



An onerous task: Administration of family and medical leave

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The Family Medical Leave Act of 1993 (FMLA) is a federal law that affords eligible employees leave to attend to certain personal and family health and related matters. The FMLA applies to all primary and secondary public schools regardless of size. In order to be eligible for family medical leave, an employee must have worked with their employer for at least 12 months, and must have worked at least 1,250 hours during the past 12 months. However, full-time teachers are deemed to meet the 1,250 hours-worked requirement regardless of hours actually worked. Any attempt to declare a full-time teacher ineligible on an hours-worked basis should be carefully considered.

If an employee meets the eligibility requirements, an employer is required to provide the eligible employee with up to 12 workweeks of unpaid leave during a 12-month period for FMLA-qualifying reasons. Those reasons include:

- the birth and care of the newborn child of an employee;
- placement with the employee of a child for adoption or foster care;
- to care for an immediate family member (spouse, child or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.

In addition, the FMLA was amended in 2008 to provide two new military family leave provisions, qualifying exigency leave and military caregiver leave. Pursuant to the amendment, employees may take up to 26 weeks for a qualified exigency that is the result of a covered service member being called to duty in the Armed Forces or to care for a covered service member who is injured or becomes ill while on covered active duty. In calculating an employee's leave entitlement, employers do not count the days during break (for example, winter, spring or summer breaks).

The Family Medical Leave Act requires that employers provide more than leave to an eligible employee. The employer is also required to maintain group health benefits during the leave and contribute the same employer portion of the premium on behalf of the employee. The employee should implement a standard practice for the collection of the employee portion of the premium. The employer must also reinstate the employee to the employee's original or equivalent position, with equivalent pay and benefits, upon return from leave. Additional obligations may arise under a board policy or collective bargaining agreement.

While the eligibility rules seem relatively easy to understand, the onerous part of FMLA is the administration of leave. An employer can reduce this burden by making sure appropriate practices are in place to process a leave request. The United States Department of Labor (DOL) maintains a variety of forms online (at www.dol.gov) that can assist with this process. An employer should check back regularly with the DOL to ensure the most recent version of the form is being utilized.

After determining initial eligibility, an employer will want to pay particular attention to the certification process. When

an employee requests family medical leave, the employer should provide the employee with the Notice of Eligibility and Rights and Responsibilities (Department of Labor Form WH-381) along with the appropriate certification form. It is the employer's responsibility to notify employees of their FMLA rights. Employers are required to post a conspicuous FMLA notice on premises and must provide a copy of the notice to each employee. The DOL has different forms for certification of an employee's serious health condition, certification of a family member's serious health condition, certification of a qualifying exigency for military family leave, certification for serious injury or illness of a current service member for military family leave, and a certification for serious injury or illness of a veteran for military caregiver leave. The employer will want to be certain to use the appropriate certification form.

An employee has 15 days to return the certification to the employer. The certification should be carefully reviewed when it is returned. If information is incomplete or confusing, or fraud is suspected, an employer may contact the provider to request complete information, clarification or confirmation of authenticity, but the employer may not request additional information. Employers may also request second and third medical opinions (at the employer's expense) if there is concern with the initial certification. Careful review of the certification form and follow-up can prove an effective tool in administering FMLA.

When an employee has requested family medical leave or when an employer otherwise knows that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of his/her eligibility within five business days. It is also the employer's responsibility to designate an employee's leave as paid or unpaid and as FMLA-qualifying and must provide notice of such designation to the employee within five days of the beginning of the leave. The designation should be based upon information provided to the employer by the employee, including medical certification. An employee's FMLA leave does not begin to run until it has been designated as FMLA leave by the employer.

If an employee requests to take leave for a proper purpose, the eligible employee may take FMLA leave in one continuous block of time or on an intermittent basis and/or as part of a reduced leave schedule when medically necessary for the treatment of the employee or the employee's child, spouse, or parents with a "serious health condition," or for recovery from treatment or the condition. An eligible employee may take leave intermittently or on a reduced leave scheduled for the birth and care of a child or the placement of a child for adoption or foster care only upon the agreement of the employer. Intermittent leave is taken in single, smaller blocks of time due to a specific qualifying reason. A reduced leave schedule reduces an employee's usual number of working hours per workweek or hours per workday.

Reduced-schedule leave and intermittent leave can prove to be challenging. An employer will want to consider how work will be covered, how absences will be reported and how time will be accurately tracked. Plans to address these issues should be discussed with the employee and put in writing at the outset. Consideration should be given to whether electronic absence reporting software can adequately track and monitor leave. In addition, the employer must consider whether the family medical leave runs concurrently with sick leave and how it relates to other forms of paid or unpaid leave that may be available through board policy or a collective bargaining agreement. Tracking overlapping leave can be particularly challenging.

Special rules apply to "instructional employees," including teachers, athletic coaches, driving instructors and special education assistants. When an instructional employee needs intermittent leave or a reduced leave schedule for more than 20 percent of the total number of working days over the period of leave, the teacher can be required to take the leave continuously or transfer to a position that would not be as seriously affected by the intermittent or reduced leave

schedule. Instructional employees are also subject to special rules when taking consecutive FMLA leave, depending on the timing of the leave. If an instructional employee's FMLA leave begins more than five weeks before the end of an academic term (or semester), will last at least three weeks, and would end during the final three weeks of the term, the employee can be required to continue the leave through the end of the term. An instructional employee can also be required to continue his/her leave through the end of a term if the leave begins more than five weeks before the end of the term, will last at least two weeks, and ends during the last two weeks of the term, if the leave is taken for a reason other than the employee's own serious health condition. An instructional employee may also be required to continue FMLA leave through the end of a term if the FMLA leave is taken during the last three weeks of the term and continues for more than five work days. These special rules do not apply to other non-instructional employees of the district.

Family medical leave scenarios can be particularly complex. Employers will want to consider working through such scenarios with legal counsel to avoid the many pitfalls that exist.

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