

## CHAPTER 38

### THE FAMILY MEDICAL LEAVE ACT (FMLA)

#### I. INTRODUCTION

The Family Medical Leave Act (FMLA) became effective on August 5, 1993 for most employers. If a collective bargaining agreement was in effect on that date, FMLA became effective on the expiration date of the collective bargaining agreement or February 5, 1994, whichever was earlier.

#### II. WHAT EMPLOYEES ARE COVERED UNDER THE FMLA?

The FMLA applies to a variety of employers, including:

1. public agencies, including state, local and federal employees, local education agencies (schools); and
2. private-sector employers who employ 50 or more employees within a 75-mile radius and the employees are engaged in commerce or in any industry or activity affecting commerce.

An employee is eligible for the benefits under the FMLA if that employee:

1. works for a covered employer;
2. has worked for a covered employer for at least 12 months; and
3. worked at least 1,250 hours of the last 12 months.

#### III. WHEN CAN AN EMPLOYEE EXERCISE THE BENEFITS OF FMLA LEAVE?

An employee who wishes to take unpaid leave, in accordance with the FMLA, must be seeking leave for one of the following reasons:

1. to care for the employee's child after birth;
2. to either care for the adoptive or foster care placement of the employee's child;

3. to care for the employee's spouse, son or daughter, or parent, who has a serious health condition;
4. for a serious health condition that makes the employee unable to perform the employer's job; or
5. to care for a spouse, parent, child, or next of kin of a service member who incurred a serious injury or illness on active duty in the Armed Forces.

At the employee's or employer's option, certain kinds of paid leave may be substituted for unpaid leave.

**A. SERIOUS HEALTH CONDITION**

A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either:

1. any period of incapacity or treatment connected with in-patient care in a hospital, hospice, or residential medical care facility, and any period of incapacity or subsequent treatment in connection with such in-patient care; or
2. continuing treatment by a health care provider which includes any period of incapacity (i.e., inability to work, attend school or perform other regular daily activities) due to:
  - a. a health condition (including treatment and recovery) lasting for more than three consecutive days and subsequent treatment or period of incapacity relating to the same condition;
  - b. pregnancy or prenatal care. A visit to the health care provider is not necessary for each absence;
  - c. a chronic serious health condition which 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 the health care provider is not necessary for each absence;
  - d. a permanent or long-term condition for which treatment may not be effective (e.g., terminal cancer, severe stroke). Only supervision by a health care provider is required, rather than active treatment; or

- e. any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (e.g., chemotherapy or radiation treatments for cancer).

#### **B. ADVANCE NOTICE**

Employees seeking to use FMLA 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. An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness-for-duty report to return to work.

#### **IV. BENEFITS AND PROTECTIONS AFFORDED BY THE FMLA**

The FMLA does not affect any other federal or state law which prohibits discrimination, or supersede any state or local law or collective bargaining agreement which provides greater family or medical leave rights. For the duration of FMLA leave, the employer is required to maintain the employee's group health insurance coverage if such coverage was provided before the leave was taken and on the same terms as if the employee continued to work. If applicable, employees will need to make arrangements to pay their share of health insurance premiums while on leave. Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent position with equal pay, benefits and other terms and conditions of employment.

Employers are prohibited from allowing FMLA leave to result in the loss of any employment benefit that accrued prior to the start of an employee's leave. The FMLA makes it unlawful for any employer to:

1. interfere with or deny the employee any rights provided under FMLA;
2. discharge or discriminate against an employee for opposing any practice, or because of involvement in any proceeding, related to FMLA.

#### **V. ENFORCEMENT OF FMLA**

An eligible employee may bring a civil action against an employer for violations of the FMLA. The U.S. Department of Labor is authorized to investigate and resolve complaints and violations. The Secretary of Labor may bring a court action against an employer in order to recover damages on behalf of an employee or group of employees. An employee may also bring a private suit against an employer. Filing of an administrative charge is not a prerequisite to filing a private complaint. Damages included in a successful suit may include:

1. wages, benefits, or any monetary losses by the employee;

2. interest on those wages and benefits;
3. liquidated damages equal to the total recovery plus interest; and
4. attorney's fees and expert's fees incurred by the employee.

Other relief, such as reinstatement of employment or promotion may be recovered if appropriate.