





A Cup Of Alphabet Soup To Cure
A Few FMLA Ills

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Presented For



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Ill Or Injured Employees

- Analyze each situation on a case-by-case basis taking into consideration the focus of each law.

1. Work Comp: inability to work

2. FMLA: serious health condition

3. ADA: qualified individual with a disability



If Time Off Is The Question

- FMLA Leave Is Always The First Answer.

- If The Employee Is Eligible.



The FMLA



The Big Issues

1. Who qualifies for leave.
2. What conditions qualify for leave.
3. What kinds of leave are available.
4. Communications with employees.

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The Big Issues

5. Communications with employee's healthcare providers.
6. Counting absences under an attendance policy.
7. Return to work issues.

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Eligibility For Leave

- Employee must have a total of 12 months of service – not continuous
- Employee must have worked 1,250 hours in the past 12 months
 - "Hours" means hours actually worked



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Eligibility For Leave

- Look back 7 years for 12-month rule
 - Longer if break is due to military duty
- Employee can become eligible for FMLA leave while on non-FMLA leave
(Very important during first year of employment)

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Amount Of Leave

- 12 work weeks of FMLA leave are available in the employer's designated 12-month period (rolling/fiscal/calendar year).
- 26 work weeks for servicemember leave.



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Types Of Leave

1. **Extended uninterrupted period** (surgery, for example)
2. **Intermittent** (epilepsy, migraines, for example)
 - *Not for Parenting*
3. **Reduced schedule** (able to work only 4 hours/day, for example)
 - *Not for Parenting*


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Monitoring An Employee's FMLA Use

- **This is critical**
 1. Worker's Compensation
 2. Partial Days
 3. Retroactive Use
- **Beware!!!**
 1. Non-Traditional Schedules
 2. Regular Overtime Work



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2013 Regulations On Tracking Intermittent Leave

1. Must track intermittent leave using the smallest increment of time used for other forms of leave, subject to a one-hour maximum.
 - Example: You calculate sick leave in quarter-hour increments. You must similarly calculate intermittent FMLA leave in quarter-hour increments. Remember, however, that you cannot record intermittent leave using increments of time greater than one-hour.
2. May not require an employee to take more leave than is necessary to address the circumstances causing the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave.

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Reasons For Leave

1. Employee's Own Serious Health Condition
2. To Care For A Family Member With A Serious Health Condition
3. Birth Or Adoption
4. Covered Servicemember's Serious Illness or Injury
5. Military Exigency



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FMLA: Serious Health Condition

- Is there a list of qualifying conditions?!
 - No, nein, non, na, nee, niet, siyo
- Instead, there are six categories of recognized serious health conditions.
- Categories include examinations to determine if in fact a serious health condition exists and evaluations of the condition.



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Serious Health Conditions – Six Categories

1. In-patient care
2. Incapacity for more than 3 consecutive calendar days (e.g., including weekends) and
 - Treatment 2 or more times by a health care provider or
 - Treatment one time with a regimen of continuing treatment such as prescription medication.



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Serious Health Conditions – Six Categories

3. Pregnancy or prenatal care, including leave for prenatal checkups or morning sickness



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Serious Health Conditions – Six Categories

4. Incapacity of any length for a “chronic serious health condition”
- Examples: Migraine headaches, epilepsy, diabetes, chronic back condition



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Serious Health Conditions – Six Categories

5. Permanent or long-term incapacity because of a condition for which treatment may not be effective
- Examples: Alzheimer’s, senility, dementia, any terminal illness



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Serious Health Conditions – Six Categories

6. Absence to receive one of multiple treatments (or to recover from those treatments) for restorative surgery after an accident or other injury or a condition that would likely result in incapacity of more than 3 consecutive calendar days without medical treatment.
- Examples: Cancer(chemo-therapy, radiation, etc.), severe arthritis (physical therapy) or kidney disease (dialysis).



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Employee Medical Leave

- Employee must have a serious health condition that renders the employee unable to perform the job functions.



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Caring For A Family Member

- Employee may take time off to
 - care for a child, spouse, or parent with a serious health condition.



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“Child” Defined Broadly

1. Biological, adopted or foster children, stepchildren, or legal wards where an employee is responsible for the child, who is under 18 years old.
2. An individual 18 years or older may qualify as a child only if he or she is incapable of care because of a mental/physical disability (defined under the ADA).



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"Spouse" Defined Narrowly

- Spouse is a legally-wedded husband or wife under state law.
- Does not include domestic partners, live-ins, etc.



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"Parent" Defined

- Parent
 1. Includes a biological parent or an adult who was responsible for the employee when the employee was a child
 2. Does not include in-laws
 3. Does not typically include grandparents



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Parenting Leave ("Well Baby" Or "Bonding" Leave)

- May take time off for a birth, adoption, or foster care placement.



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Parenting Leave ("Well Baby" Or "Bonding" Leave)

- Must be taken within the first year after the birth, adoption, placement, etc.



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Servicemember Leave

- Eligible: Service member's spouse, child, parent, or nearest blood relative
- "Covered Servicemember":
 1. Member of regular Armed forces, Guard, or Reserves undergoing medical treatment, recuperation, or therapy, otherwise in outpatient status, or on the temporary disability retired list for a serious illness or injury; or

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Servicemember Leave

2. Effective March 8, 2013, a veteran undergoing medical treatment, recuperation, or therapy for a serious injury/illness if the veteran was released or discharged, other than dishonorably, at any time during the 5-year period before the first date an eligible employee takes military caregiver leave.

