

**AFSCME's
Comprehensive Guide
to Understanding the**

Family Medical Leave Act



Table of Contents

Introduction	3
General Provisions	4
Notice Requirements	9
Leave Status	12
Substitution of Paid Leave	14
Military Family Leave Provisions	15
Impact on Other Laws and Bargaining Agreements	18
Enforcement	19
Bargaining for FMLA	21
Footnotes	31
Resources	33
Appendix A: Serious Health Condition Definition	34
Appendix B: Health Care Provider Definition	35
Appendix C: Employer Response to Employee Request for FMLA	36





Introduction

AFSCME fought hard for the Family and Medical Leave Act (FMLA). More than 15 years after its passage, it is still seen as one of the most important and beneficial advances for working families. FMLA has allowed 100 million American workers to take job-protected time off to care for their loved ones or themselves when they need it most. However, many workers still do not fully understand their rights or the procedures they must follow when seeking FMLA leave. Many questions still arise from affiliates about workers' rights under FMLA and management's implementation of the law.

Over time, the U.S. Department of Labor (DOL) and some courts have clarified FMLA requirements. Additionally, in 2008 this law saw its first-ever expansion with the addition of new military family leave provisions as well as revisions of the previously existing FMLA regulations. While the military leave regulations are a positive step for service members and their families, the second part of the new regulations released contain several provisions that restrict workers' FMLA rights.

For these reasons, the Department of Research and Collective Bargaining Services has updated AFSCME's FMLA publication. This user-friendly manual answers a variety of frequently asked questions and provides tips on ways affiliates can bargain for improvements in family leave policies or changes in state laws. Also included are citations for regulatory requirements referred to in the manual, allowing affiliates to locate provisions on their own with greater ease.

This publication replaces the *Family and Medical Leave Act: AFSCME's Comprehensive Guide for You, Your Family and Your Union*.





General Provisions

1. What is the Family and Medical Leave Act (FMLA)?

The Family and Medical Leave Act is a federal law which became effective on Aug. 5, 1993. It provides certain employees with up to 12 work weeks of unpaid, job-protected leave per year and requires group health benefits be maintained during the leave. Amendments to the FMLA by the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Public Law 110-181, expanded the FMLA to allow eligible employees to take up to 12 weeks of job-protected leave in the applicable 12-month period for any “qualifying exigency” arising out of the fact that a covered military member is on active duty, or has been notified of an impending call or order to active duty. The NDAA also amended the FMLA to allow eligible employees to take up to 26 weeks of job-protected leave in a “single 12-month period” to care for a covered service member with a serious injury or illness. The U.S. Department of Labor (DOL) has issued detailed regulations interpreting the FMLA.

2. What am I entitled to under FMLA?¹

A covered employer must grant an eligible employee up to a total of 12 work weeks of unpaid leave in a 12-month period for one or more of the following reasons:

- The birth and care of a newborn child;
- The placement, with the employee, of a child for adoption or foster care and to care for the newly-placed child;
- Care for an immediate family member (spouse, child or parent – but not parent in-law) with a serious health condition;
- When the employee is unable to work because of a serious health condition (See Appendix A for definition); and
- Any “qualifying exigency”² arising out of the fact that the employee’s spouse, son, daughter or parent is a covered military member on or called to active duty.



An employee's entitlement to family and medical leave for the birth or placement of a child expires 12 months after the birth or placement of the child.³ For other requests for family leave, an employee may use up to 12 weeks each year.

3. Which employers must provide this leave?⁴

All public employers⁵ regardless of size and private employers who have 50 or more employees who have been on the payroll for 20 or more weeks in a calendar year are required to provide FMLA leave. However, not all employees of a covered employer are eligible for FMLA.



4. Which employees are eligible?⁶

Eligible employees are those who have worked for the employer:

- A minimum of one year;
- A minimum of 1,250 hours (an average of 25 hours per week) during the 12 months prior to the start of the FMLA leave; and
- At a location where at least 50 employees are employed by the employer within a 75-mile radius.⁷

Each state, city, county and school district is considered an employer under FMLA for purposes of counting the number of employees to determine if an employee is “eligible” for FMLA leave. For example, if an agency in a city has fewer than 50 employees but the city as a whole employs 50 or more employees, the employee will be eligible.

5. Must the 12 months of employment be consecutive months?⁸

No. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation, etc.) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.) the week counts as a week of employment.





6. Do the 1,250 hours include paid leave time or other absences from work?⁹

No. The 1,250 hours include only those hours actually worked, on the job, for the employer. Paid leave, including workers' compensation, and unpaid leave, including FMLA leave, are not included in the 1,250 hours.

7. How can I find the U.S. Department of Labor regulations?

The regulations can be found in the U.S. Code of Federal Regulations at Title 29 beginning at Sections 825.100. You also can access the regulations and many other compliance assistance materials online at www.dol.gov/whd/fmla/index.htm.

