

# Welcome

Employee benefit laws change rapidly —  
UBA Partner Firms help their clients stay one step ahead  
with ongoing expert compliance resources.

This webinar is intended to provide general compliance information regarding employee benefits laws. Please consult your legal advisor for specific legal advice.



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# Navigate Your Way Through FMLA



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# Agenda

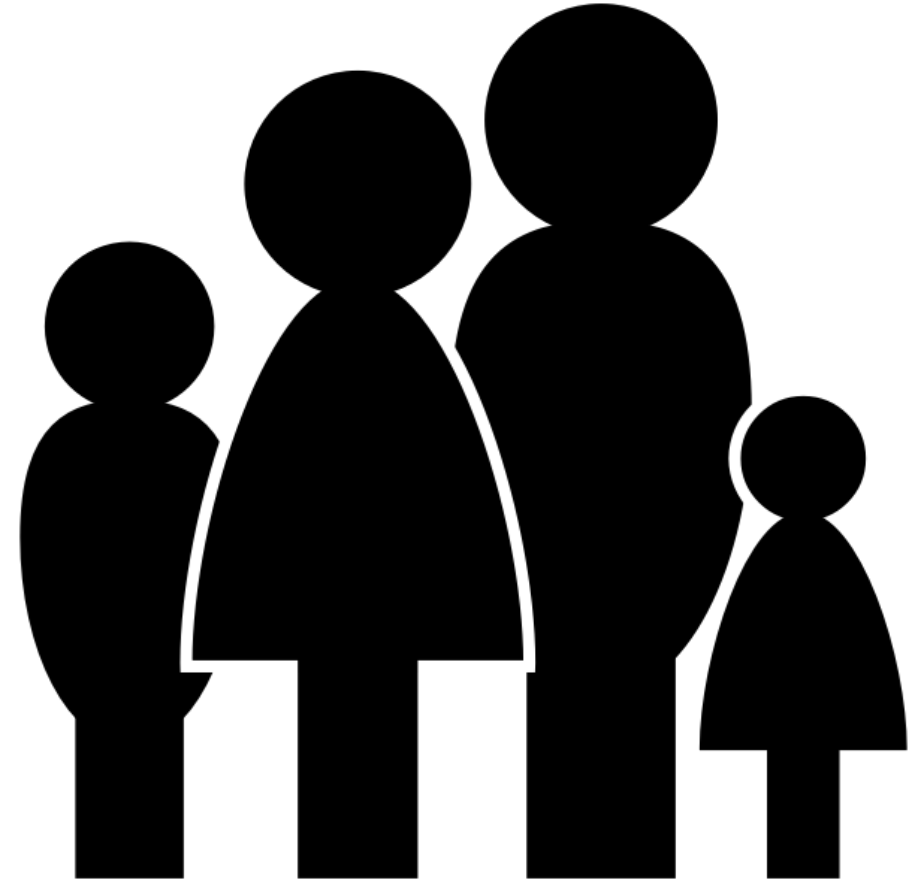
1. Background
2. Who is Affected
3. Reasons for Leave
4. Managing Benefits During Leave
5. After Leave is Over

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# FMLA Generally

- Employee entitled to leave based on qualifying reasons
- Duration
  - 12 weeks per year in most instances
  - 26 weeks per year for military caregiver leave
  - Employer has several options for how to define a year
- Leave may either be unpaid or substituted paid leave
- Reinstatement
  - Employee must be restored to their position or a position with equivalent duties, pay, and benefits after FMLA leave has ended
- State law may give employees additional rights



# Who is Affected - Covered Employers

- Private sector employers must have 50 or more employees during 20 or more workweeks in the current or preceding year
  - Problems can occur with counting when dealing with:
    - Successor entities (one entity takes over another entity's business)
    - Multinational companies (employees outside the United States not counted)
    - Joint Employment (for example, at a temp agency)
    - “Integrated” employers (two employers being treated as the same employer)
- Public Sector
  - Includes federal, state, and local governments and their agencies
  - Public entities covered without regard to number of employees
  - Private schools are also covered without regard for number of employees





