



BENEFIT *Advisor*

In This Issue

In this fourth issue of the McGraw Wentworth Benefit Advisor for 2007, we will tackle the Family Medical Leave Act (FMLA). The FMLA has been in effect for over a decade and employers are struggling to manage these leave provisions.

The law seems straightforward, but it impacts many human resource functions. The law does not provide clear guidance in all the employment areas it ultimately affects. This Advisor will address the key provisions of the FMLA. New FMLA regulations are expected in the next year and hopefully they will clarify the areas that employers are struggling with.

We welcome your comments and suggestions regarding this issue of our technical bulletin. For more information on this Benefit Advisor, please contact your Account Manager or visit the McGraw Wentworth web site at www.mcgrawwentworth.com.

“Family Medical Leave Act”

The Family Medical Leave Act (FMLA) became law on August 5, 1993. Although the goal of the law is rather simple, to provide 12 weeks of unpaid leave during a 12 month period for certain family needs, the effect of this law has been far-reaching. What’s more, the FMLA’s lack of clear guidelines has created confusion.



This *Benefit Advisor* explains various FMLA key requirements, including:

- Covered employers and employees
- Reasons for leave
- Determining 12 weeks in a 12 month period
- Key communication steps
- Continuation of group health benefits
- Re-employment process
- Intermittent leave

The FMLA is intended to protect employees’ jobs when they need to take unpaid leave for a qualifying reason. The FMLA also allows these employees continued access to their group health plan coverage under the same terms as active employees.

Employers struggle to comply with the FMLA. The Department of Labor (DOL) has been rumored to be releasing new

guidelines over the last three years. After asking employers and administrators for comments at the end of last year, the DOL received 15,500 responses during a two-month period.

The sheer volume demonstrates the frustration employers are feeling. The government has a tremendous number of issues to resolve before it releases final regulations. It is likely the new regulations will be released next year. These new regulations should ease employers’ frustrations in administering the FMLA.

Covered Employers and Employees

To be subject to the FMLA, private sector employers must have 50 or more employees in 20 or more work weeks in the current or previous calendar year. When an employer has multiple locations, each location must have at least 50 employees within a 75 mile radius for that location to be subject to the FMLA.

For example, if an organization has a corporate office and a manufacturing plant located within 5 miles of each other and each employs 40 people, the organization would be subject to the FMLA. Overall, the

organization has 80 employees, which exceeds the 50 employee threshold and although they are split 40 employees at each location, the locations are within 5 miles of each other, so they meet the 50 employees within a 75 mile radius requirement.

Your organization may have some locations subject to the FMLA and others that are not. For example, if your organization has 600 employees in Michigan and another 10 employees in Montana, the Michigan location is subject to the FMLA but the Montana location is not. You can extend FMLA protections to the Montana location, but these protections would not be required under federal law.



Public agencies, governmental employers and local educational agencies, however, are all subject to the FMLA, regardless of the number of people they employ.

Organizations subject to the FMLA must extend FMLA protections to all workers employed for a total of at least 12 months. The regulations clearly state, however, the 12 months need not be consecutive. Also, time spent in a temporary position counts in determining FMLA eligibility when temporary employees move to permanent positions.

Once the 12 month employment threshold is passed, the employee must meet a second FMLA requirement. The employee must have worked 1,250 hours in the 12-months before the request for leave. Employees must satisfy both requirements to qualify for an FMLA leave.

Employers are not required to protect the jobs of key employees in certain situations. A key employee is a salaried employee who is one of the highest 10% paid at their specific worksite. For these employees, employers must offer FMLA leave rights, but they are not required to reinstate their jobs if it would cause the employer "substantial and grievous" economic injury. Unfortunately, the FMLA does not define "substantial and grievous" economic injury.

Employers need to follow a specific process when they manage a key employee's FMLA leave:

- They must identify the employee as a key employee when they respond to a leave request.
- They must also notify the employee at the beginning of the leave that the company is not obligated to reinstate the position.

- They must allow the employee to decide against taking the leave if the employee is concerned about losing his or her job.
- They must review the position when the key employee's leave ends to determine whether they can reinstate the employee without causing substantial and grievous economic injury.

Finally, under the FMLA a husband and wife working for the same company are limited to 12 weeks total leave in a 12 month period for the birth or adoption of a child or to care for an immediate family member with a serious health condition.

