

An employee’s entitlement to family and medical leave for the birth or placement of a child expires 12 months after the birth or placement of the child. For other requests for family leave, an employee may use up to 12 weeks each year.

6. Can I be sure I’ll have a job when I return from leave?

The law requires that an employee returning from leave be restored to the position they would have been in if they had not taken the leave. This means you can return to your old job or to an equivalent position with the same pay, benefits and other terms and conditions of employment. However, if, for example, your position was terminated during your leave and you would have been laid off, you are not entitled to get your job back. (“Key employees” who are among the highest paid 10 percent of employees may be denied reinstatement, if necessary, to avoid substantial and grievous economic injury to the employer’s operation.)

7. Can the employer require me to provide medical certification when requesting leave?

Yes. An employer may require that you provide a certification issued by your health care provider (see [Appendix B](#) for a definition of “health care provider”) or that of your son, daughter, spouse or parent to support your request.

The certification must include:

- a description of the serious health condition;
- the date that the condition began or treatment became necessary; and
- the expected duration of the condition or treatment.

8. What happens to my health care benefits when I am on leave?

You may continue your coverage under the employer’s group health plan. For example, if the employer pays 80 percent of your health care premium and you pay 20 percent, that same arrangement will continue during the unpaid leave period. Employers and employees may negotiate an arrangement in advance which will accommodate both the employer’s administrative needs and the employee’s financial situation. However, the employer cannot require pre-payment. The regulations provide, at a minimum, that if an employee does not meet the agreed upon date for payment of the premium, he or she has a 30-day grace period during which provision of health coverage will not be affected. If coverage lapses for nonpayment of premium coverage, employees still must be restored with the same plan upon return with no restrictions.

If you choose not to continue your health benefits while on FMLA leave, your coverage still must be fully restored with no restrictions when you return to work.

9. What happens to my other employment benefits while I am on leave?

Taking leave will not result in the loss of any employment benefit accrued prior to the date the leave begins. Although the law does not entitle you to continue to accrue seniority or other benefits while on unpaid FMLA leave, unionized employees may negotiate stronger language protecting other benefits such as life insurance and pension rights for employees on unpaid leave.

10. If I decide not to return to work after the leave, will I have to reimburse the employer for the cost of the health insurance?

It depends on the reason you do not return. If the reason is the continuation, onset or recurrence of a serious health condition, you will not have to reimburse the employer. Otherwise, the employer can require reimbursement.

Notice Requirements

11. Is the employer required to tell me what its FMLA policies are?

Yes. Employers must take the following steps to provide information to employees about FMLA:

- Post and keep posted a notice of the FMLA requirements in conspicuous places where employees can see it. The notice also must provide information concerning procedures for filing complaints with the Wage and Hour Division of the U.S. Department of Labor.
- Include information about employee rights and obligations under FMLA in employee handbooks or other written material, including collective bargaining agreements. If handbooks or other written material do not exist, the employer must provide general guidance about employee rights and obligations under FMLA **whenever an employee requests leave.** (See [Question 13.](#))

12. Do I have to give notice to the employer before I take leave?

If the need for leave is foreseeable, the law requires 30 days' notice. If the need for leave is not foreseeable 30 days in advance, you should give whatever notice is possible, ordinarily within one or two business days of when you learn of the need for leave. **You do not need to mention the FMLA when requesting leave.**

If an employee uses paid leave, under circumstances that qualify for FMLA leave, that employee is only required to comply with the notice requirement for use of paid leave, unless the FMLA notice requirement is shorter and then the employee can comply with that notice. Thus, AFSCME councils and locals may want to negotiate less stringent notice or certification requirements for paid leave than those under FMLA.

13. How will I know whether the leave has been approved?

The employer must provide you with 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. (See [Appendix C](#) for the kinds of information included in the notice.) This employer notice should be provided to you within one or two business days after receiving your notice of need for leave.

14. If an employer fails to tell me that the leave is FMLA leave, can the employer count the time I've already been off against the 12 weeks of FMLA leave?

In most situations, the employer cannot count leave as FMLA leave retroactively. Remember, you 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 your return to work.