# Who is Affected – Eligible Employees



- Requirements for Employee
  - Must work for covered employer
  - Must have worked for employer for at least 12 months as of the date that FMLA leave is to start
  - Must have worked 1,250 hours of service during the 12-month period immediately before the date FMLA leave is to start
  - Works at a location where the employer employs 50 employees within 75 miles of that worksite
- Public agency and school employees must meet eligibility requirements as well

# Notice Requirements

- Requirements for Employer
  - General notice
    - Eligible employer must post a general notice (referred to as a poster, one is available on the DOL's website)
    - Poster must be in plain view and be large enough to be easily read.
  - If any employees are eligible, they must receive a written general notice.
    - This can be put in an employee handbook or other written materials about leave and benefits
  - Eligibility notice – When employee takes FMLA leave, employer must notify them of their eligibility to take FMLA leave within 5 business days.
  - Rights and responsibilities notice – Employer must give notice of expectations and consequences for failure to meet those obligations
  - Designation notice
    - When employee requests leave, employer is required to give a notice of the leave's designation as FMLA-qualified or non-qualified leave
- Requirements for Employee (when attempting to take leave)
  - Foreseeable leave – must provide notice when they know about need and it is possible/practical to do so
  - Unforeseeable leave – must provide notice as soon as possible and practical.



# Reasons for Leave – Generally

- Permitted reasons for FMLA
  - Serious health condition
    - of an employee
    - of an employee's family member
  - Birth of a child
  - Placement of a child with employee for adoption or foster care
  - Military leave
    - Qualifying exigency
    - Military caregiver



# Reason for Leave – Serious Health Conditions

- Leave must be granted for serious health conditions that make it impossible for employees to perform their jobs
  - The condition must fall into one of the FMLA's qualifying reasons for leave
  - Does not apply to routine medical examinations or common medical conditions like an upset stomach (unless complications develop)
  - Physical and mental health conditions are treated the same under this rule
- Leave must be granted for an employee to care for an immediate family member with a serious health condition
- Immediate family members include
  - Spouse
  - Parent
  - Child
    - More limited FMLA leave when the child is 18 or over
- Employer may ask for reasonable documentation of the qualifying family relationship

# Reason for Leave – Serious Health Conditions

Qualifying Reason	Description	Leave
Inpatient Care	Overnight stay in hospital, hospice, or residential medical care facility	Granted for any period of incapacity due to the underlying condition or any treatment in connection with the overnight stay
Incapacity Plus Treatment	Incapacity for more than 3 full consecutive days where (1) there was a doctor's visit within 1 week of the incapacity, and (2) either a second doctor's visit within 30 days or a recommended regimen of ongoing treatment (e.g. an antibiotic prescription, physical therapy)	Granted for as long as employee cannot perform their job, is being treated for the condition, or is recovering from the condition
Pregnancy	Any period of incapacity due to pregnancy or for prenatal care	Same as above
Chronic Conditions	Serious health conditions such as diabetes, asthma, or migraines. Requires visit to a health care provider at least twice per year and recurs over an extended period of time.	Granted for periods of incapacity associated with the condition or for treatment for the condition
Permanent or Long-Term Conditions	Period of incapacity which is permanent or long-term, where treatment may not be effective, but which requires constant supervision from a health care provider (e.g. Alzheimer's disease, terminal cancer)	Usually occurs in the context of an employee caring for someone else who has the condition.
Condition requiring multiple treatments	Restorative surgery after an accident or other injury, or a condition that would likely result in a period of incapacity of greater than three full consecutive days if the employee/employee's family member did not receive treatment (e.g. dialysis)	Granted for any period of absence needed to receive the treatment

