Chapter 4

Reasons for leave

Specific events

12 weeks

Eligible employees are entitled to take 12 weeks of FMLA under the following circumstances:

- for the birth of a son or daughter and to care for the newborn child
- for the placement, with the employee, of a son or daughter for adoption or foster care
- to care for the employee's spouse, son, daughter or parent who has a serious health condition
- because of a serious health condition which makes the employee unable to perform the functions of the position of his or her job
- for qualifying exigency event(s) while a covered service member is on active duty or call to active duty status.

Eligible employees may take a total of 12 work weeks of FMLA leave during any 12-month measuring period. Thus, an employee is not entitled to take 12 weeks of FMLA leave for the birth of a child followed by 12 weeks of FMLA leave for his or her own serious health condition all in the same 12-month measuring period.

26 weeks

An eligible employee who is the spouse, parent, son, daughter, or next of kin to a covered service member can take 26 weeks in any single 12-month period to care for the service member with a serious illness or injury.

Baby leave issues

A pregnant employee and/or her spouse may take time off prior to the birth of their child, but such leave would then be due to the expectant mother's own serious health condition such as morning sickness or prenatal care, not for the birth of a child.

An eligible employee's right to leave for the birth or placement of a child expires at the end of the 12-month period beginning on the date of the birth or placement, unless either state law or the employer allows leave to be taken for a longer period of time.

An employee can take intermittent or reduced schedule leave after the birth or placement of a child or for adoption or foster care only if the employer agrees to allow such intermittent leave. Such

intermittent leave may be a part-time work schedule or leave taken in several small segments. Otherwise, such leave after the birth or placement of a child can only be taken on a non-intermittent basis.

As an example, a female employee's baby is due June 1st. She asks to take FMLA in two six-week periods – June 1st through July 13th, and November 1st through December 13th. The employer can:

- agree to this intermittent approach

  or

- decline this approach and tell the employee for the birth of her child she must take FMLA leave on a non-intermittent basis.

Prior to the birth of a child, FMLA can be taken by an employee only for the serious health condition of the expectant mother. Unlike FMLA leave upon or after the birth of a child, leave taken prior to the birth can be taken on an intermittent basis. For example, a male employee's wife is pregnant; her doctor orders bed rest for one month. The employee/husband asks for every Thursday and Friday off for one month to care for her. This intermittent schedule is appropriate under FMLA.

Prior to the placement or adoption of a child, an employee may be absent from work to attend events such as court appearances, interviews, counseling sessions, attorney-client meetings, to undergo physical examinations, and the like. Time off associated with these events will count as FMLA leave, provided the employee is otherwise eligible, and such FMLA leave may be taken on an intermittent basis.

The need to take leave for the birth of a child, to care for a newborn child, or for the placement or adoption of a child applies to both male and female employees. Thus, a father, even an unwed father, can take FMLA leave for the birth of his son or daughter.

Foster care to adoption

Foster care is the 24-hour care for children in substitution for, and away from, their parents or guardian, where placement is made by or with the state's agreement or pursuant to a voluntary agreement between the parent or guardian. What happens when an employee has a foster child placed in her home and then later adopts the child? Is the employee entitled to 12 weeks of FMLA for both events? According to the DOL the answer is no. In 2005, the DOL issued an opinion letter concluding that an employee is entitled to FMLA only for the foster care placement. The DOL focused on the regulations which allow for FMLA when a child is "newly" placed for adoption or foster care. In this situation, the child is "newly" placed for foster care, not the subsequent adoption.

Sick leave

An eligible employee is entitled to take FMLA leave for his or her own serious health condition or for the serious health condition of a spouse, son, daughter, or parent. A parent-in-law is not covered.

The employee's serious health condition must render the employee unable to perform his or her position. This requirement is met when the employee's health care provider indicates that the employee is unable to work at all or is unable to perform any one of the essential functions of his or her position. The same job descriptions utilized by the employer under the ADA may also be utilized under the FMLA in

assisting the health care provider in making the determination as to whether the employee can perform the essential functions of the job.

For the employee to take FMLA leave for the serious health condition of his/her family member (son, daughter, parent, or spouse), the requisite health care provider certification form requires the employee to explain why he or she is needed to care for the family member. "Needed to care for" involves a variety of situations, such as providing basic medical, hygienic, or nutritional needs, providing transportation for the family member, or providing psychological comfort or reassurance to the family member. This term also includes the times when the employee is needed to serve as a substitute for other persons who are caring for the family members or to make arrangements for care of the family member (for example, a nursing home interview). The new regulations make clear that the employee need not be the only person available to care for the family member.

