

Leave and Accommodations

IN THIS SECTION

- Federal Family and Medical Leave Act
- Americans with Disabilities Act
- Military Leave
- Other Types of Leave
- Compliance Checklist: FMLA Practices and Policies
- FMLA Worksheet
- Compliance Checklist: ADA Practices and Policies

FEDERAL FAMILY AND MEDICAL LEAVE ACT

Background

The Federal Family and Medical Leave Act (FMLA) was enacted in 1993 to promote work-life balance by allowing employees to take unpaid leave for specified family and medical reasons without fear of losing their jobs or certain benefits. It has been amended several times in subsequent years, including in 2008 to extend protection to employees with family members serving in the armed forces, National Guard and Reserves, and in 2015 to expand the definition of “spouse” to employees in legal same-sex marriages, regardless of where they live. While FMLA leave is unpaid, depending on the reason for leave, employees may be entitled to use other paid leave benefits to provide income

replacement while on FMLA leave, such as paid sick leave, short/long term disability, state paid medical leave, or workers’ compensation.

Eligibility and Coverage

FMLA applies to independent schools and other private employers that have 50 or more employees on the payroll during 20 or more calendar weeks in either the current or preceding calendar year. Any employee whose name appears on the payroll is considered employed and must be counted whether or not they receive any compensation in a given week. This means schools must include part-time, summer and seasonal employees in the calculation of 50 or more employees, counting each person as one employee, not using full-

time-equivalent calculations or other pro-rating based on hours or months worked.

Employees are eligible for FMLA leave if they are employed by a school with 50 or more employees within a 75-mile radius of the worksite where the employees work and are employed for at least 12 months prior to requesting leave. Employees must have worked at least 1,250 hours during the 12-month period immediately before the leave starts. Full-time FLSA-exempt employees who have worked for a school for at least 12 months are presumed to have met the 1,250 hours of service required for purposes of FMLA eligibility even if no time records are kept. The 12 months need not be consecutive.

If an employee meets the above requirements for eligibility, the school must then determine how much leave is available to them.

Regulations state that employees may take up to 12 workweeks of leave in a 12-month period. Schools must define the 12-month period in their FMLA policies and procedures. If a school fails to define the 12-month period, whatever is most favorable to employees will apply. Most schools define the 12-month period as a rolling period of the prior 12 months looking back from the start of the leave.

An exception to this is military caregiver leave, which provides up to 26 workweeks of leave in a 12-month period rolling forward from the date the leave begins, regardless of the period established for other FMLA reasons.

Reasons for Leave

FMLA provides eligible employees with 12 workweeks of unpaid family and medical leave in a 12-month period for the following qualifying reasons:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;
- To care for a spouse, son, daughter or parent who has a serious health condition;
- A serious health condition makes the employee unable to perform the essential functions of his or her job; or
- To address certain qualifying exigencies arising out of the fact that the employee's spouse or a son, daughter or parent is on 'covered active duty' (or has been notified of an impending call or order to covered active

duty) in the National Guard, Reserves, or Regular Armed Forces.

FMLA also provides up to 26 workweeks of military caregiver leave in a 12-month period to care for a son, daughter, parent or next of kin who is an injured or ill service member or veteran. During a single 12-month period, an eligible employee is entitled to a combined total of 26 workweeks of leave for qualifying exigencies and military caregiver leave.

FMLA provides employees the right to be restored to their original or "equivalent" job upon return from FMLA leave. Employees are also entitled to any employment benefit they earned or were entitled to before FMLA leave. Under limited circumstances, schools can deny job restoration to certain highly paid (among the 10% highest paid employees), salaried "key" employees if job restoration would cause substantial and grievous economic injury to the school and the employee is notified in writing at the time the employee gives notice of the need for FMLA leave or when leave commences, whichever is earlier.

Intermittent Leave

The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances.

Reasons might include:

- To care for a seriously ill family member.
- To attend to the employee's own serious health condition.
- To care for a newborn or adopted child.

However, the FMLA does not require schools to provide intermittent/reduced schedule leave for newborn or newly placed adopted or foster care children. Determine how the school will handle such requests and include clear language in the FMLA policy.

Employees needing intermittent/reduced schedule leave for foreseeable medical treatment must work with the school to schedule the leave so as not to unduly disrupt the school's operations, subject to the approval of the employee's health care provider. In some cases, a school may transfer an employee temporarily to an alternative job with equivalent pay and benefits that accommodates recurring periods of leave better than the employee's regular job.

Depending on the reason for leave, employees may be entitled to use other paid leave benefits to provide income replacement while on FMLA leave, such as paid sick leave, short/long term disability, state paid medical leave or workers' compensation.

