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FMLA Essentials for the Public Sector Practitioner

IASPA Annual Conference 2024

IASPA
Illinois Association of School Personnel Administrators

FMLA Basics

Who is a covered employer under the FMLA?

Private employers with 50 or more employees

Public employers without regard to size

- Includes all public agencies, and all public and private elementary and secondary schools

FMLA Basics

- FMLA provides leave for a serious health condition:
  - Overnight hospitalization
  - 3-day absence + treatment (doctor visit + prescription or 2 doctor visits in 30 days)
  - Chronic conditions
  - Employee, parent, spouse, and/or child
- Childbirth/bonding leave, military exigency and caregiver provisions
- Intermittent/reduced schedule leave
- Employee notice (reasonable notice, verification, changes)

Eligibility

- Generally, an eligible employee under the FMLA:
  - (1) Works at a worksite with 50 or more employees within 75 miles of that worksite; and
  - (2) Has worked for the employer for at least 12 months; and
  - (3) Has worked at least 1,250 hours over the 12-month period prior to the date leave commences
    - However, pursuant to *School Code* Section 24-6.4, the threshold for coverage for school district employees in Illinois is **1,000 hours**

Eligibility

- (2) Has worked for the employer for at least 12 months
  - Determined as of the date leave is to start
  - Does not have to be consecutive 12 months
    - Aggregate periods of service over prior 7 years (and potentially beyond if absences due to military service obligations)
  - Any partial week of pay or benefits/compensation in lieu of pay count as a week of employment
  - 12 months of employment for intermittent, occasional, or casual employee = 52 weeks on payroll

Eligibility

- (3) Has worked at least 1,250 hours* over the 12-month period prior to the date leave commences
    - Does not include:
        - Vacation
        - Holidays
        - FMLA time
        - Any other paid or unpaid time off

**1,000 hours for Illinois school district employees (State law)*

Types of FMLA Leave Allowed

(1) Because of an employee's serious health condition that makes the employee unable to perform the essential functions of his or her job;

(2) The care of a spouse, child, or parent with a serious health condition;

(3) The care of a child after birth, or placement of a child for adoption or foster care

Types of FMLA Leave Allowed

(4) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active-duty status)

(5) The care of a military service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the service member

Medical Leave Basics

An employee's own serious health condition that makes the employee unable to perform essential functions of the job

- Overnight hospitalization
- 3-day absence + treatment (doctor visit within 7 days of incapacity + prescription; or 2 doctor visits in 30 days)
- Chronic conditions (at least biannual doctor visits; e.g., asthma, epilepsy)
- Pregnancy or pre-natal care
- Permanent/long-term conditions (continuing supervision but no active treatment; e.g., Alzheimer's, terminal disease)
- Conditions requiring multiple treatments (e.g., cancer, kidney disease)

Medical Leave Basics

- How can an employer verify an employee's serious health condition?
  - Medical certification from a health care provider must be provided using the FMLA certification form
  - No additional information can be requested
  - Medical certification form must be provided within 15 calendar days after it is requested
  - FMLA leave is conditionally granted pending certification

Family Leave Basics

The care of a spouse, child, or parent with a serious health condition

- Child = biological, adopted, foster child, stepchild
  - Child may be adult child only if incapable of self care due to a mental or physical disability – beware the teenager living at home!
- Parent = employee's own parent, not parent in-law
  - Spouses employed by same employer may be limited to combined 12 weeks for parental care (each spouse for their own parent)

Family Leave Basics

- What does “caring for” a family member with a serious health condition mean?
  - Assistance with daily hygiene activities;
  - Dispensing medications;
  - Making nursing home arrangements;
  - Psychological comfort (i.e., holding hand at bedside)
- Employee may be required to submit certification form to support the need for FMLA leave to care for a covered family member

Bonding Leave Basics

The care of a child after birth, or placement of a child for adoption or foster care

- Childcare leave must be taken within 1 year after birth or placement
- Intermittent only with employer agreement (or as provided in CBA)
  - Employer may require a temporary transfer
- Spouses employed by same employer may be limited to a combined 12 weeks (only 12 weeks total for this child)
- Adoption/foster care leave may occur before placement

Bonding Leave Compliance Tips

- FMLA leave for the birth of a child has two components: (1) medical leave; and (2) bonding leave
- Pregnancy/childbirth = employee's serious health condition
  - Also consider possible leave entitlement under Pregnant Workers' Fairness Act
- Employers should obtain documentation of the medical component to coordinate the different components

Types of FMLA Leave Allowed

- 12 workweeks of leave
  - Workweek = that employee's average workweek
- In a 12-month period
- Leave is unpaid but employee can use any accrued paid benefits
- Leave accounted for in no greater than 1-hour increments
  - Except teachers and physical impossibility of return