# Reasons for Leave – Substance Abuse

- Covered under the FMLA if it qualifies as a serious health condition
- Absence because of use of a substance, as opposed to treatment, does not qualify for FMLA leave
- Employee may exercise FMLA rights to care for a covered family member receiving treatment for substance abuse
- Employer may take action against an employee for violating an established policy prohibiting drug use, regardless of whether the employee is taking FMLA leave
  - Policy must be applied in a non-discriminatory manner
  - Action cannot be taken against employee because employee exercised right to take FMLA leave for treatment



# Reason for Leave – Military Leave

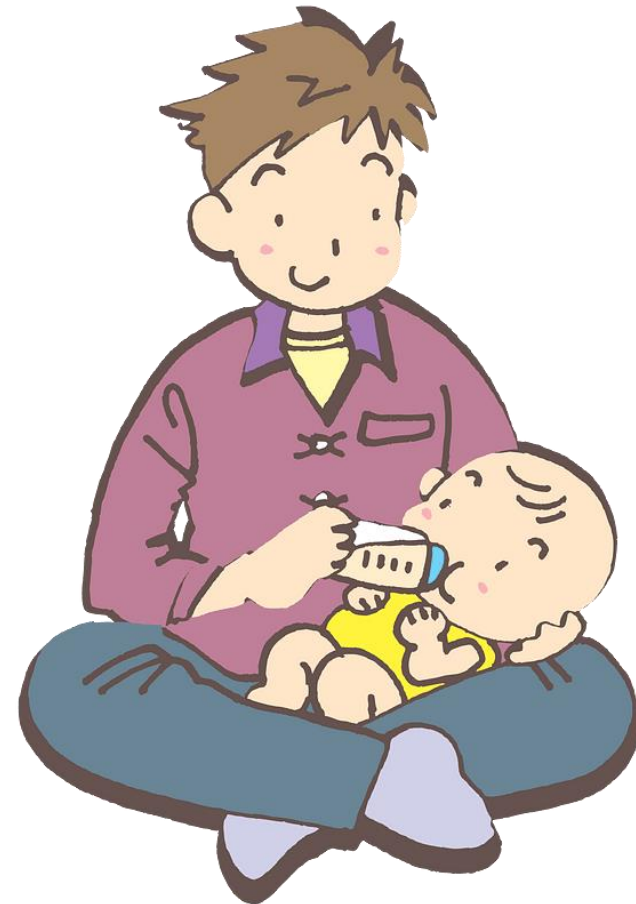


- Qualifying Exigency Leave – Any “qualifying exigency” arising from foreign deployment of employee’s spouse, child or parent with the US Armed Forces
  - Includes issues with deployment, counseling, military events (including official ceremonies), spending time with military member is on rest and recuperation leave, etc.
  - Qualifying exigency leave contingent on member of the armed forces being on covered active duty or being notified of an impending call or order to covered active duty
  - 12 weeks of qualifying exigency leave allowed under FMLA
- Military Caregiver Leave – Care for a covered servicemember or veteran with a serious illness or injury if the employee is the servicemember’s spouse, child, parent, or next of kin
  - Up to 26 weeks of military caregiver leave allowed under FMLA
  - Total number of weeks of leave allowed under FMLA will not exceed 26



# Reasons for Leave – Birth of a Child

- Can be taken for birth or to bond with the child
- Can be taken within one year of birth
- Can be taken by either mother or father
- When two employees work for the same covered employer, the employer can limit the total FMLA leave taken by both parents for this reason to 12 weeks
  - Example – Mom and Dad both work for same company. Mom and dad each take six weeks of FMLA leave to bond with the baby. Mom and dad each have six weeks of FMLA leave left, but the employer is not required to give them more FMLA leave to bond with the baby.