8. Can the employer require me to provide medical certification when requesting leave?¹⁰

Yes. An employer may require that you provide a certification issued by your health care provider (see Appendix B for definition of "health care provider") or that of your son, daughter, spouse or parent to support your request. The employer's request for certification should be at the time an employee gives notice of the need for leave or within five business days. If the employer has reason to question the appropriateness or duration of the leave they may request certification at a later date. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the circumstances. If the certificate is not complete or sufficient, the employer must provide the employee with seven days to fix the deficiencies and a list of what information is still needed. The certificate must include¹¹:

- name, address, telephone and fax numbers of health care provider and type of medical practice;
- a description of the serious health condition;
- the date that the condition began or treatment became necessary; and
- the expected duration of the condition or treatment.



An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered service member with a serious injury or illness be supported by a certification.¹²

9. Can my employer contact my health care provider about my serious health condition?¹³

If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification after the employer has given the employee an opportunity to fix any deficiencies. The contact must be made by a health care provider, a human resources professional, a leave administrator or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. Also, if the employer wishes to get another opinion, you may be required to obtain an additional medical certification at the employer's expense.



10. Will I have to sign a medical release as part of a medical certification?¹⁴

No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. Providing such authorization is up to the employee. However, if the employee's certification is not complete and sufficient, and the employee does not fix any deficiencies, the employee's request for FMLA may be denied if authorization to contact the employee's health care provider is not given to the employer.

11. What happens to my health care benefits when I am on leave?¹⁵

You may continue your coverage under the employer's group health plan. For example, if the employer pays 80 percent of your health care premium and you pay 20 percent, that same arrangement will continue





during the unpaid leave period. Employers and employees may negotiate an arrangement in advance that will accommodate both the employer's administrative needs and the employee's financial situation. However, the employer cannot require prepayment. The regulations provide, at a minimum, that if an employee does not meet the agreed upon date for payment of the premium, he or she has a 30-day grace period during which provision of health coverage will not be affected. If coverage lapses for nonpayment of premium coverage, employees still must be restored with the same plan upon return with no restrictions.

If you choose not to continue your health benefits while on FMLA leave, your coverage still must be fully restored, with no restrictions, when you return to work.

12. What happens to my other employee benefits while I am on leave?¹⁶

Taking leave will not result in the loss of any employment benefit accrued prior to the date the leave begins. Although the law does not entitle you to continue to accrue seniority or other benefits while on unpaid FMLA leave, unionized employees may negotiate stronger language protecting other benefits such as life insurance and pension credit for employees on unpaid leave.



13. Can I be sure I'll have a job when I return from leave?¹⁷

The law requires that any employee returning from leave be restored to the position they would have been in if they had not taken the leave. This means you can return to your old job or to an equivalent position with the same pay, benefits and other terms and conditions of employment. However, if, for example, your position was terminated during your leave and you would have been laid off, you are not entitled to get your job back. Note: "Key employees," who are among the highest paid 10 percent of all employees, may be denied reinstatement if necessary to avoid substantial and grievous economic injury to the employer's operation.¹⁸

14. If I decide not to return to work after the leave, will I have to reimburse the employer for the cost of health insurance?¹⁹

It depends on the reason you do not return. If the reason is the continuation, onset or recurrence of a serious health condition or certain circumstances beyond your control, you will not have to reimburse the employer. Otherwise, the employer can require reimbursement.

Notice Requirements

15. Is the employer required to tell me what its FMLA policies are?²⁰

Yes. Employers must take the following steps to provide information to employees about FMLA:

- Post and keep posted a notice of the FMLA requirements in places where employees can readily see it. The notice also must provide information concerning procedures for filing complaints with the Wage and Hour Division of the U.S. Department of Labor.
- Include information about employee rights and obligations under FMLA in employee handbooks or other written material, including collective bargaining agreements. If handbooks or other written material do not exist, the employer must provide general guidance about employee rights and obligations under FMLA by distributing a copy of the general notice (poster mentioned in first bullet – WH Publication 1420) to each new employee upon hiring.

Electronic posting and distribution is permissible.

16. Do I have to give notice to the employer before I take leave?²¹

If the need for leave is foreseeable, the law requires 30 days notice or, if 30 days advance notice is not possible, notice must be given “as soon as practicable” (meaning the same day or the next business day after employee





becomes aware of need). If the need for leave is not foreseeable, the employee must follow the employer's usual call-in rules and procedures unless there are unusual circumstances. If an employee does not comply with the employer's procedures, and no unusual circumstances exist, FMLA-protected leave may be delayed or denied.²²

17. How will I know whether the leave has been approved?²³

The employer must provide you with a written notice designating the leave as FMLA leave and detailing specific expectations and obligations of an employee who is exercising his/her FMLA entitlements. (See Appendix C for the kinds of information included in the notice.) After requesting leave, or when the employer has enough information to determine whether or not the leave is FMLA-qualifying, these employer notices (Rights & Responsibilities and Designation) must be provided to you within five business days.

