



THE FAMILY AND MEDICAL LEAVE ACT OF 1993

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The Family and Medical Leave Act of 1993 (the “Leave Act” or “FMLA”) became effective August 5, 1993.* This landmark legislation requires all private employers with 50 employees to provide up to 12 weeks of unpaid leave per year to eligible employees who want the leave because of the birth of a child or placement of an adopted are child, to take care of a child, spouse, or parent who has a “serious health condition,” or for the employee’s own serious illness. While on leave, employees are entitled to continued health benefits.

Final Regulations (including forms) totaling 67 pages issued to interpret the twelve-section, twelve-page statute, became effective April 6, 1995. See 29 C.F.R. Part 825.

I. HIGHLIGHTS OF THE LEAVE ACT

- Only employees who have worked at least one year and 1,250 hours within the previous 12-month period at a worksite where the employer employs 50 or more employees within a 75-mile radius of that worksite are entitled to FMLA leave. Sections 2611 (2)(A)(i)(ii); 29 C. F. R. § 825.110.
- The FMLA entitles employees to take a maximum of 12 weeks of unpaid FMLA leave in a 12-month period (usually employees may choose “any” twelve month period). Section 2612 (a) (1).
- **Child care leave** is available “to care for” a son or daughter because of its birth, or because of the placement of a son or daughter with the employee for “adoption or foster care” during any 12-month period.* Section 2612 (a)(1)(A)(B). Leave must be taken and concluded within twelve months after the date of birth or placement. 29 C.F.R. § 825.201.
- **Medical leave** is available to take care of a child, spouse (including common law) or parent (including those standing in loco parentis) who has a serious health condition or for the employee’s own serious health condition that renders the employee unable to perform the functions of his or her position. Section 2612(a)(1)(C)(D); 29 C.F.R. § 825.113, .115. Leave for mere sickness is not a “serious health condition” and is not counted toward the 12 weeks. 29 C.F.R. § 825.114.
- In many cases the problems of granting a 12 week leave are not monetary (other than 3 months of medical benefits). The problem is that losing a key employee for 12 weeks hurts production even if a temporary replacement is found.
- Employers may require employees to take any paid vacation, personal, sick, or family leave as part of the 12-week leave, Section 2612(d)(2)(A), however, they must tell the employee

that the paid leave is designated as FMLA leave. 29 C. F. R. § 825.208. Employees who receive payment from sources such as Workers' Compensation, state disability, or disability insurance cannot substitute paid leave for any portion of the leave. 29 C. F. R. §825.207(d)(2).

- Employees taking leave are entitled to receive benefits under a “group health plan” while they are on unpaid FMLA leave under the same terms and conditions as when they were on the job. Section 2614(c)(1). If employee contributions are required, the employer must provide notice as to how and when payments are to be made. 29 C. F. R. § 825.210(d). An employee who declines to contribute must have benefits reinstated after the leave without having to qualify as a new employee. 29 C.F.R. § 825.209(e). An employee who does not return to work after 12 weeks can be required to repay the health benefits cost.
- Following FMLA leave, employers must restore returning employees to the positions they held when leave commenced or to an “equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.” Section 2614(a)(1)(B). If the job was eliminated by a layoff, reinstatement is not required, but the employer has the burden of proof on the issue. 29 C.F.R. § 825.216(a)(1).
- Highly compensated (top 10%) employees can be denied reinstatement, if necessary, “to prevent substantial and grievous economic injury to the operations of the employer.” Section 2614(b)(1)(A). Regulations contrast “substantial and grievous economic injury” with “minor inconvenience and costs,” and conclude that the “substantial and grievous economic injury” standard is more stringent than the American with Disabilities Act’s “undue hardship” test. 29 C.F.R. § 825.218. Employers must give notice to such “key employees” and inform them in writing of their risks as soon as practicable after the employer receives notification. 29 C.F.R. § 825.219.
- Taking family leave may not result in loss of any employment benefits accrued prior to the date the leave commenced, but neither “seniority” nor “employment benefits” accrue during the leave. Section 2614(a)(3)(A).
- Employees may not take leave on an intermittent schedule unless the employee and employer agree otherwise. Section 2612(b)(1). If the need for intermittent leave is foreseeable for planned medical treatment, the employer may transfer the employee to an alternative position with equivalent pay and benefits, and that better accommodates recurring periods of leave. Section 2612(a)(1)(A)(2).
- The FMLA allows civil suits by employees and also authorizes the Secretary of Labor to sue on behalf of employees whose employers have violated the Leave Act. Employees may be awarded double damages unless the employer acted in good faith. 29 C.F.R. § 825.400.
- The FMLA does not preempt state and local laws which provide greater leave rights. The law does not “modify or affect in any way” any federal or state civil rights law, including Title VII of the 1964 Civil Rights Act and the Americans with Disabilities Act of 1990.

II. DETAILED ANALYSIS OF THE LEAVE ACT

A. Who Must Comply?

Private employers who employ 50 or more employees for each working day during each of 20 or more calendar weeks in the current or preceding calendar year must comply with the leave Act.