Reasons for Leave

The reason for the leave must also meet FMLA guidelines. The following leave reasons are acceptable:

- **Employee is having a child:** leave must end within 12 months after the child is born. The 12 weeks do not need to follow the birth of the child. For example, if an employee is on bed rest four weeks before her child is born, those four weeks can count toward the 12 weeks permitted.
- **Employee is adopting a child or taking in a foster child:** as with the birth of a child, the 12 weeks must end within 12 months after the child is placed.
- **Employee needs to care for an immediate family member with a serious health condition:** An immediate family member is defined as a spouse, son, daughter or parent. In-laws are not considered

NOTABLE THOUGHTS

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immediate family members. However, individuals acting as parents before a child turns 18 are considered immediate family members. Therefore, even though grandparents are not technically immediate family members, grandparents who raise a grandchild, would be considered immediate family members.

- **Employee has a serious health condition:** Employees with a health condition so serious that they cannot perform the functions necessary for the position.

In most cases, it is fairly easy to determine whether the reason for the leave qualifies. However, in many other situations determining whether the reason for the leave meets FMLA requirements may be much more difficult.

If an employee requests a leave because of a serious health condition, an employer can require proof of that condition. The DOL has a model form employers can use for this purpose. Employers are not required to use the model form, but they cannot ask for any more medical information than the DOL form requires.

The FMLA defines a "serious health condition" as an injury, illness, or physical or mental impairment that falls into any of the categories below:

- The employee is incapacitated and requires inpatient care in a hospital, hospice, or residential medical care facility and subsequent treatment for that condition.
- The condition requires continuing treatment defined as follows:

- The employee cannot work for more than 3 consecutive days.
 - The employee is treated by a health care provider on two or more occasions; **or**
 - The employee is treated by a health care provider on one occasion, and requires continuing care, which could be as simple as taking a prescription medication.
- The employee is incapacitated because of pregnancy or prenatal care.
 - The employee is incapacitated because of a chronic condition that:
 - Requires periodic treatment by a health care provider.
 - Is treated regularly and can include recurring episodes of the underlying condition.
 - May cause episodes of poor health rather than continued incapacity, such as diabetes, asthma or other chronic conditions.
 - The employee needs treatments that would cause a period of incapacity of 3 or more days if treatment as not received.



Care for the serious health condition of a family member does not always mean physical care. For example, if the family member is an inpatient at a hospital, hospice or skilled nursing facility, professionals would provide physical care. In these instances, the employee can

use the leave to provide emotional support.

If the immediate family member dies, the reason for the employee's FMLA leave no longer exists and the FMLA leave ends. At this point, your organization's bereavement leave provisions apply.

The employer can require proof of a serious health condition before agreeing to grant an FMLA leave. Employers requiring such proof need to allow employees at least 15 days to complete a questionnaire proving the condition is serious.

Once the employer receive the serious health condition questionnaire, if there is a doubt about its validity, the employer can require a second opinion. The employer can choose the physician and must pay

for the visit. The physician cannot be a company employee.

If the second opinion differs from the first opinion,

the employer can require the employee to seek a third opinion. The employer and the employee then must choose the physician together and the employer must pay for the visit. The opinion of the third medical provider is the tie-breaker. If the third opinion agrees with the first, as stated in the questionnaire, the employer needs to approve the FMLA leave. If the third opinion agrees with the second opinion, the employer can deny the FMLA leave.

Determining 12 Weeks In A 12 Month Period

Employees are permitted 12 weeks of leave in a 12 month period; this 12 month period is referred to as the "leave year." Employers need to disclose how they are calculating the leave year in their FMLA policy and administer the leave year consistently.

The FMLA allows four definitions of a leave year:

1. **12 Month Rolling Forward:** From the first day of the leave, the employer would roll forward 12 months and that 12 month period would constitute the leave year.
2. **12 Month Rolling Backward:** From the first day of the leave, the employer rolls backward 12 months and that would constitute the leave year.
3. **Calendar Year:** This method allows 12 weeks every calendar year.
4. **Fixed Year:** This is similar to the calendar except the employer designates the 12 month period; it can be based on the employer's fiscal year, the benefit plan year or even the employee's date of hire.

Key Communication Steps

Employers must inform employees of their rights under the FMLA. The employer has three core communication requirements:

1. **Post a Notice of FMLA Leave Rights:** The Department of Labor has created a model notice employers may use. The notice provides a general overview of employee rights under the FMLA. It must be

posted in conspicuous places throughout the workplace. It must also be placed where other government notices are posted and where it can be reasonably assumed all employees will see it.

2. **General FMLA Leave Policy:** This document is your organization's general policy regarding the FMLA and it must be part of your employee handbook (if your organization publishes an employee handbook). This policy needs to explain how your organization will administer the FMLA and should include:
 - a. Calculation of the leave year.
 - b. Coordination with other paid leave benefits.
 - c. Coordination with other programs such as short-term disability or workers' compensation plan.
 - d. Process for continuing coverage in the group health plan.