18. If the employer fails to tell me that the leave qualifies for FMLA leave, can the employer still count the time I've already taken off retroactively?²⁴

Yes. The regulations concerning designation have been revised to comply with the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.* *Ragsdale* ruled that a "categorical" penalty for failure to appropriately designate FMLA leave was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement to demonstrate individual harm. Under the regulations, retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave (and notify the employee of the designation). The employer may be liable, however, if the employee can show that he/she has suffered harm or injury as a result of the failure to timely designate the leave as FMLA.



19. In order to qualify for FMLA leave, do I have to specifically mention FMLA?²⁵

No, not when you are seeking leave for the first time for a FMLA-qualifying reason. You must, however, provide “sufficient information” to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave. “Sufficient information” may include information such as stating that the condition leaves you unable to perform the functions of your job, that you were hospitalized overnight, you are pregnant, or you (or your family member) are under the continuing care of a health care provider. If you are seeking leave due to a FMLA-qualifying reason for which you have already been provided FMLA leave, you must either reference specifically the qualifying reason for leave or the need for FMLA leave. In all cases, your employer should ask for further information if it is necessary to determine if the leave being requested qualifies as FMLA leave.



20. How often may my employer ask for medical certifications for an ongoing serious health condition?²⁶

An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee. However, if the condition will last for more than 30 days, the employer must wait to request a recertification until the specified period has passed. Nonetheless, in all cases, an employer may request a recertification every six months in connection with an absence.

For example, Joe takes eight weeks of FMLA leave for a back operation and intensive therapy and gives his employer a medical certification that states that he will be absent for eight weeks. At the end of the eight-week period, Joe tells his employer that he will need to take three days of FMLA leave per month for an indefinite period for additional therapy; his employer may properly request a recertification at that time. Six months later, and in connection with an absence for therapy, the employer may properly ask Joe for another recertification for his need for FMLA leave.





The regulations also allow an employer to request recertification in less than 30 days if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. Additionally, for chronic medical conditions lasting longer than one year, employers may request a new certification each leave year.²⁷

Leave Status

21. Can my employer put me on FMLA leave whether I want to be or not?²⁸

Yes. In all circumstances, it is the employer's responsibility to designate leave, unpaid or paid, as FMLA-qualifying and to give notice of the designation to you, as long as the illness or injury meets the definition of a "serious health condition."

22. Can I take leave on an intermittent basis or work on a reduced schedule?²⁹

Yes. The FMLA does make provision for intermittent leave or leave on a reduced schedule for planned medical treatment or a serious health condition. Intermittent leave or reduced work week schedules for an employee taking leave for the birth, adoption or placement of a foster child are permitted under FMLA but only with the employer's approval. Therefore, AFSCME councils and locals may negotiate language securing such rights.

When the need for such leave is foreseeable, based on planned medical treatment, the employer can require the employee to transfer temporarily to another position with equivalent pay and benefits if such a move better accommodates the employer's needs during the period of medical treatment or serious health condition.³⁰

23. Does workers' compensation leave count against my FMLA leave entitlement?³¹

It can. FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to qualifying serious illness or injury and the employer designates the leave as FMLA leave in accordance with the regulations.

24. Can the employer count time on maternity leave or pregnancy disability leave as FMLA leave?³²

Yes. Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious condition and may be counted in the 12 weeks of leave.

25. If I am too sick to return to work, can my employer force me to come back to work once my leave expires?³³

No. If your serious health condition requires you to stop working altogether, you cannot be forced to return. But note that once you end your employment, your former employer has no obligation to provide health benefits. You may be eligible, however, to continue your health benefits for 18 months under the Consolidated Omnibus Budget Reconciliation Act of 1986, or "COBRA," provided you pay the full cost.

26. Can I return to work early?³⁴

Yes. If you begin a requested 12-week leave of absence and, three weeks into the leave ask to return to work earlier than originally planned, your employer is obligated to promptly restore you. FMLA states that an employee may only take FMLA leave for reasons that qualify under the Act, and may not be required to take more leave than is necessary to respond to the need for FMLA leave.





Substitution of Paid Leave

27. Can my employer require me to use my paid leave for unpaid FMLA leave?³⁵

Yes, with some restrictions. Congress gave employers the right, unless barred by a union contract or state law, to substitute paid leave whether or not you requested it, for unpaid FMLA leave. You, too, can request to substitute your accrued paid leave for some or all of the FMLA leave period; however, you must follow the terms and conditions of your employer's normal leave policy. If you fail to comply with the requirements in the employer's paid leave policies you are no longer entitled to substitute the paid leave, but you remain entitled to take unpaid FMLA leave.³⁶

28. If my sick leave, vacation, personal leave, etc., adds up to more than 12 weeks, am I still entitled to an additional 12 weeks of unpaid leave after I have exhausted my paid leave?³⁷

Not if the employer requires you to first use your paid leave for your family and medical leave. As stated in the previous question, employers may require the employee to substitute accrued paid leave for FMLA leave and therefore count that paid leave as part of your 12 weeks of family leave. If neither you nor your employer elect to substitute your paid leave then you remain entitled to all earned/acrued paid leave under the terms of your employer's plan.