Section 2611(A)(4)(i).^{*} Any employee, full or part-time, whose name appears on the payroll is considered to be employed each working day of the calendar week. 29 C. F. R. § 825.105(b). Additionally, once an employer meets the 50-employee/20 work week threshold, the employer remains covered until it has employed fewer than 50 employees for 20 (nonconsecutive) work weeks in the current and preceding calendar years. 29 C.F.R. § 825.105(f). Employees on leave or suspension who are expected to return count toward the 50 employees, but those on layoff do not. 29 C. F. R. § 825.105(c).

Employers who operate locations with fewer than 50 employees at each location may escape coverage at those locations, unless they employ 50 or more employees within a 75-mile radius of the employee's work site. Section 2611(2)(B)(ii). This 50-employee threshold is determined when the employee requests the leave. 29 C. F. R. § 825.110(f). Once determined to be eligible, the employee's eligibility is not affected by a subsequent change in the number of employees.

Employment by predecessors and successors in interest is aggregated, and successors assume their predecessor's FMLA obligations. 29 C.F.R. § 825.107(c).

Joint employees get counted by each of the joint employers. 29 C.F.R. § 825.106. For employees with no fixed worksite, the "worksite" is their "home base," either where their "work is assigned," or where "they report." 29 C. F. R. § 825.111 (a)(2).

B. How Much Leave May An Employee Take?

1. Employees Are Entitled To Take 12 Weeks of Leave

Employees are entitled to take up to 12 weeks of leave in "any 12-month period." The Regulations allow employers several options by which they may compute the 12 month period: (1) the calendar year- (2) any fixed 12-month leave year, such as a fiscal year or based on an employee's anniversary date; (3) 12 months from the date leave is first used; or (4) a "rolling" 12-month period measured backward from the date leave is used. 29 C.F.R. § 825.200(b). An employee's entitlement to leave for the birth or placement of a child expires 12 months after the birth or placement. 29 C. F. R. § 825.200.

2. Leave Year Must Be Defined

Where an employer did not adequately inform its employees that it had chosen the retroactive rolling "leave year" method for calculating their eligibility for FMLA leave, the court applied the option most beneficial to the employee, the calendar year method. Bachelder v. America West Airlines, Inc., 259 F.3d 1112 (9th Cir. 2001).

3. Designating the Leave Promptly

Some courts have held that designation of leave as FMLA leave has to be made at the time of the leave, though others have not.

Though the court in Hunt v. Rapides Healthcare System, LLC, 2001 WL 165096 (5th Cir. Dec. 26, 2001) did not reach the issue, its defendant Medical Center argued, and the district court held, that the DOL regulations prohibiting retroactive written designations of FMLA leave are invalid because they can result in leave periods extending beyond the twelve weeks the statute requires. Said the court:

Both the Eighth and Eleventh Circuits have found the DOL regulation invalid on this basis. See, McGregor v. Autozone, Inc., 180 F.3d 1305, 1308 (11th Cir. 1999); Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 940 (8th Cir. 2000). The Sixth Circuit has reached the opposite conclusion. Plant v. Morton Int'l, Inc., 212 F.3d 929, 936 (6th Cir. 2000). District courts have similarly divided. Compare, Schloer v. Lucent Tech., Inc., No. CIV 99-3392, 2000 WL 128698 at *1 (D. Md. Jan 21, 2000) (striking down regulations); Neal v. Children's Habilitation Ctr., No. 97 C 7711, 1999 WL 706117 at *2 (N.D.Ill. Sept. 10, 1999)(same); Donnellan v. New York City Transit Auth., No. 98 CIV 1096, 1999 WL 527901 at *4-5 (S.D.N.Y. July 22, 1999)(same); with Ritchie v. Grand Casinos of Mississippi, Inc., 49 F.Supp.2d 878, 881 (S.D.Miss. 1999) (upholding DOL regulations); Chan v. Loyola Univ. Med. Ctr., No. 97 C 3170, 1999 WL 1080372 at *10 (N.D.Ill. Nov. 23, 1999)(same). The Fifth Circuit has not yet addressed this issue. However, the present posture of this case does not require this court to do so now.

Hunt, 2001 WL 165096 at *6-7.

In turn, employers may involuntarily place employees on FMLA leave. Some courts have found that the FMLA's implementing regulations authorize an employer to place an employee on FMLA leave "involuntarily," even if the employee does not request such leave, as long as that employee is "eligible" for leave by virtue of having taken a qualified absence from work. Hicks v. Leroy's Jewelers, Inc., 2000 WL 1033029 (6th Cir. 2000).

The United States District Court of the Northern District of New York holds that "there is no right under the FMLA to bring an action against an employer for placing an eligible employee on leave." Harvender v. Norton Co., 1997 WL 793085 at *7 (N.D.N.Y. 1997). In Harvender, the company received a notice from the employee's doctor that she should not be exposed to chemicals. Since the employee was a laboratory assistant and being exposed to chemicals was one of her job's essential functions, she could no longer perform her job and the company could characterize her time off as FMLA leave.

C. Who Is Covered?