



What USW Activists Should Know About the Family Medical Leave Act

Participant Workbook



Workshop Agenda

Session 1 – FMLA Benefits

Session 2 – Eligibility Requirements

Session 3 – Qualifying Conditions

Session 4 – Leave Year Methods

Session 5 – Notification Requirements

Session 6 – Certification

Session 7 – Recertification

Session 8 – Return to Work

Session 9 – Appeal Process

Session 10 – Summary

FMLA Benefits

The Family and Medical Leave Act of 1993 provides the following benefits to eligible workers:

- 1) Up to 12 work weeks of unpaid leave in a 12 month period for:
 - a) Medical leave
 - b) Family leave
 - c) Childbirth/newborn care up to age one and
 - d) Adoption or foster placement leave¹

- 2) Leave may be taken continuously, intermittently or as part of a reduced schedule. However, leave may only be taken continuously for childbirth and newborn care.

- 3) During the leave, health benefits must be maintained by the employer – however, the employee is required to pay the employee share of the health benefits premium as if they were working.

- 4) The worker must be restored to her original position or its equivalent upon return from leave.

NOTE: FMLA leave is unpaid leave, however, in some cases workers may use accrued paid leave like sick or vacation time and can be required to use paid leave

¹ FMLA regulations limit leave for newborn or adoption/foster placement in the case of husbands and wives with the same employer. In those cases the employer may limit the couple to a combined total of 12 weeks.

while on FMLA leave. A worker who chooses to use paid leave while on FMLA must follow the same rules and policies under the employer's plan and/or the union contract as other workers who take such paid leave. In addition, the collective bargaining agreement may provide for additional benefits (expanded eligibility, additional paid leave, etc.) beyond what the FMLA provides.

Remember: If the employee is on FMLA leave, paid leave may be provided consistent with employer's policy and/or union contract. Also consistent with employer's and/or union contract, the employer may designate paid leave as FMLA leave and subtract up to 12 weeks of unpaid FMLA leave for any qualifying paid leave.

Eligibility Requirements

Worker Eligibility

To qualify for an FMLA leave, the worker must meet all of the following eligibility requirements:

1. Worked for the employer at least 12 months.
2. Worked at least 1,250 hours over the previous 12 months (based on actual time worked – vacation, workers’ compensation, union, disability, educational, and FMLA leave do not count and overtime does not count as time and one half).
3. Be employed at a worksite with at least 50 workers within 75 miles of the worksite.
4. Need the leave as a result of a serious health condition affecting the worker or the worker’s child, spouse or parent.

Who Qualifies As Family?

In the case of needing leave to care for a family member who is suffering from a serious health condition, the FMLA defines “family” to consist of the following:

- a. A biological, adopted, or foster child, stepchild, legal ward, or a child of a person standing in *loco parentis* (person with day-to-day responsibilities

to care for and financially support the child)² who is under 18 years old or incapable of self-care.

- b. A spouse as recognized by state law, however, this does not include domestic partners (FMLA coverage can be extended to include domestic partners through a union contract).
- c. a biological mother or father or an individual who stood in loco parentis to an employee when the employee was a child. It does NOT include in-laws.

Caring for a family member under the FMLA includes:

- Physical care
- Psychological care
- Needed to transport
- Arrange for long-term care
- Fill-in for someone who regularly cares for the family member
- Relocate family member to receive medical care.

² Under Federal Administrator's Interpretation NO. 2010-3 (June 22, 2010) a domestic partner (including a same-sex partner) who shares responsibility for the day-to-day care of his/her partner's child would qualify as a parent under FMLA.

Qualifying Conditions

The worker or the family member being cared for needs to be “incapacitated” from a “serious health condition.”

Incapacitation means:

- inability to work,
- attend school, or
- perform other regular daily activities

because of a serious health condition or treatment for or recovery from a serious health condition.

“Inability to Work” means:

The employee cannot perform any one of the essential functions of the position within the meaning of the ADA (Americans with Disabilities Act).

A serious health condition means:

A health condition that meets one of the following 6 requirements:

1. An overnight stay in a hospital, hospice, or residential medical care facility; OR
2. An incapacity for more than 3 consecutive calendar days that requires two or more visits to a health care provider – with 1st visit occurring within 7 days of the incapacity and 2nd visit within 30 days -- or a single visit that results in a regimen of supervised treatment (commonly a course of prescription medicine); OR
3. An incapacity due to a serious chronic disorder that:
 - a. Continues over an extended period of time,
 - b. Requires periodic visits (at least 2 per year) for treatment by a health care provider, AND
 - c. Causes or may cause episodic periods of incapacity; OR
4. An incapacity due to pregnancy;³ OR
5. A long-term or permanent disability; OR

³ FMLA regulations specifically state that an expectant mother is entitled to leave for incapacity due to pregnancy even if she does not receive treatment from a health care provider during the absence and the absence does not last for more than three consecutive calendar days. The regulations give as an example a pregnant employee unable to report to work because of severe morning sickness.