29. My employer has a no-fault attendance policy. Will my FMLA leave be counted against that policy, thereby putting me in line for disciplinary action?³⁸

No. The FMLA regulations clearly state that an employee cannot be penalized in any manner whatsoever if the employee is absent for a reason covered by FMLA.

Military Family Leave Provisions

Qualifying Exigency Leave

30. What is “qualifying exigency leave?”³⁹

“Qualifying exigency leave” is one of two military family leave provisions (same employee/employer eligibility rules as traditional FMLA leave). This leave helps families of a covered military member manage their affairs while the member is on active duty in support of a military operation. This provision makes the normal unpaid 12 work weeks of FMLA job-protected leave available to eligible employees when a covered military member is on or called to active duty. A covered military member is the employee’s spouse, son/daughter (without the limiting age requirement under traditional FMLA leave) or parent who is on active duty or called to active duty status.⁴⁰

31. Are families of service members in the Regular Armed Forces eligible for qualifying exigency leave?⁴¹

Yes. Originally, this military family leave entitlement that extends FMLA leave due to a qualifying exigency was only offered to family members of National Guard and Reserves and certain retired military. However, in October 2009, the President signed the National Defense Authorization Act of 2010 (NDAA 2010), which expanded this qualifying exigency leave to members in the Regular Armed Forces.

32. What is a “qualifying exigency?”⁴²

The Department of Labor developed a list of eight qualifying exigencies that encompass a wide range of specific activities in the following broad categories:

- Short notice deployment
- Military events and related activities (official ceremonies/events, briefings)





- Child care and school activities (not on a routine, regular or everyday basis)
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities
- Additional activities that the employer and employee agree upon as qualifying exigencies

33. How much leave can I take if I need leave for both a serious health condition and a qualifying exigency?⁴³

Qualifying exigency leave, like leave for a serious health condition or birth/adoption, is a FMLA-qualifying reason for which an eligible employee may use his or her entitlement for up to 12 work weeks of FMLA leave each year. An eligible employee may take all 12 weeks of his or her FMLA leave entitlement as qualifying exigency leave or the employee may take a combination of 12 weeks of leave for both qualifying exigency leave and leave for a serious health condition.

Military Caregiver Leave

34. What is “military caregiver leave?”⁴⁴

“Military caregiver leave” is the second of the two military family leave provisions. An “eligible employee” is entitled to take up to 26 work weeks of leave to care for a covered service member with a serious injury or illness. An “eligible employee” is the spouse, son, daughter, parent or next of kin of a “covered service member.” The serious injury or illness can either be one incurred by the covered service member in the line of active duty or a preexisting injury that is aggravated by service in the line of duty while on



active duty. In addition to current members of the Armed Forces, National Guard or Reserves, the NDAA 2010 expanded the definition of a “covered service member” to include veterans undergoing treatment for a serious injury or illness incurred or aggravated by service in the line of duty if such treatment occurs within five years of leaving service.

35. Can I take military caregiver leave for more than one seriously injured or ill service member, or more than once for the same service member if he or she has a subsequent serious injury or illness?⁴⁵

Yes. The military caregiver leave is a “per-service member, per-injury” entitlement. So, an eligible employee may take 26 work weeks of leave to care for one covered service member in a “single 12-month period,” and then take another 26 work weeks of leave in a different “single 12-month period” to care for another covered service member. This eligible employee may also take the 26 work weeks of leave in different single 12-month periods to care for the same service member with a subsequent serious injury or illness (e.g., if the service member is returned to active duty and suffers another injury).

36. How is leave designated if it qualifies as both military caregiver leave and leave to care for a family member with a serious health condition?⁴⁶

For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that an employer must designate the leave as military caregiver leave first. The regulations also prohibit an employer from counting leave that qualifies as both types against both an employee’s entitlement to 26 work weeks of military caregiver leave and 12 work weeks of leave for other FMLA-qualifying reasons.





Impact on Other Laws and Bargaining Agreements

37. I live in a state which has its own family leave law. Which law applies to me?

It depends on which one is better. If your state law provides family and medical leave rights superior to the federal law, the state law applies. If the FMLA is better, it applies.⁴⁷

38. My union has negotiated leave for the bargaining unit. How does the FMLA affect our contract?

If the leave provided by your contract is superior to the FMLA, the FMLA does not affect your contract. If your contract provisions are not as good as that required by the FMLA, the employer is obligated to comply with the FMLA.⁴⁸ There may be gaps in what your contract provides. For example, your contract might include good parenting leave provisions but nothing on leave to care for a spouse, child or parent with a serious health condition. You may negotiate language to fill in these gaps. That way all of the employee's rights to leave can be enforced through the contract, which may be faster and more effective than filing charges with the U.S. Department of Labor.