# Reasons for Leave - Adoption

- This can include court dates, consultations with attorneys, travel to another country, or any other absence that is required.
- Source for the adopted child does not matter (easy or difficult adoptions subject to same rules)
- When two parents of an adoptive child work for the same covered employer, the employer is only required to grant them a total of 12 weeks of FMLA time off to care for the child after placement (similar to limit for a birth of a child)



# Certification Requirements – In General

- Employer may request certification for
  - Leave for an employee's serious health condition, or that of their family members
  - Military family leave (either qualifying exigency or caregiver leave)
  - Employer may not request certification for a healthy newborn or adoption, but they may request documentation to confirm the family relationship.
- For serious health injury
  - Employer is allowed to require certification of a serious health condition of the employee or employee's spouse, parent, or child, at employee's expense
  - Certification includes paperwork completed by the employee and the employee's healthcare provider
- For Military Family Leave
  - Qualifying Exigency – Employer is allowed to request documentation on the exigency and may contact the DOD for verification
  - Military Caregiver – Employer may require certification from DOD, VA, TRICARE, or by a private health care provider.

# Certification Requirements – After Submission for Serious Health Conditions

- Employer may require employee to cure insufficient or incomplete certification
  - This includes certification that does not provide required information (incomplete) or provides information that is overly vague or non-responsive (insufficient)
  - Employer is required to give employee written notice stating what additional information would make the certification complete/sufficient and give the employee at least 7 days to fix the problems.
- Employer may contact the healthcare provider to clarify or authenticate the certification
- Employer may request recertification every 30 days
- Employer may require a second medical opinion, at employer's expense, if the employer doubts the validity of the certification of the serious health condition
  - Third opinion may be required (at employer's expense) if second opinion differs from the first
  - For Military Caregiver Leave, employer cannot require second or third opinions unless the healthcare provider is private

# Certification Requirements – Actions After Certification

- Employer must notify employee, in writing, whether their leave is or is not FMLA protected
- Fitness for duty certification – employer may require certification from health care provider that the employee is able to resume work as a condition for restoring the employee to their position after they take FMLA leave for a serious health condition



# Coverage During Leave – Group Health Plan



- Group Health Plan is broadly defined
  - Most health plans offered by employers will be considered group health plans
- Group health plans get more protections than other types of benefits

# Coverage During Leave – Group Health Plan (cont.)

Type of Plan	Group Health Plan Under FMLA
Medical or health insurance plan (including self-insured plans)	Yes
Dental, vision, prescription drug plans	Yes
Health FSA	Yes
Employee Assistance Plan	Yes (if it provides medical care)
HSA Plan	Unclear
Life Insurance	No
Accidental Death and Dismemberment Insurance	No
Disability Insurance	No
Dependent Care Assistance Program	No
Individual Insurance Policies	Yes, unless certain safe-harbor requirements are met.



# Coverage During Leave – Group Health Plan (cont.)

- Employer must maintain employee's coverage under any group health plan as if the employee had been continuously employed during the leave period
  - If the employment relationship would have terminated regardless of FMLA leave, then employer may terminate employee's health insurance (this can trigger COBRA, but is not guaranteed to)
- Employee is entitled to new health plans or changes to health benefits or plans while employee is on FMLA leave to the same extent that they would be if they were not on FMLA leave
  - Any changes an employee is permitted to make to the group health plan while employed must be permitted during FMLA leave
  - Employer must give notice of benefits changes to employee while employee is on FMLA leave
  - During FMLA leave, employee's open enrollment rights still apply

# During Leave – Maintenance of Other Benefits

- Employee's entitlement to benefits other than group health benefits during a period of FMLA leave is determined by the employer's established policy for providing these benefits when the employee is on other similar forms of leave
- Example – when determining whether an employee on FMLA leave would receive holiday pay, determine whether employees on similar types of leave would receive holiday pay and apply the same rule to the employee on FMLA leave