6. An absence to receive multiple treatments for restorative surgery after an injury or to prevent an incapacity of more than 3 consecutive days.

CONDITIONS GENERALLY NOT CONSIDERED

SERIOUS (unless complications arise that meet one of the six criteria above):

- Routine physical examinations
- Eye exams
- Dental exams or treatments
- Taking o-t-c medication
- Cosmetic surgery
- Common cold, flu, earache, minor ulcer, hay fever, upset stomach, poison ivy, food poisoning, non-migraine headaches
- Absence due to abuse of substance (versus treatment for substance abuse).

Exercise 1: Does My Condition Qualify for Leave Under FMLA?

1. I have a skin infection that required me to stay home for five days. I saw my physician and he prescribed an antibiotic.
2. I regularly work out by swimming several nights a week at my gym. I developed an ear infection and my physician prescribed an antibiotic. The infection has left me without my usual energy so I'd like to work part-time until the infection clears up.
3. I badly strained my back doing yard work at home. My doctor says I have a pinched nerve that will require monitoring and eventually surgery. I find that I can generally do my desk job but there are some days that the pain requires me to stay in bed a day or two every other month.
4. I was in a car accident that rendered me unable to work for three weeks. I took FMLA leave for those three weeks and then returned to work full-time, even though I must attend physical therapy sessions once a week. I have tried to schedule these appointments after work but I haven't been able to get an appointment for any time other than during regular work hours.
5. I was in a car accident and suffered painful whiplash. I saw my doctor and was incapacitated two days the week of the accident and five separate days over the next four weeks.
6. My psychiatrist is treating me for severe anxiety. My supervisor yelled at me in front of everyone else in the office and I couldn't leave my house for two days.

7. I was in a car accident heading home after work on a Thursday. I suffered painful whiplash and was given a prescription for painkillers and told to stay in bed through Monday. I reported to work on Tuesday but was incapacitated five separate days over the next four weeks.

8. I suffered some chest pains last Sunday and had my wife take me to the emergency room. I was released that same day after receiving a battery of tests and told it was likely indigestion. I called in sick the next day, Monday, and my employer wants to charge me a day of FMLA for this absence.

9. I'm a recovering alcoholic but recently went on a three-day binge starting on Good Friday (a paid holiday under my union contract) that left me incapacitated Monday, Tuesday, and Wednesday morning.

10. I'm three months pregnant and under a doctor's care for my pregnancy. I recently reported to work late because of morning sickness.

Exercise 2: Can I Take FMLA Leave To Care For My Family Member?

1. My five-year old granddaughter lives with me because my daughter is an unwed mother in prison. My granddaughter recently had a tonsillectomy that required an overnight hospital stay. Can I take FMLA leave to care for her at home while she recovers?
2. My 24-year old son suffers from severe mental retardation and requires constant care. My mother has been living with me and caring for him but recently she needed some time off to visit family out of state. Can I take five days of FMLA leave to care for my son?
3. My five-year old son has the flu so I can't leave him at daycare this week. Can I take FMLA leave to stay at home this week to take care of him?
4. My husband's 90-year old father suffers from Alzheimer's. We're in the process of moving him to an assisted-living facility. Can I charge two days of FMLA leave to assist my husband in moving him to the home?
5. My same-sex partner and I are raising my partner's five-year old son who suffers from epilepsy. My partner recently changed employers and therefore must wait a year to take FMLA to care for her son when he suffers from seizures. Would I be able to take FMLA leave to act in her place if he should suffer a seizure?

6. My wife and I work for the same employer. We're about to adopt a child. Can each of us take turns taking 12 weeks of FMLA leave following the placement?

7. My wife and I work for the same employer. We about to adopt a child. Following the placement can each of us take turns taking 2 weeks of FMLA leave at a time for a total of 12 weeks?

8. My union contract provides for 16 weeks of maternity leave. Does FMLA reduce this to 12 weeks?

9. After my father recently suffered a heart attack I was able to arrange part-time care for him. Can I take a reduced schedule from my full-time shift to part-time to care for him?

10. My girlfriend is expecting my child. Would we have to get married in order for me to charge FMLA leave for new-born care when the baby arrives?

Leave Year Methods

Under the FMLA the 12-month period during which an eligible employee may take their 12 weeks of leave must be defined by one of the following methods:

1. The regular calendar year.

This is the simplest method. Under this method eligible employees may take up to 12 weeks FMLA leave between January 1 and December 31 of the year.