15. Can my employer make inquiries about my leave during my absence?

Yes, but only to you. Your employer may ask you questions to confirm whether the leave needed or being taken qualifies for FMLA purposes. Also, if the employer wishes to obtain another opinion, you may be required to obtain additional medical certification at the employer's expense. The employer may have a health care provider representing the employer contact your health care provider, with your 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 your health condition or that of a family member.

16. My employer has a policy that anyone who is on FMLA leave must check in every 4 weeks. Is this legal?

Yes. Your employer may require you to report periodically on your status and intent to return to work. However, your employer may not do this in a discriminatory way — for example, by requiring only women who are on leave following childbirth to check in, based on the employer's belief that women will probably change their minds about returning to work. Also, your employer may require a medical recertification during a period of FMLA leave, but not more often than every 30 days.

Leave Status

17. Can my employer put me on FMLA leave whether I want to be or not?

Yes. In all circumstances, it is the employer's responsibility to designate leave, unpaid or paid, as FMLA-qualifying and to give notice of the designation to you, as long as the illness or injury meets the definition of a "serious health condition."

18. Can I take leave on an intermittent basis or work on a reduced schedule?

Yes. The FMLA does make provision for intermittent leave or leave on a reduced schedule for planned medical treatment or a serious health condition. FMLA permits an employee taking leave for birth, adoption or placement of a foster child to take leave intermittently or by working a reduced workweek only with the employer's approval. Therefore, AFSCME councils and locals may want to negotiate language securing such rights.

When the need for such leave is foreseeable based on planned medical treatment, the employer can require the employee to transfer temporarily to another position with equivalent pay and benefits if such a move better accommodates the employer's needs during the period of medical treatment or serious health condition.

19. Does workers' compensation leave count against my 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 you in writing that the leave will be counted as FMLA leave.

20. Can the employer count time on maternity leave or pregnancy disability leave 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.

21. If I am too sick to return to work, can my employer force me to come back to work once my leave expires?

No. If your serious health condition requires you to stop working altogether, you cannot be forced to return. But note that once you end your employment, your former employer has no obligation to provide health benefits. You may be eligible, however, to continue your health benefits under the Consolidated Omnibus Budget Reconciliation Act of 1986 or "COBRA" provided you pay the full cost.

22. Can I return to work early?

Yes. If you begin a requested 12-week leave of absence, and, 3 weeks into the leave ask to return to work earlier than originally planned, your employer is obligated to promptly restore you. FMLA states that an employee may only take FMLA leave for reasons that qualify under the Act, and may not be required to take more leave than is necessary to respond to the need for FMLA leave.

Substitution of Paid Leave

23. Can I substitute paid leave, e.g., sick leave or vacation for any part of the unpaid 12 weeks leave?

Yes. The law permits you 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. However, regarding the use of sick leave to care for eligible family members, nothing in the Act requires an employer to provide paid sick leave, paid medical leave, or paid family leave in any situation in which the employer would not normally provide any such paid leave. For example, if your employer does not allow employees to use their sick leave for anyone else except themselves, the employer is not required to let you substitute sick leave for a family member. Therefore, AFSCME councils and locals may want to negotiate the broadest type of paid leave language possible.

24. If my sick leave, vacation, personal leave, etc., adds up to more than 12 weeks, am I still entitled to an additional 12 weeks of unpaid leave after I have exhausted my paid leave?

Not if the employer requires you to first use your paid leave for your family and medical leave. Because there is nothing in the Act that either prohibits an employee from using FMLA leave and

paid leave consecutively or requires an employee to substitute paid leave for FMLA leave, AFSCME councils and locals may want to negotiate language that allows our members the broadest discretion in deciding whether to take the leave as unpaid or paid leave.

25. My employer has a no fault attendance policy. Will my FMLA leave be counted against that policy, thereby putting me in line for disciplinary action?

No. The FMLA regulations clearly state that an employee cannot be penalized in any manner whatsoever if the employee is absent for a reason covered by the FMLA.

Impact of Other Laws and Bargaining Agreements

26. I live in a state which has its own family leave law. Which law applies to me?

It depends on which one is better. If your state law provides family and medical leave rights superior to the federal law, the state law applies. If the FMLA is better, it applies.