Substitution of Paid Leave

- Employers can and should designate available paid leave to run concurrently with an employee's unpaid FMLA leave even if employee does not elect
- Keep in mind legal parameters on sick leave usage under the School Code
  - Paid sick leave for illness of parents and children allowed
  - Up to 30 days paid sick leave allowed for parental leave unrelated to the need to recover from childbirth
    - Tracks FMLA bonding leave provisions: can be take any time within the 12-month period following birth of a child
    - Does not require medical certification

Substitution of Paid Leave

- Receipt of benefits is not the same as paid leave but can and should run concurrently (e.g., workers' compensation)
- Employee's entitlement to benefits (other than group health insurance benefits) during FMLA leave is to be determined by established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate)

Health Insurance Continuation

- Maintain coverage on same terms as though the employee remains employed
- Employee can waive coverage but must be reinstated after leave
- Employer must provide advance written notice of the terms and conditions under which employee's contribution must be paid
- Employer may recover the employee's share of any premium payments missed for any FMLA leave period during which the employer pays the employee's share to maintain employee's health insurance coverage
- If employee does not return from leave for at least 30 calendar days for reasons unrelated to leave, employer can recover its own share of premium payments

Counting Issues

- FMLA leave is pro rated for part-time employees
    - If an employee's workweek varies (e.g., support services), use the employee's weekly average of hours worked over the 12 weeks prior to the beginning of the FMLA leave
- Only time taken for leave can be charged against the employee's entitlement; working from home does not count
- Cessation in employer's operations (e.g., school district closing two weeks for the Christmas/New Year holiday or the summer vacation) do not count against FMLA leave

Counting Issues

Intermittent leave = separate block of time due to a single qualifying reason

Reduced schedule leave = reduces an employee's usual number of working hours per workweek, or hours per workday for a period of time

There must be a medical need that can be best accommodated through an intermittent or reduced leave schedule

Planned treatments = employee must make reasonable effort to schedule so as not to unduly disrupt employer's operations

Counting Issues

- Special school rules impose certain limits on teaching staff taking intermittent leave
- If a teacher needs intermittent leave and would be on leave for more than **20 percent** of the total number of working days over the leave period, the school may require them to take consecutive leave for the duration of the planned medical treatment or transfer temporarily to an available alternative position for which they are qualified (with equivalent pay and benefits)

Counting Issues

When can an employee be transferred to a different position to accommodate leave?

- Intermittent or reduced leave schedule that is foreseeable = employee may be required to transfer temporarily
- 20% planned absence threshold to transfer school employees
- Position must be available, does not have to have same duties
- Employee must be qualified
- Must comply with CBA and accommodation provisions of ADA
- Cannot reduce pay or benefits, but can pro-rate accruals like vacation leave if based on number of hours worked

Designation of FMLA Leave

When is an employer on notice that the employee's FMLA rights might apply?

- Employee tells anyone in management of an absence for a potentially FMLA-qualifying reason; or
- Employee's conduct signals potential need for leave; or
- Employer knows of qualifying reason from another source if employee is incapacitated

If you don't know, then ask!

Permissible Inquiries

- Don’t be fooled by the employee who says: “I’m not asking for FMLA leave, so I don’t need to answer your question.”
  - An employer has a legal obligation to provide FMLA leave – regardless of whether the employee wants it!
  - The employee may not bar the employer from designating a qualifying absence as FMLA leave.
- Don’t worry about the ADA – questions permitted by the FMLA are *per se* “job related and consistent with business necessity.” *EEOC FMLA-ADA Fact Sheet Q. & A. 10* (1996).

Permissible Inquiries

- Employees do not have to expressly mention the FMLA when requesting leave and notice may be verbal.
  - Even "strange behavior" may be enough to trigger FMLA protections.
    - *See, e.g., Stevenson v. Hyre Elec. Co.*, 505 F.3d 720 (7th Cir. 2007).
- Once leave is approved, employees need to tell employers that an absence is due to an FMLA-qualifying reason.
  - Follow standard FMLA certification procedures.

What questions should I or can I ask?

How long will you be out?	When did you become aware of this situation?	What is the nature of your family member's treatment or care? What is your involvement?
Were you/will you stay overnight in a medical facility?	What are you doing to recover?	Have you or are you scheduled to see a doctor?