3. **Designation of Leave Time as FMLA:** Once an employee requests a leave for any reason, the employer must determine whether the leave time qualifies under FMLA. If it



does, the employer must notify the employee in writing within 1 or 2 days after the employer gathers enough information to suspect the FMLA applies. The specific notice must state the following:

- Leave time will count toward the 12 week FMLA leave time.

- Whether or not the employee will have to prove that the health condition is serious, and what happens if the employee fails to provide the certification.
- Rules and rights for coordinating FMLA leave with any other leave available.
- Group health plan premium payment options and the consequences for not paying the premiums if the employee wants to continue coverage under your health plan.
- Any fitness for duty obligations (must be specific to the leave and must be required of other leaves).
- Designation, if applicable, of a key employee and the potential impact on re-employment rights.
- Job restoration rights at the end of an FMLA leave.
- Requirements for repaying the entire health premium if the employee does not return at the end of the leave or if the employee returns for less than 30 days (some exceptions apply-see the next section).
- Whether or not the employee must submit periodic status reports.

The specific notice should discuss only the issues pertaining to the employee requesting the leave.

Continuation of Group Health Benefits

Employers need to allow employees on an approved FMLA leave to continue group health coverage at the normal contribution rate. Employees can continue their health insurance during this time using any of the options below to pay any contributions required:

- **Prepayment:** If the reason for the leave is foreseeable, employees can prepay their health plan premiums before the leave begins. Presumably with the prepayment option, employee premiums are paid with pre-tax dollars. Under Section 125, an employee cannot pay for a benefit in one year that is used in the following year. If the leave is going to straddle your Section 125 plan year, the employee can pre-pay only up to the end of your Section 125 plan year. Any premium remaining (from the end of the Section 125 plan year until the end of the FMLA leave) will need to be paid in another way.
- **Pay as you go:** Employers can allow employees to pay for their health coverage during their FMLA leave. If the employee has paid leave running concurrently with the FMLA leave, employee premiums can be paid with pre-tax dollars. If the leave is unpaid, the premium can be paid on an after-tax basis during the leave.



- **Catch-Up Contributions:** In this situation, employers can pay for coverage during the leave and require the employee to repay them when the employee returns to work.

Employers can require a specific payment method. However, they cannot limit employees' choices to prepayment because prepayment will not be feasible for all leaves.

Employers can cancel coverage if the employee chooses the pay-as-you-go method and then misses payments. However, employers must meet specific requirements before they terminate coverage during a leave. If an employee misses a payment, the employer must allow the employee 30 days to pay the premium. At least 15 days before the end of this grace period, the employer must notify the employee that the payment is overdue. The notice needs to inform the employee that the payment has not been received and if it is not paid by the end of the grace period, coverage will terminate.

The date coverage would terminate depends on the employer's policy. Employers can reserve the right to terminate the coverage retroactively, if coverage during other unpaid leaves is subject to the same rules. In this situation, coverage would end on the date the premium was due. The other option is a prospective termination of the coverage at the end of the grace period. If an employer does not reserve the right to retroactive termination, prospective termination is the default termination date.

Employers can require employees to reimburse them for the employer portion of the group health plan premium if the employee does not return from the leave or returns for less than 30 days. In this case, employers must reserve that right in the general FMLA policy. In addition, they must notify employees of this policy in the specific notice.

Employers can't request reimbursement if:

- Employee does not return because of his or her own serious health condition.
- Employee does not return due to circumstances beyond his or her control.
- Employee is a key employee and the employer does not reinstate the employee.

If none of these situations apply, the employer can require an employee to repay the employer portion of the premium when the FMLA leave ends.

Re-Employment Process

Employers have both benefit and job obligations for employees returning from an FMLA approved leave.

As far as benefits are concerned, employers must reinstate all employee benefits as of the first day an employee returns to active work. Employers cannot require employees to complete a rehire waiting period or even wait until the first of the month following their return to work.

This issue may not cause a problem when it comes to health plan coverage because many employees will

continue health plan coverage during the leave. However, if they don't or coverage is canceled during the leave, coverage must be reinstated on the first day back to work.

Other coverage, such as life and disability, shouldn't be ignored. FMLA does not require employers to continue non-health plan coverage for employees on an approved FMLA leave; however, an employer must reinstate the coverage on the first day the employee returns. Employers should create a return to work checklist to make sure returning employees' non-health plan benefits are reinstated.

Some employers do not want to worry about reinstating the coverage and choose to continue coverage during the FMLA leave. Employers can certainly be more generous than the FMLA requires. If your organization takes this approach, make sure it is clearly stated in your summary plan descriptions and your insurance contracts.