2. Any other fixed 12-month period.

This method works the same way as the calendar year, but using a different 12-month period (for example, July 1st through June 30th).

3. Measured forward 12 months from the first use of FMLA leave.

This method is more complicated because every employee's leave year will be different. Under this method each employee's leave year begins the first time he or she takes FMLA leave.

4. Measured backward 12 months from each date FMLA leave is needed.

Under this method the leave year is measured by the 12-month period prior to each day the employee requires leave. This method is particularly disadvantageous to the employee for two reasons:

- a. It requires employees who take a full 12-weeks of continuous leave to wait a year and three months before qualifying for another 12 weeks (on the one-year anniversary of the employee's first day of leave she'll have one day of FMLA available to her; on the following day she'll have two; and so on, until 3 months have passed and she's amassed a full 12 weeks).
- b. It eliminates any chance of an employee having more than twelve weeks of leave within a 12-month period as in the case of an employee who takes FMLA leave during the latter part of the leave year period.

NOTE: Leave year periods are mandatory subjects of bargaining under the National Labor Relations Act and therefore any changes in an employer's leave year method (particularly those that disadvantage employees) require that the union be notified and given the opportunity to bargain before the new method can be implemented.

Notification Requirements

Employee Obligations

- If the leave is foreseeable 30 days or more in the future, the worker must give at least 30 days advance notice which
 - can be verbal or written BUT
 - must include date leave is to begin, how long and why leave is needed.
- If 30 days notice can't be given, the employee must tell the employer "as soon as practicable." This generally means the same day or the next business day but taking into account all the facts and circumstances.
- The notice must clearly state that a serious health condition is involved or that the leave is for a qualifying purpose such as newborn care. It is not necessary to mention the FMLA by name.
- Absent unusual circumstances, a worker must follow the employer's regular notice requirements for requesting leave.

Employer Obligations

- Display FMLA posters.
- Describe the FMLA in employee handbooks and benefit documents.
- Provide employees who request FMLA leave with an eligibility notice within five business days of the request.
- Provide employees who are eligible for requested FMLA leave a rights and responsibilities notice that includes the 12-month leave year as well as any additional information the employer requires such as medical certification.
- In the case of a request for paid leave that qualifies as FMLA leave provide notice to the employee that the employer intends to count the paid leave against the employee's available FMLA leave.

Certification

When FMLA is being taken, the employer has the right to demand certification, signed by a health care provider, verifying that the worker or the family member suffers from a serious health condition and needs a period off or an intermittent or reduced work schedule.

Basic Certification Rules

- If Employee doesn't get certification, FMLA leave can be denied.
- Employer must ask for certification in writing and advise of penalty for non-compliance, within the first 5 days after employee gives notice of FMLA leave.
- Employer can use their own form or DOL form for certification.
- Employee has 15 days to complete certification, with an additional 7 days to provide any incomplete information.

Who can certify a serious health condition?

- doctors of medicine or osteopathy
- podiatrists
- dentists
- clinical psychologist
- optometrists
- chiropractors (with limitations)
- state-licensed nurse practitioners

- nurse-midwives
- clinical social workers
- physician assistants
- Christian Science practitioners
- any health care provider who is able to certify serious health conditions to substantiate benefits claims under the employer's group health plan.

Employer's Right to Contact Healthcare Provider for Medical Information

In order to clarify or authenticate the certification, and after giving the worker at least seven calendar days to provide the needed information, the employer may directly contact the Health Care Provider (HCP)
BUT . . .

1. The employer must use a health care provider, a human resources professional, or a leave administrator or management official to make the contact – under no circumstances may the worker's direct supervisor make the contact.
2. A worker who chooses not to consent to management's contacting the provider through a HIPAA release risks being denied FMLA leave.
3. The worker's release should be limited to information about the condition for which she is applying for FMLA.

Second Opinions

An employer who has reason to doubt the accuracy of a medical certification can require a worker to be examined by a second health care provider at its own expense BUT. . .

1. The provider may not be on the employer's regular payroll or do regular business with the employer.
2. If the second opinion conflicts with the original provider's opinion, the worker may be required to attend an examination by a third party health care provider at the employer's expense. The third party is chosen jointly by the worker and the employer.
3. **IF THE EMPLOYER DOES NOT UTILIZE THE SECOND AND THIRD OPINION PROCEDURE THE EMPLOYER MAY NOT REJECT THE ORIGINAL COMPLETED MEDICAL CERTIFICATION.**

Recertification

If a worker continues to be absent for a condition, an employer can, under the following rules, ask the worker to recertify the condition:

- 1) If the minimum period of continuous incapacity on a previous certification is more than 30 days, the employer may not request recertification during this period unless:
 - a. The worker requests an extension of leave;
 - b. Circumstances described by the previous certification change significantly; or
 - c. The employer receives information that casts doubt on the reason for the worker's absence.