HIPAA

- But what if the employee says: “You can’t ask me that under HIPAA, it’s private.” WRONG!
- Generally, “employers” do not have to follow HIPAA privacy rules – they are not covered providers
- Medical information in employment records is not considered PHI under HIPAA
    - Employers still must maintain the confidentiality of an employee’s medical information in personnel file

Employee Notice Obligations

- Provide 30-days advance notice if leave is foreseeable (e.g., birth, placement for adoption or foster care, planned medical treatment), OR
- As soon as practicable (usually same or next business day), OR
- If leave has already been approved, specific notice that an absence is for that reason or for FMLA leave is required

Employee Notice Obligations

Identify a qualifying reason for leave (e.g., child in hospital overnight)

- Employee's failure to explain the reason for their absence may be basis for denial of leave

If reason/information learned after-the-fact, the employer may designate FMLA leave retroactively

- Even if employee denies seeking FMLA leave, employer can designate even if employee does not ask

Employer Notice Obligations

FMLA poster

FMLA handbook policy

Upon learning of potential FMLA-qualifying leave, 5 business days to inform employee of eligibility

- Provide Eligibility Determination Notice and Notice of Rights and Responsibilities
- Make sure any custom forms track all required DOL information

Employer Notice Obligations

- If the employee has not previously taken leave for the same reason, employer should provide employee with “Notice of Eligibility of Rights and Responsibilities,” request medical certification, or obtain any other information needed to determine FMLA coverage
- If employee has previously taken FMLA leave for the same reason, the employee must reference the reason for leave
    - Calling in sick is not enough to trigger coverage

Employer Notice Obligations

- Notice of Rights and Responsibilities should address substitution of paid leave
  - Employer may require and leave is used to the extent consistent with underlying policies, CBA provisions, or practice
- Notice of Rights and Responsibilities should address health insurance continuation = medical, surgical, hospital, dental, and vision care, mental health counseling, substance abuse treatment, etc., on the same terms as before leave began
  - How will employee cover contribution during unpaid leave?
    - If employer does not intend to "carry" employee for missed payments, track minimum of 30-day grace period for missed payment and 15-day cancellation notice
- What about pension contributions? It depends! Unpaid leaves may not be creditable service, but employees may be able to "purchase" some credit or apply for continuing credit before the leave.
  - What about other benefits? It depends! Pre-pay, pay as you go, catch up, or even drop may be options. Check IRS guidance.

Employer Notice Obligations

- Notice of Rights and Responsibilities can seek medical certification
  - Employee has 15 calendar days to provide
  - FMLA approved on contingent basis pending receipt of certification
  - If any information is incomplete or insufficient to establish need for leave, request further information from employee
    - Advise the employee in writing what additional information is necessary to make the certification complete and sufficient
    - Provide the employee with seven calendar days to cure the deficiency
    - Failure to cure deficiency can be basis for denying leave.
  - Alternatively, employer can seek clarification from employee's healthcare provider, but the scope of clarification is limited; does not involve discussion about employee's medical condition

Employer Notice Obligations

Upon receiving enough information to identify FMLA-qualifying reason, provide Designation Notice

- Failure to address fitness-for-duty certification can waive right to obtain prior to reinstatement

Only one designation for each FMLA-qualifying reason per 12-month period required

- Re-certify and re-designate annually

Failure to follow notice requirement may be FMLA violation

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Employer Notice Obligations

- Designation Notice must address any specific return to work certification requirement and provide list of employee's essential job functions if employer intends to require fitness for duty before reinstating employee from FMLA leave

Recertification Process

- Recertification can be used to determine ongoing need for leave
- Process is available:
  - Any time the employer receives information casting doubt on the stated reasons for the absence or continuing validity of the absence
  - When the circumstances described by the previous certification have changed (e.g., where an employee is taking leave more frequently than indicated on certification)
  - When the employee requests an extension of leave (unless the certification contains a minimum duration)
- Consequence for failure to provide recertification: denial of continuation of FMLA protection

Recertification Process

- An employer may specifically request certification as to whether an employee's absence pattern is consistent with the serious health condition and need for leave
  - Certification is provided by employee's health care provider at employee's expense
- No second or third opinion may be required from recertification
  - But for ongoing or chronic conditions requiring intermittent leave, employer may require a new certification annually in the same manner as initial certification
- Recertification not available for non-medical leaves

Return to Work Process

- Can require and obtain periodic reports from employee
- Can require employee to provide fitness-for-duty certification *if* all similarly-situated employees required to obtain certification before resuming work
- Can delay reinstatement if employee does not provide the certification if included in Designation Notice

Reinstatement

- FMLA is a job-protection statute
- At end of qualifying leave, employee returns to same or an equivalent position, regardless of what has happened with employee's position while on leave
- Same benefits = escalator principle

Reinstatement

- What if an employee has limitations upon return (e.g., seeking different schedule)?
  - Not an FMLA entitlement
  - Consider ongoing ADA obligations
  - Also cannot penalize employee

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QUESTIONS?

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