Substitution of Paid Leave

FMLA leave is unpaid job-protected leave. Depending on the reason for FMLA leave, however, an employee may be eligible to use paid leave such as PTO, sick, vacation or parental leave during FMLA leave pursuant to the school's employee handbook policies. For example, a parental leave policy may provide a new parent with four weeks of paid leave immediately following the birth of a child, running concurrently with unpaid FMLA leave. Many schools require employees to use accrued paid sick, vacation, personal or other leave while on FMLA. However, some jurisdictions, such as the District of Columbia, forbid employers from requiring employees to apply available paid leave under state law. Explain any such requirements in the FMLA policy section of school's employee handbook. In addition, be sure any paid leave, including workers' compensation, short-term disability, long-term disability or state-provided paid leave benefits, runs concurrently with applicable FMLA leave.

Calculating Leave

Schools must track employees' use of FMLA leave for two reasons: to ensure that employees get the leave they are entitled to, and to know when the school's leave obligation has been fulfilled. When tracking leave, keep in mind that generally, leave counts as FMLA only when the employee is otherwise scheduled to work. For instance, teachers do not use FMLA leave over the summer, assuming they are not required to work when school is not in session. For example, if a teacher gives birth to a child over the summer, FMLA leave does not begin until the beginning of the school year, when the teacher is normally required to report to work. However, administrative, security and other staff who work 12 months of the year do need to use FMLA for summer leave. Schools must maintain records of employee FMLA leave.

What about breaks and holidays during the school year? FMLA does not count when school is closed for an entire week, such as winter and spring breaks, unless an employee is scheduled to work. If the school is open for a portion of the week, such as Thanksgiving break, and the employee is on leave for the full week, the entire week is counted as FMLA. If a holiday

falls during a week when an employee is taking the full week of FMLA leave, the entire week is counted as FMLA leave. If a holiday falls during a week when an employee is taking less than the full week of FMLA leave, the holiday is not counted as FMLA leave unless the employee is expected to work on that day.

While the law does not require it, schools may also choose to be more generous and not count holidays when school is closed as FMLA leave. This is an area where school culture plays a role in how policies are administered. Schools can provide benefits beyond what is required by the law as long as they do so in a consistent manner.



PRACTICAL TIP: A school may retroactively designate FMLA leave if it provides appropriate notice to the employee and the retroactive designation does not cause harm or injury to the employee. If the leave qualifies for FMLA protections, the school and employee can mutually agree that leave be retroactively designated as FMLA leave.

If the school's failure to designate FMLA leave in a timely fashion causes the employee to suffer harm, the school may be liable for damages or be required to take other remedial actions.

Another circumstance might involve two married school employees who take leave for the birth or placement of a child, or to care for a relative with a serious health condition. The school can limit this leave to a combined total of 12 workweeks (or a combined total of 26 weeks if caring for a covered service member with a serious illness). However, married employees need not combine leave if either spouse takes leave to care for the other spouse, for a child or for the employee's own serious health condition.



PRACTICAL TIP: Count leave in the smallest increment of time you allow for other forms of leave, such as sick leave or PTO.

While schools normally do not track the hours of exempt employees, FMLA provides an exception in which schools may track exempt employees' use of intermittent FMLA in hourly (or shorter) increments without impacting their exempt status. If an exempt

employee runs out of paid leave to use while on intermittent FMLA leave, the school may deduct from their salary in less than whole-day increments for time counted as intermittent FMLA leave.

Maintenance of Health Benefits

If an employee is on FMLA leave, the school must maintain the employee's group health insurance coverage, including family coverage, on the same terms as if the employee continued to work.

Where appropriate, you may need to arrange for an employee on unpaid FMLA leave to pay their share of health insurance premiums. For example, if the group health plan involves co-payments by the school and employees, both employees on unpaid FMLA leave and the school must pay their normal portion of the premiums. Such payments may be made under any arrangement to which both parties voluntarily agree.

A school is no longer obligated to maintain health benefits under FMLA if and when an employee informs it of an intent not to return to work at the end of the leave period, or if an employee fails to return to work when the FMLA leave entitlement is exhausted. The school's obligation also stops if the employee's premium payment is more than 30 days late (unless the school's policy provides a longer grace period) and the employer has given the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received.

In some circumstances, the school may recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave.

Other Benefits

Schools need not maintain other benefits during periods of unpaid FMLA leave. Nor are schools required to allow employees to continue to accrue other earned benefits such as seniority or paid leave during periods of unpaid FMLA leave — as long as their policies are consistent and do not allow such benefits to accrue for employees on other types of unpaid leave. Schools may make arrangements to continue other benefits, such as life insurance coverage,

Special Rules for Instructional Employees:

Leave taken by instructional employees over summer months when school is not in session is not counted as FMLA leave.