27. My union has negotiated leave for the members. How does the FMLA affect our contract?

If the leave provided by your contract is superior to the FMLA, the FMLA does not affect your contract. If your contract provisions are not as good as that required by the FMLA, the employer is obligated to comply with the FMLA. There may be gaps in what your contract provides. For example, your contract might include good parenting leave provisions but nothing on leave to care for a spouse, child or parent with a serious health condition. You may want to negotiate language to fill in these gaps. That way, all of an employee's rights to leave can be enforced through the contract, which may be faster and more effective than filing charges with the U.S. Department of Labor.

For suggested contract language, see, AFSCME's "[Bargaining and the Family and Medical Leave Act — A Supplement to AFSCME's Family and Medical Leave Act: Questions and Answers.](#)"

Enforcement

28. What federal agency enforces the FMLA?

The Wage and Hour Division of the U.S. Department of Labor is the agency which enforces FMLA.

29. What should I do if my employer denies me the right to take leave?

Talk with your steward about whether your contract provides such leave. If it does, you and your union can file a grievance. In addition, you and the union can file a complaint with the Wage and Hour Division of the U.S. Department of Labor or file a private lawsuit. The Wage and Hour Division, which has offices in most major cities, will investigate your complaint. Because speedy

resolution of complaints is essential, the division provides an accelerated intake and investigative process that will prevent employees from suffering irreparable harm.

The FMLA also gives the Wage and Hour Division the right to go to court and get an injunction to keep the employer from withholding wages or employment benefits. The FMLA also gives you and the union the right to go directly to court and file a private lawsuit without first filing with the Wage and Hour Division. You and the union have 2 years from the FMLA violation, 3 years if it was a willful violation, to file either a complaint with the Wage and Hour Division or a private lawsuit.

30. Must I first exhaust my employer's internal complaint procedures before filing a complaint with the Department of Labor?

No. The Act places no requirement that an employee exhaust administrative remedies before being authorized to file with the Department of Labor.

31. What damages can I recover from an FMLA violation?

The employer can be sued by the employee or the Department of Labor to recover wages and benefits lost as a result of the violation, monetary losses sustained, such as the cost of hiring someone to provide care, and interest on the money owed to you. This is in addition to equitable remedies such as reinstatement. In cases where the employer cannot prove that they acted in good faith, believing their action was legal, you can recover double the amount of damages.

Resources

**American Federation of State, County
and Municipal Employees, AFL-CIO**

1625 L Street, N.W.
Washington, D.C. 20036-5687

Women's Rights Department

(202) 429-5090
FAX: (202) 429-5088
e-mail: womensrights@afscme.org

Research and Collective Bargaining Services Department

(202) 429-1215
FAX: (202) 223-3255
e-mail: research@afscme.org

These departments answer specific questions regarding FMLA as well as provide written materials and conduct workshops on the issue.

[AFSCME Guide to Winning Work/Family Programs](#) (1998).

[Fighting for the Rights of Employees with Disabilities: An AFSCME Guide](#) (1998).

[“Bargaining and the Family and Medical Leave Act — A Supplement to AFSCME’s Family and Medical Leave Act: Questions and Answers.”](#)

[National Partnership for Women & Families](#)

1875 Connecticut Avenue, N.W. Suite 710 Washington, D.C. 20009 (202) 986-2600

[Guide to the Family and Medical Leave Act: Questions & Answers](#) (Fourth edition, 1998).

[U.S. Department of Labor](#)

Employment Standards Administration

Wage and Hour Division

200 Constitution Avenue, N.W.

Washington, D.C. 20210

1-800-959-FMLA

(202) 219-8305

[Compliance Guide to the Family and Medical Leave Act](#), WH Publication 1421 (1996).

Appendix A

Serious Health Condition Definition

“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.).

Appendix B

Health Care Provider Definition

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 sublimation 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, Mass.;
- 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.

Appendix C

Employer Response to Employee Request for FMLA

The employer may use the U.S. Department of Labor Optional Form WH-381, "Employer Response to Employee Request For Family and Medical Leave."

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 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.