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Serious Illness/Injury

1. Incurred or aggravated in the line of duty, on active duty
 - As determined by U.S. Department of Defense (DOD)
2. Renders the service member medically unfit to perform duties of office, grade, rank, or rating.
3. Effective March 8, 2013, relaxed certification requirements allow any health care provider to certify military caregiver leave for a veteran's "serious injury or illness."

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Exigent Leave

1. For a service member's spouse, child, or parent.
2. For a "qualifying" exigency arising from the service member who is on or called to active duty in support of a military operation in which members are or may become involved in certain military actions or results in a call or ordered to or retention on active duty.

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What Is A Qualifying Exigency?

1. Short-Notice Deployment
2. Military Events and Related Activities
3. Child Care and School Activities
4. Financial and Legal Arrangements
5. Counseling
6. Rest and Recuperation
7. Post-Deployment Activities
8. Parental Care – NEW!
9. Additional Activities

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Expanded Scope Of Exigency Leave

- Effective March 8, 2013
 1. Added parental care to arrange for care for a military member's parent when necessitated by the member's covered active duty (may include limited actual parental care).
 2. Enlarged the amount of leave for rest and recuperation with the military member from 5 days to 15 days



Expanded Scope Of Exigency Leave

3. Expanded the list of information required for certification for leave to include a copy of the military member's rest and recuperation leave orders or other military documentation establishing dates of the military member's leave.



Notices

1. Within 5 business days of leave request, notify the employee of initial eligibility and substitution of paid time (eligible to extent request is supported by appropriate medical documentation).



Notices

2. At **first knowledge** of potential serious health condition, give the employee the appropriate paperwork.
 - Always give the paperwork
 - Document you gave it and when
3. Within **15** days employee should provide medical information (follow up if not in).

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Notices

4. Within **5** business days of receipt of documentation, make a decision and give notice of the designation **in writing**.
5. At **expiration** of time, follow up with status of employee (consider other leave options if available).

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Return To Work

- Upon return to work from FMLA leave,
 - Typically restore employee to the same job unless
 1. Job no longer exists
 2. Key employee exception (rarely used)

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FMLA Absences Cannot Be Considered For

1. Attendance disciplinary purposes
2. Evaluation of performance
3. Bonuses based on being at work
 - FMLA absences may disqualify employees from perfect attendance bonuses if certain conditions are met.
4. Pay adjustments
5. Promotions/demotions

FMLA Absences Are Non-events.

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Employer Communications With Employee's Health Care Providers

1. Unless the contact is strictly for a worker's comp issue, an employer must exercise caution; the key is to get only authentication or clarification of information
2. Direct supervisor cannot communicate with health care provider



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Fitness For Duty Certification

1. May require Fitness for Duty Certification.
2. Must uniformly impose requirement and must be job-related.
3. Must notify employee of specific certification requirements at outset (in designation notice).



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Understanding Work Restrictions

1. Insist on clear, specific work restrictions. If necessary, ask the physician for greater detail.
2. Compare the specific work restrictions to the essential job functions.
3. If the employee cannot do the job, consider FMLA and ADA issues.

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Light Duty

1. Cannot force employee with available FMLA time to take a light duty position in lieu of FMLA.
2. However refusal to accept light duty will jeopardize continuation of worker's compensation payments.

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Return To Work With Restrictions

1. Resist the temptation to first consider whether you can offer a reasonable accommodation. Don't determine whether you can provide a reasonable accommodation unless the employee is a qualified individual with a disability.
2. Consider continued FMLA Leave



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Inability To Return To Work

1. Inability to return to work at the end of an FMLA leave means the employee loses the job protections provided by the FMLA.
2. **But . . .**
 - What about extending leave under your policies?
 - What about an extended leave as reasonable accommodation?

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Action Steps To Reduce Risk

1. Have FMLA; Extended Medical Leave (For After FMLA Exhausted); Medical Leave For Non-FMLA Eligible Employees (Less Than 1 Year's Service Or Part-Time Employees Under 1250 Hours); and Personal Leave Policies
2. Enforce policies fairly/consistently
3. Supervisors **MUST** notify HR or whoever handles FMLA of a possible FMLA issue

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Action Steps To Reduce Risk

4. Consider FMLA/ADA issues before discipline
5. Properly designate FMLA leave
6. Document unacceptable performance/conduct (before leave; carefully after)
7. Act in good faith

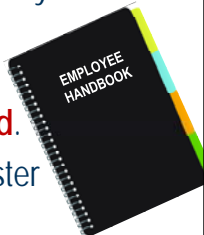
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Written Policies

1. Must place the FMLA policy in the handbook.
2. Make the policy **detailed**.
3. **Tip:** Insert the DOL poster after the policy.



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Documenting And Tracking FMLA

- Employer must
 - Demonstrate that an employee is not eligible for leave, or
 - Show employee has exhausted all available leave time.
 - Show dates FMLA leave is taken and amount taken



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Don't Let Managing The FMLA Create . . .

A Serious Health Condition For You



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