Intermittent leave

If an instructional employee requests intermittent leave for a serious health condition of the employee's family member, covered service member, or the employee's own serious health condition AND the leave is foreseeable based on planned medical treatment AND the absence is more than 20 percent of working days during a particular duration, the school may deny use of intermittent leave. Instead, the school may require the instructional employee to remain absent for the period of planned treatment or to temporarily transfer to an alternative position.

Leave near the end of the academic year

If an instructional employee begins leave more than five weeks before the end of the term, the school may require the employee to continue leave to the end of the term if:

- The leave will last at least three weeks, and
- The employee would return to work during the three-week period before the end of the term.

If an instructional employee begins leave for a purpose other than their own serious health condition less than five weeks before the end of the term, the school may require them to continue taking leave until the end of the term if:

- The leave will last more than two weeks, and
- The employee would return to work during the two-week period before the end of the term.

If an instructional employee begins leave for a purpose other than their own serious health condition less than three weeks before the end of the term, where the leave will last more than five working days, the school may require them to continue taking leave until the end of the term.

If an instructional employee is required to take leave until the end of an academic term:

- Count only the period of leave until the employee is ready and able to return to work against their FMLA leave entitlement.
- Do not count any additional required leave to the end of the school term as FMLA leave.
- Maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

while employees are on FMLA leave. In such cases, they may recover employees' share of premiums at the conclusion of the leave.

Other FMLA Leave Laws

State family and medical leave laws often provide job protection and/or paid leave for the same or similar qualifying reasons as Federal FMLA. Some state laws extend to employers with fewer than 50 employees, offer longer periods of leave and require more paid leave benefits. Consult with legal counsel to ensure the school's compliance with both

federal and state requirements in this area. If an employee's absence qualifies for leave under both laws, the absences count against the employee's leave entitlement under both laws. If the two laws conflict, apply the law that is most beneficial to the employee. If both laws apply, the leave runs concurrently.

There can be some overlap between the FMLA and the Americans with Disabilities Act ("ADA") where leave is taken related to an employee's own serious health condition. As a result, there may be instances where an employee requests additional leave as an ADA accommodation after he or she has used all protected leave provided by the FMLA. As with any accommodation request, the school has a responsibility to evaluate the employee's request for a reasonable accommodation related to an ADA-covered disability and determine whether it would cause an undue hardship on the employer. Importantly, schools are not required to provide the employee his or her desired accommodation if another form of accommodation would meet the requirements of the ADA as described later in this Section; i.e., a light duty assignment as opposed to additional leave.

FMLA REQUIREMENTS

Applicable law requires that schools:

- Provide unpaid job-protected leave to eligible employees for qualifying reasons.
- Provide employees with general notice about the FMLA.
- Notify employees concerning their eligibility status and rights and responsibilities under the FMLA.
- Notify employees whether specific leave is designated as FMLA leave and the amount of time that will count against their FMLA leave entitlement.
- If a school's workforce is comprised of a significant portion of workers not literate in English, the school must provide notices in a language in which they are literate.
- Allow employees to return to the same or equivalent job (unless the highly-paid, key employee exception applies).
- Hold employees' positions (unless they were slated for elimination even if employees were not out on leave).

- May fill positions temporarily until employees return.
- Must maintain group health insurance coverage, including family coverage.
- Allow employees to continue to receive benefits during leave in the same manner as they would during any other type of leave.
- Allow employees to take leave on an intermittent or reduced leave schedule if necessary to care for sick family members or due to their own serious health condition, if supported by medical certification.
- Retain records for not less than three years.
- Maintain FMLA medical records in separate files from the usual personnel files. Include:
 - Dates FMLA leave is taken;
 - Hours of FMLA leave if less than full-day increments;
 - Copies of FMLA notices;
 - Any documents, including electronic records, describing employee benefits or the school's policies and practices regarding paid or unpaid leave;
 - Premium payments for employee benefits;
 - Records of any dispute between the school and employees regarding the designation of leave as FMLA leave.

PROHIBITED

Applicable law prohibits schools from:

- Interfering with, restraining or denying the exercise of/attempt to exercise any FMLA-protected right.
- Discriminating or retaliating against employees or prospective employees for exercising or attempting to exercise any FMLA-protected right.
- Discharging or in any other way discriminating against any person, whether or not an employee, for opposing or complaining about any unlawful practice under the FMLA.
- Discharging or in any other way discriminating against any person, whether or not an employee, because that person:
 - Filed any charge or instituted/caused to be instituted any proceeding under or related to the FMLA.
 - Gave or is about to give any information in connection with an