Enforcement

39. What federal agency enforces FMLA?

The Wage and Hour Division of the U.S. Department of Labor is the agency that enforces FMLA. (www.dol.gov/whd or 1-866-487-9243)

40. What should I do if my employer denies me the right to take leave?⁴⁹

Talk with your steward about whether your contract provides such leave. If it does, you and/or your union can file a grievance. If not, you and/or your union can file a complaint with the Wage and Hour Division of the U.S. Department of Labor. The Wage and Hour Division, which has offices in most major cities, will investigate your complaint. Because speedy resolution of complaints is essential, the division provides an accelerated intake and investigative process designed to prevent employees from suffering irreparable harm.

The FMLA also gives the Wage and Hour Division the right to go to court and get an injunction to keep the employer from withholding wages or employment benefits. The FMLA also gives you and/or your union the right to go directly to court and file a private lawsuit without first filing with the Wage and Hour Division. You and/or the union have two years from the FMLA violation, three years if it was a willful violation, to file either a complaint with the Wage and Hour Division or a private lawsuit.





41. Must I first exhaust my employer’s internal complaint procedures before filing a complaint?⁵⁰

No. FMLA does not require that an employee exhaust administrative remedies before being authorized to file with the DOL.

42. What damages can I recover from an FMLA violation?⁵¹

The employer can be sued by the employee or DOL to recover wages and benefits lost as a result of the violation, monetary losses sustained (such as the cost of hiring someone to provide care) and interest on the money owed to you. This is in addition to equitable remedies, such as reinstatement. In cases where the employer cannot prove that they acted in good faith, believing their action was legal, you can recover double the amount of damages.



Bargaining for FMLA

The Family and Medical Leave Act is unique in that it creates a floor of family and medical leave benefits for eligible workers, but not a ceiling. Benefits beyond those provided by law can be negotiated in the collective bargaining agreement (CBA). In addition, the FMLA regulations emphasize that employees must receive the benefit of the most favorable provisions of the FMLA or any applicable state law. For example, section 825.701(a)(3) states:

If state law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a “spouse equivalent,” and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under state law, and state leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or “spouse equivalent.”

Also, if the CBA gives the employee six weeks of paid maternity/paternity leave and the FMLA gives the employee 12 weeks of unpaid leave, the employee would be entitled to six weeks of paid maternity/paternity leave and another six weeks of unpaid family leave. Since the benefits are not cumulative, unless the employer agrees, the employee would not be entitled to a combined total of 18 weeks of leave. However, it could be negotiated to make these benefits cumulative.

When preparing to negotiate FMLA provisions, it would be good to first:

- Determine if the employer is covered by the FMLA.
- Determine if the bargaining unit members are eligible for FMLA leave.
- Compare the benefits available under FMLA with those in your CBA. Identify benefits under the FMLA that are not covered by the CBA and identify provisions under the CBA that exceed those of the FMLA.
- Determine if there are problems with the current application of the FMLA and if there is justification for any proposed changes.
- Go through the same process with any applicable state law and/or employer policy.





There are several areas where affiliates can bargain for improvements in the FMLA or state laws.

1. Enforce the FMLA through the CBA.

If you incorporate the provisions of the FMLA into your CBA, you will be able to enforce those entitlements through the grievance and arbitration process. This will provide your members with a much quicker and more efficient remedy when their FMLA rights have been violated.

Suggested Language:

Any violation either of the FMLA or of any state laws, or their respective implementing regulations relating to family and medical leave, shall be subject to the grievance and arbitration provisions of this Agreement. Any remedies provided for in federal and state laws as well as remedies provided for under this Agreement shall be applicable for any violations of these laws.

2. Expand FMLA coverage.

If your employer is not covered by the FMLA or might not be covered in the future, you may want to negotiate an agreement wherein the employer will abide by the FMLA regardless of whether they are covered by the terms of that statute. In addition, you may want to negotiate to eliminate or lessen FMLA eligibility requirements.

Suggested Language:

Notwithstanding the provisions of the FMLA, the employer agrees to apply provisions of that Act to all employees in the bargaining unit regardless of whether they meet the eligibility requirements contained in FMLA.

3. Broaden the definition of “family member.”

The FMLA limits family member to spouse, child and parents. You may want to negotiate a broader definition of family member to include grandparents, grandchildren, siblings, parents-in-law and domestic partners.



Suggested Language:

In addition to family members as defined by the FMLA, employees shall be permitted up to 12 weeks unpaid leave per year to care for the following relatives suffering from serious health conditions: grandparents, grandchildren, brothers, sisters, parents-in-law or domestic partner.