- 2) In the case of a chronic condition, the employer may not ask for recertification unless:
 - a. An absence occurs and a previous certification is more than 30 days old;
 - b. Circumstances described by the previous certification have changed significantly; OR
 - c. The employer receives information that casts doubt on the reason for the worker's absences.

- 3) If the provider certifies a need for intermittent leave or a reduced schedule and indicates a minimum period, the employer may not request recertification in less than the period specified unless one of the conditions set forth in rule #1 above applies.
- 4) Where no minimum period is indicated or the period is in excess of 6 months, an employer may request a recertification every six months in connection with an absence.
- 5) In other circumstances, the employer may not request recertification more often than every 30 days, unless one of the conditions in rule #1 above applies.

Note: A sick-pay or disability-insurance plan can require employees to submit more frequent recertifications and employers can require new certification each time a new leave year begins.

Return to Work

When a worker returns from her approved FMLA leave, she must be returned to her old position, or to a position equivalent to her old position. For a position to qualify as equivalent it must satisfy the following:

- a) Pay, benefits, working conditions, privileges, and status must be virtually identical.
- a) Skills, efforts, responsibility, and authority must be substantially equivalent.
- a) Duties must be substantially similar.

Fitness For Duty Requirements

An employer can require employees to submit a Fitness for Duty Report but with the following restrictions:

1. The employer must give the employee notice when he or she takes FMLA leave that a Fitness for Duty Report is required before returning to work.
2. The report need only state that the worker is able to return to work, but the employer may require that it address ability to perform the job's essential functions.
3. Management may not call the worker's health care provider to discuss the report without the worker's permission.

4. A report cannot be requested after leave for newborn care, adoption, foster placement, family leave, or if the worker has been absent on an intermittent basis and no reasonable job safety concerns exist. Also, if the terms of a collective bargaining agreement govern the employee's return to work, those provisions shall be applied.

Adverse Treatment Prohibited

Under FMLA a worker may not be treated in any adverse manner because he or she took FMLA leave. This means the employer may not:

- Reduce the worker's overtime assignments.
- Order the worker to work extra hours.
- Change the worker's vacation schedule.
- Transfer the worker to an area with a smaller workplace.
- Assign the worker more difficult work.
- Harass the worker.
- Give the worker a poor evaluation.
- Deny the worker a non-FMLA leave, such as union or educational leave.

Enforcing the FMLA

In the case of possible violations of the FMLA members have the following options:

- Contact your shop steward to determine if a grievance should be filed.
- Contact your Local's Civil Rights Committee/District coordinator.
- File a complaint with U.S. Department of Labor or file a private lawsuit against the employer within two years (three years if the violation was willful).

FMLA Case Study

Since June 15, 2000 Jose Ramos has worked full-time at Fancyfootwork, Inc., a mid-size fabrication plant employing 250 workers which uses the calendar-year method of defining the FMLA leave year. On June 11, 2010, he was injured on the job and unable to work. At the time of his injury he had not taken leave of any kind that calendar year. Within five business days of the injury he received a notice from his employer designating his time off work as FMLA leave and informing him that he must present a fitness-for-duty report before returning to work. On Monday, August 30, 2010, after missing 55 working days, he returned to work.

One month later his father, who lives in another city six hours away, suffered a stroke and required Jose's help immediately. Jose called his supervisor to tell him what had happened and immediately left town to be with his father. A week later he phoned his supervisor to say that he would need another week to care for his father before he could return. When he returned a week later, after missing ten days of work, he received a disciplinary notice for absenteeism citing the company's attendance policy of issuing discipline to anyone who has ten or more absences within a six-month period. Jose's union contract does not provide for any family leave, paid or unpaid.

- 1) What protection, if any, would the FMLA provide Jose from being disciplined for this latest absence? Would he have any other possible defense, apart from the FMLA?
- 2) A month later Jose moves in with his girlfriend who's due to have their child within the next four weeks. Can Jose take FMLA leave to be with his newborn, and if so, when is the soonest he can take this leave and how much is available to him?

3) If Jose is eligible to take FMLA leave to be with his newborn, would this in any way affect the amount of FMLA available to him if his father should suffer another stroke a year after his first?

Summary

- ✓ FMLA Benefits
- ✓ Eligibility Requirements
- ✓ Qualifying Conditions
- ✓ Leave Year Methods
- ✓ Notification Requirements
- ✓ Certification
- ✓ Recertification
- ✓ Return to Work
- ✓ Enforcing the FMLA