Employers also have certain job obligations to employees returning from an FMLA leave. An employee must be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. An FMLA leave cannot cause an employee to lose any employment benefit accrued before the leave began.

Employers should be careful when restoring a position. The best option is to give the employee the same job he or she had before the leave. Be careful, the same position but at a different location or

on a different shift could be construed as not equivalent.

Many employers are also under the impression that an organization cannot take an employment action against an employee on an FMLA leave. This is not always the case, and employers should approach this situation carefully. For example, what if your organization is going to outsource the functions of a specific department and your plan is to lay off all the employees in that department as of a specific date? On that date, one employee from the department is on an approved FMLA leave. The employer can lay that employee off, along with all the others in that department. Clearly the employee would have been laid off if he or she had been actively working. If your decision to lay a person off is more arbitrary, you should be cautious about laying off an employee on an FMLA leave. If you are uncertain, consult an attorney.

Employers may also terminate an employee on FMLA leave if the employee violates company policy, but again, employers need to be careful. If an employer would have terminated the employee had the individual not been on a leave, the employer can terminate the employee during an FMLA leave. The reason for the termination

should be very clear and not something that may be viewed as arbitrary. For example, if an organization discovers an employee has been embezzling but at the time the employee is on an FMLA leave, the employer can still terminate the employee for embezzlement. If the situation is less clear cut, consult an attorney.

If your organization decides to take an employment action against an employee on an FMLA leave, your actions should be consistent with your organization's policies and past practices.

Intermittent Leave

Employers' number one challenge in administering the FMLA leave is handling intermittent leaves. The FMLA allows employees to take intermittent leaves when they or their family members have serious health conditions.

The need for intermittent leave time may be driven by the medical condition. In some cases, employees may need to reduce their work schedules temporarily. For certain chronic conditions, periodic flare-ups are less predictable. In these cases, employees may need to take time off when the condition warrants it. Intermittent leave may also be used to care for an immediate family member with a serious health condition. Again the intermittent leave may depend on the situation. The employee may need to provide respite care or provide care when other care options are not available.

Employers should establish a procedure to handle intermittent leaves. First, employers should track absences and leave requests carefully. Employees do not need to request FMLA leave time directly, but if an absence might be subject to FMLA protections, employers are compelled to investigate the situation. To qualify for an intermittent leave, the condition must meet the definition of a serious health condition. For this reason, many employers start investigating an absence once it exceeds the 3-day time limit. Others will investigate absences after 5 or 7 days; the time



span really depends on the absence issues your organization faces.

If employers suspect an absent employee might be eligible for FMLA leave, they should discuss it with the employee. Many employers will send their employees a preliminary determination explaining that the leave may be protected by the FMLA and they may ask the employee's doctor to complete a serious health condition questionnaire. Once the employer has enough information, the employer can officially designate the leave as FMLA. Employers should notify the employee in writing that the leave qualifies under FMLA and inform the employee of his or her responsibilities. If the employee requires a reduced work schedule, the employer should make accommodations for the reduced work schedule. If the leave will be sporadic because of episodic flare-ups, the employer needs to track absences related to the condition.

When they track absences, employers must determine the time taken as it relates to an employee's normal work week. If an employee works half the normal day all week long, that would be half of an FMLA week. If the employee consistently works ½ weeks, the FMLA 12 week leave time would be elapsed in 24 weeks of working ½ time. Your organization should track leave time in the lowest increment of time tracked by your payroll system, but it has to be an hour or less.

You can request proof the time off is needed for a serious health condition. Once the initial timeframe on the serious health certification

elapses, you can ask the employee for a re-certification form every 30 days. If your organization feels your employees are abusing the intermittent leave provision, you should require as much documentation as the FMLA permits. When employees realize you are actively tracking leaves, they will be less likely to abuse the system.



Detailed documentation on intermittent leaves is imperative. Keep copies of all your employee communications and records of employee leaves.

While it is not required, it is a good practice to confirm in writing with the employee any time counted toward intermittent leave.

Conclusion

The FMLA seems very straightforward; however, employers have found it very frustrating to administer.

The confusion is not lost on Congress or the Department of Labor. In fact, revising the FMLA regulations will be a key issue in the coming year. In making the revisions the Department of Labor will consider the deluge of comments and suggestions it received from employers and FMLA administrators. Hopefully, the proposed regulations to be released within the next two years will clarify most of the issues.

In the meantime, employers need to meet the intent of the current regulations. A comprehensive process will help manage the run-of-the-mill leave requests and also help manage the situations where the issues are not so clear cut.

McGraw Wentworth will keep your organization informed of any changes in the FMLA regulations. If you have any questions regarding this Benefit Advisor, please contact your McGraw Wentworth Account Manager. **MW**

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