4. Increase the amount of leave that an employee is permitted to take under the FMLA.

The 12 weeks of unpaid leave under the FMLA often is not enough time for employees to deal with some family or medical situations. The length of FMLA leave can be increased through collective bargaining.

Suggested Language:

In addition to the 12 weeks of unpaid leave that an employee is entitled to under FMLA, each eligible employee shall receive an additional ___ weeks of unpaid leave, or paid leave if available, in any 12-month period which shall be subject to all of the rights, obligations and conditions contained in FMLA.

5. Choose the most favorable method for defining the FMLA leave year.

The FMLA leave year is the 12-month period during which employees may take their 12 weeks of FMLA leave. DOL regulations allow four possible methods for defining the leave year. They are the calendar year; the anniversary date of hire; 12 months commencing on the date the employee first takes FMLA leave; or 12 months measured backwards from the initial day of each leave period. All except the last method are good choices for the members because they are easy to apply and they allow members to combine leave over two years.

Suggested Language:

The leave year for FMLA purposes shall be the calendar year beginning January 1 and ending December 31 [or the anniversary date of hire; or the 12 months commencing with the date the employee first takes FMLA leave].





6. Negotiate for leave banks that could be used in conjunction with the FMLA.

Many unions have negotiated leave banks. Eligibility requirements can easily be revised to include a member who takes leave under FMLA and who has exhausted his or her entitlement to paid leave.

Suggested Language:

Each employee who volunteers to participate in a sick leave bank may do so by donating a minimum of one day and up to a maximum of five days each year into the leave bank. An employee who has exhausted his or her entitlement to paid leave under the Agreement and who is taking leave under FMLA, may apply to the bank to withdraw up to 20 days per year of paid leave. The paid leave will be substituted for any unpaid FMLA leave to which the employee is entitled.

The union shall establish a committee that shall administer the leave bank. The committee shall determine employee eligibility and the amount of leave they will be allowed to withdraw.

7. Make a portion of unpaid FMLA leave paid leave.

The major reason eligible employees do not take family or medical leave is that they cannot afford to do so. A survey commissioned by the U.S. Department of Labor in 2000 found that more than one-third of leave takers received no pay during their longest leave and nearly two out of every five leave takers had to cut their leave short due to lost pay. In fact, 78 percent of employees who have needed but not taken family or medical leave say they could not afford to take the leave.

Suggested Language:

Following the birth of a child, bargaining unit employees with one or more years of service (or more liberal: who have completed six continuous months of service) will be eligible for four weeks paid maternity leave.



An employee whose wife gives birth shall be granted two weeks paid paternity leave for the care of the employee's wife and family.

8. If the employer provides Temporary Disability Insurance (TDI), expand the language to include family and medical leave. If the employer does not offer TDI, you may want to negotiate for it.

TDI provides partial wage replacement to employees who are temporarily disabled for non-work related reasons including pregnancy and other serious health conditions. Many workers cannot afford to take unpaid FMLA leave and may not have the accrued paid leave to cover the time off they need. If the employer provides a TDI plan, it can be used to provide pay during FMLA leave. However, under FMLA, disability leave can be charged against the employee's 12 weeks of FMLA leave if the reason for that leave meets the definition of a serious health condition. Thus, you would want to ensure that you also negotiate to increase the amount of leave an employee is permitted to take (*see Bargaining #4*).

Suggested Language:

The temporary disability insurance plan benefits shall extend to employees who take leave for their own illness, the birth or adoption of a child or to care for a seriously ill family member.

If your employer does not offer TDI, you may want to negotiate for such a plan. The employer, employee or both, may pay for a TDI plan; it may be part of a state-run program, self-insurance plan or private insurance plan. Consult your local or council union experts on the best plan to negotiate.

9. Negotiate a sick leave policy that would allow employees to use their sick leave for family members.

Some employers restrict the use of sick leave to the employee's own illness. Therefore, when an employee has to take FMLA leave for a family member, they are unable to use sick leave under this policy and must exhaust all of their vacation or personal leave time. The contract can allow employees to use accrued sick leave when caring for ill family members.





Suggested Language:

Employees shall be allowed to use accrued sick leave during any absence in which the employee is caring for a family member who has a serious health condition as defined in the FMLA.

10. Liberalize the rules on substituting accrued paid leave for unpaid FMLA leave.

Employers can require employees to substitute accrued leave for unpaid FMLA leave, even if the employee would prefer to take unpaid leave. You may want to negotiate a policy that would limit the employer's rights in several ways:

- Restrict the employer's right to require employees to substitute accrued paid leave for unpaid FMLA leave.
- Expand the types of accrued paid leave that can be substituted for certain types of unpaid FMLA leave or permit unrestricted substitution of paid leave for unpaid FMLA leave.
- Permit employees to borrow from their future entitlement to paid leave and to substitute that paid leave for FMLA leave.