An employee's own serious health condition or that of a family member may require the employee to take leave on a consecutive basis (for example, 12 weeks in a row) or on an intermittent basis or reduced leave schedule.

Spouses working for same employer

When a husband and wife work for the same covered employer and are both eligible for FMLA leave, the FMLA provides different rules as to the use of FMLA. The husband and wife are limited to a **combined** total of 12 weeks of leave when leave is taken:

- for the birth of the employees' son or daughter or to care for the child after birth

  or

- for the placement of a son or daughter, for adoption or foster care, or to care for the child after such placement

  or

- to care for the employee's parent who has a serious health condition

Under service member care leave, spouses working for the same employer are limited to a combined total of 26 weeks leave.

These rules apply when the husband and wife are employed by the same employer, even if they work at different worksites more than 75 miles apart. However, each spouse can take 12 weeks simultaneously for the serious health condition of a child or the other spouse. If the spouses each take a portion of the 12-week entitlement, they each are entitled to the difference between what was taken individually and 12 weeks. For example, if each spouse took six weeks for the birth of a child, each could use six weeks to care for a child, parent, or spouse with a serious health condition, or for the employee's own serious health.

Commonly asked questions and answers

Q. Who determines whether an eligible employee is unable to perform the functions of his of her job?

A. This determination is made by the employee's health care provider. Questions 7a and 7b on the Certification of Healthcare Provider Form reference an employee's ability to perform the essential functions of the job.

Q. If a pregnant employee is unable to work the last three months of her pregnancy and, thus, takes a leave of absence at that time, is an employer required to give her 12 weeks of FMLA upon the birth of her baby?

A. If an eligible employee takes FMLA leave prior to the birth of her child, such time off will count toward the 12-week entitlement under FMLA. Thus, if the employee uses 12 weeks of leave prior to the birth of her child, upon the birth of her child she has no FMLA leave left. However, keep in mind that if the employer utilizes the calendar year as the 12-month measuring period and the 12 weeks prior to the birth occurred at the end of one calendar year, the employee may be eligible for some FMLA upon the new calendar year.

Q. If an employee has a foster child in her home, is the employer required to grant FMLA leave when the foster child is sick?

A. A foster child is considered a son or a daughter under the FMLA. Thus, if the foster child has a serious health condition and the employee is eligible for FMLA leave, then FMLA must be granted under the circumstances.

Q. If the employee needs time off from work to care for an ill family member, but the employee will not be providing any medical care or treatment, is the employee entitled to FMLA leave?

A. An eligible employee may take FMLA leave when he or she is needed to care for a spouse, son, daughter, or parent who has a serious health condition. The phrase "needed to care for" is not limited to the providing of medical care or treatment. Certainly if the employee provides medical care to the ill family member, he/she is "needed to care for" the family member. However, "needed to care for" also includes providing transportation, providing psychological comfort or reassurance, making arrangements for care such as interviews in selecting a nursing home, and filling in for others who are caring for the ill family member.Q. What if an employee asks for time off to care for her ill grandmother whom she says raised her?

A. The employee is explaining that her grandmother stood *in loco parentis* (as a parent) to her when she was a child. If the employee so explains the relationship in this manner, she is eligible for FMLA leave, provided that the grandmother has serious health condition and the employee is otherwise eligible for leave.

Q. What if the employee is unable to prove this relationship with documentation?

A. In this *in loco parentis* example, the employee is unlikely to have documentation because many such relationships are handled outside the legal or courtroom setting. Moreover, the employee was likely raised by her grandmother many years ago. An employer would not be wrong to accept the employee's explanation as being true. The employer should document that the employee's request was to care for her grandmother who raised her, so that FMLA may properly be counted.

Q. Dealing with "adult children" issues is confusing. How is the best way to handle these issues?

A. When an employee states that he or she needs time off to care for an ill child, an employer is entitled to ask the age of the child. If the child is 18 or over, the employee is not entitled to FMLA leave unless the child is incapable of self care because of a mental or physical disability as defined by the ADA. The employer is entitled to ask questions relating to the child's condition, and the employee must provide this information. If the employee refuses to cooperate in these questions, the employer may deny FMLA leave and, of course, document the reasons why.