# During Leave – Payment of Premiums



- For group health plan
  - In instances where FMLA leave is substituted paid leave, employee's share of premiums must be paid as usual (e.g., using a payroll deduction)
  - In instances of unpaid leave, employer may require employee's payment to be made to the employer or the insurance carrier
    - Employer cannot charge for administrative expenses
    - Payments may be scheduled in a number of permissible ways (see 29 CFR § 825.210(c))
    - Employer and employee may agree to prepayment of premiums when the need for FMLA leave is foreseeable, but the employer cannot require it
  - If the employee fails to pay premiums, the employer may drop coverage subject to certain notice requirements (listed in 29 CFR § 825.212)

# After Leave – Reinstatement of Benefits and Recovery of Costs

- Employee required to be restored to an “equivalent position,” which includes equivalent benefits
  - Employer cannot require employee returning from FMLA to requalify for benefits that lapsed while on FMLA leave
- If employee does not return
  - Employer may recover employer’s share of premiums during a period of unpaid FMLA leave if employee fails to return to work after their FMLA leave has either been exhausted (more than 12 weeks’ leave) or expired (underlying condition vanished)
    - If employer elects to do this, employee is indebted to employer for the amount of the premiums employer paid
    - In instances where paid leave is substituted for FMLA leave, employer may not recover premiums that it paid during the period covered by employee’s paid leave
- If the employer elected to maintain employee’s other benefits (life insurance, disability insurance, etc.) by paying employee’s share of the premiums while employee was on leave, the employer is allowed to recover those costs, regardless of whether the employee returns

# After Leave – Reasons for Denial of Reinstatement

- Denial of reinstatement can occur due to non-discriminatory changes to employee's position
  - If employee's position was eliminated due to layoffs, employee is not entitled to restoration of job
  - If employee's position or benefits were changed, employee would be entitled to return to their position subject to the enacted changes
  - Seasonal/term employment – term expires during FMLA leave
- Grievous economic injury – employer may deny restoration to salaried key employees if such denial is necessary to prevent substantial/grievous economic injury to the operations of the employer.
- Delayed restoration allowed for employees who fail to provide a fitness-for-duty certification
- Employee is unable to perform an essential function of their position due to a physical or mental condition (including any that were the reason for their FMLA leave)

# After Leave – Reasons for Denial of Reinstatement (cont.)

- Fraud
  - FMLA does not protect restoration of job or maintenance of health benefits when leave was obtained fraudulently
- Moonlighting
  - Employer may enforce uniformly-applied policy governing outside or supplemental employment during FMLA leave. However, employer may not deny FMLA benefits for this reason in the absence of such a policy (unless FMLA leave was obtained fraudulently)





# Interactions with Other Laws - COBRA

- FMLA leave can be a qualifying event under COBRA in the following circumstances
  - Employee, spouse, or dependent child was covered on the day before the first day of FMLA leave or becomes covered during FMLA leave under the employer's group health plan
  - Employee does not return from FMLA leave
    - This includes if coverage lapses (for instance due to nonpayment of premiums) while employee is on FMLA leave
  - Employee, spouse, or dependent child would lose coverage under the group health plan in the absence of COBRA
    - COBRA coverage does not begin until group health coverage is actually lost
- If employer eliminates group health plan coverage for a class of employees while employee is on FMLA leave, no qualifying event occurs.
- State and local laws may affect the benefits that may be given



# Interactions with Other Laws – Workers' Compensation/Disability Insurance



- On-the-job injury or illness may also qualify as a serious health condition under FMLA. If it does, employer may designate leave as FMLA leave, in which case FMLA leave and workers' compensation leave will run concurrently.
  - Light duty – Employer may offer light duty under workers' compensation rules. Under FMLA, employee is not required to accept it.
    - Employee not accepting light duty may continue on FMLA protected leave but may lose workers' compensation benefits
- Disability Insurance
  - FMLA and disability benefits may run concurrently if the employee qualifies for both (employer must designate leave as FMLA leave)
  - Employee may be eligible for one but not the other
  - LTD and STD submission process may be separate from FMLA submission process

# Q&A



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