Suggested Language:

Notwithstanding the provisions of the FMLA, the employer shall not require an employee to substitute any paid leave earned under this Agreement for unpaid leave taken under FMLA without the consent of the employee.

Notwithstanding the provisions of the FMLA, an employee taking leave to which he or she is entitled under FMLA may substitute, at the employee's discretion, any paid leave earned under this Agreement for any unpaid FMLA leave taken by the employee.

In addition, an employee taking leave to which he/she is entitled under the FMLA may use unearned paid leave up to an amount that the employee would earn in the following 12 months and may substitute that paid leave for any unpaid FMLA taken by the employee.

11. Continue all benefits during the FMLA leave period.

Under FMLA, employers must continue to provide health benefits on the same basis as before the leave, but they are not obligated to provide any other benefits if they do not normally continue these benefits during leaves of absence.

Suggested Language:

During FMLA leave, the employer shall continue to pay its share of all insurance benefit programs in which the employee participates.

12. Require the employer to assist employees to pay premiums for group health coverage.

Under FMLA, employers are not obligated to help an employee who cannot afford to pay his or her share of health insurance premiums.

Suggested Language:

The employer shall defer payment of the employee's share of the cost of his or her health benefits until the employee's return to pay status. At that time, the employer shall deduct from the employee's paycheck one-twelfth of the total amount owed in each of the successive 12 pay periods.

13. Require that employees accrue seniority during periods of FMLA leave.

Under FMLA, employers are not required to count unpaid leave time towards seniority. The contract can insist on this benefit.

Suggested Language:

Notwithstanding the provisions of FMLA, an employee who takes FMLA leave to which he or she is entitled shall accrue seniority for all purposes during the FMLA leave period.





14. Expand the reasons for which FMLA leave may be taken.

The FMLA does not provide job-protected leave for families that need to protect themselves from domestic violence. Victims require time away from work to go to court to obtain protection orders against their batterers, to seek medical treatment and/or seek new living arrangements and child care.

Suggested Language:

Employees who are suffering from domestic violence may take FMLA leave for legal and other activities related to the violence.

15. Permit intermittent and reduced leave schedule to be taken for FMLA.

Many new parents want to work part time after children are born or adopted. The FMLA permits employers to refuse permission for intermittent or reduced schedule childbirth and newborn care leave. However, this provision is negotiable.

Suggested Language:

Notwithstanding the provisions of FMLA, an employee taking FMLA leave for childbirth, newborn care, adoption or foster placement leave shall be allowed to voluntarily take FMLA leave on an intermittent or reduced schedule basis.

16. Expand the definition of a serious health condition.

The definition of a serious health condition under the FMLA does not include medical emergencies that do not require in-patient care or require that the employee or family member be away from his or her daily activities for more than three calendar days.

Suggested Language:

In addition to the reasons set forth in the FMLA, an employee may also take FMLA leave because of the employee's own medical emergency or that of a family member who has suffered a medical emergency, even though the medical emergency may not require in-patient care or require that the employee or family member be away from his/her daily activities for more than three calendar days.



17. Permit a husband and wife who are employed by the same employer to take their full entitlement of 12 weeks of FMLA leave as long as the reason for the leave is for legitimate FMLA purposes.

If a husband and wife both work for the same employer, your employer may limit your combined leave to 12 weeks during a 12-month period if leave is taken for child birth, the adoption of a child or to care for a sick parent.

Suggested Language:

Notwithstanding the provisions of the FMLA, employees who are married to each other or are domestic partners will each be entitled to the 12-week maximum amount of leave under the Act as long as the reason for the leave is for legitimate FMLA purposes.

18. Limit the right of the employer to transfer employees on intermittent or reduced leave schedules to other jobs.

Suggested Language:

Notwithstanding the provisions of the FMLA, the employer shall not transfer an employee taking FMLA leave for planned medical treatment on an intermittent or reduced schedule basis to another position during the period of that FMLA leave without the consent of the union.

19. Reduce the notice period for requesting FMLA leave.

Suggested Language:

Notwithstanding the provisions of the FMLA, an employee who intends to take unpaid leave should give the employer notice of his or her intention 15 calendar days before the leave is to commence. Where the need for the leave is not foreseeable, the employee should give the employer notice as soon as practicable after the employee learns of the need for leave. Nothing in this provision shall apply to a request for paid leave under this Agreement regardless of whether the paid leave might also qualify as FMLA leave.





20. Limit requirement for fitness-for-duty certifications to extended absences.

Suggested Language:

Employees returning from FMLA medical leave of four weeks or longer may be required to submit a fitness-for-duty certification from their health care provider.

21. Limit the effect on other employees of reinstating employees returning from FMLA leave.

Although the FMLA regulations have very favorable language on what is an “equivalent position,” the reinstatement of an employee to an equivalent position, which is different than the employee’s previous position, may impact on the job positions, hours of work, etc., of other bargaining unit members. Therefore, you may want to negotiate over the impact a reinstatement will have on other bargaining unit members.

Suggested Language:

Notwithstanding the provisions of the FMLA, the reinstatement of an employee returning from FMLA leave shall not displace any other bargaining unit employee or limit another employee’s hours of work, except as agreed to by the union. Nothing in this provision shall diminish in any way the obligation of the employer under the FMLA to reinstate an employee returning from FMLA leave to the same position that the employee held prior to taking FMLA leave or to an equivalent position.

Footnotes

The citations listed in this part are to sections in the U.S. Code of Federal Regulations, 29 CFR Part 825

- 1 29 CFR §825.100(a).
- 2 29 CFR §825.126.
- 3 29 CFR §825.120.
- 4 29 CFR §825.104(a) and 105.
- 5 29 CFR §825.108(d).
- 6 29 CFR §825.110.
- 7 29 CFR §825.111.
- 8 29 CFR §825.110(b).
- 9 29 CFR §825.110(c).
- 10 29CFR §825.305.
- 11 29 CFR §825.306. DOL has developed two optional forms (WH-380E for employee's own serious health condition and WH-380F when leave is for a family member's illness) for employees' use in obtaining medical information. See Appendix B of the DOL regulations.
- 12 29 CFR §825.309 and 310. DOL has developed form WH-384 for qualifying exigency leave and form WH-385 for military caregiver leave. See Appendix G and H of the DOL regulations.
- 13 29 CFR §825.307.
- 14 29 CFR §825.305(d) and 307(a).
- 15 29 CFR §825.209 – 213.
- 16 29 CFR §825.215(d).
- 17 29 CFR §825.214 – 216.
- 18 29 CFR §825.216(b).
- 19 29 CFR §825.213(a).
- 20 29 CFR §825.300. See Appendix C of the DOL regulations for the general notice.
- 21 29 CFR §825.302 and 303.
- 22 29 CFR §825.302(c).
- 23 29 CFR §825.300(b), (c) and (d). See DOL model letter (WH-381 and WH-382) in Appendices D and E of the regulations.
- 24 29 CFR §825.300(d).





25	29 CFR §825.302(c).
26	29 CFR §825.308.
27	29 CFR §825.305(e).
28	29 CFR §825.301.
29	29 CFR §825.202 and 203.
30	29 CFR §825.204.
31	29 CFR §825.207(e).
32	29 CFR §825.207(d).
33	29 CFR §825.209(f) and 213(a)(1)(3).
34	29 CFR §825.311(c).
35	29 CFR §825.208(a) and 300(c)(1)(iii).
36	29 CFR §825.207(a).
37	29 CFR §825.207(a)(b).
38	29 CFR §825.220(c).
39	29 CFR §825.112.
40	29 CFR §825.122(g).
41	29 CFR §825.126(b)(2).
42	29 CFR §825.126(a).
43	29 CFR §825.200.
44	29 CFR §825.112(6) and 127.
45	29 CFR §825.127(c)(2).
46	29 CFR §825.127(c)(4).
47	29 CFR §825.701.
48	29 CFR §825.700.
49	29 CFR §825.400.
50	<i>Ibid.</i>
51	<i>Ibid.</i>

Resources

American Federation of State, County and Municipal Employees, AFL-CIO

Department of Research and Collective Bargaining Services

1625 L Street, NW
Washington, DC 20036-5687
(202) 429-1215
Fax: (202) 223-3255
E-mail: research@afscme.org
Website: www.afscme.org

National Partnership for Women & Families

1875 Connecticut Avenue, NW, Suite 650
Washington, DC 20009
(202) 986-2600
Fax: (202) 986-2539
E-mail: info@nationalpartnership.org
Website: www.nationalpartnership.org

Guide to the Family and Medical Leave Act: Questions & Answers
(Fifth edition, 2002)

U.S. Department of Labor

Wage and Hour Division
200 Constitution Avenue, NW
Washington, DC 20210
(866) 487-9243
Website: www.dol.gov

FMLA Employee Guide

Regulations governing FMLA 29 CFR Part 825

Fact Sheet #28: The Family and Medical Leave Act of 1993

Fact Sheet #28A: The Family and Medical Leave Act Military Leave Entitlements





Appendix A

Serious Health Condition Definition (29 CFR §825.113 – 115)

“Serious health condition” means an illness, injury, impairment or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice or residential medical care facility; or
- period of incapacity of more than three consecutive, full calendar days from work, school or other regular daily activities that also involves continuing treatment by a health care provider twice, or once with a continuing regimen of treatment; or
- any period of incapacity related to pregnancy or for prenatal care; or
- any period of incapacity or treatment for a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
- a period of incapacity for permanent or long-term conditions for which treatment may not be effective (e.g., Alzheimer’s, stroke, terminal diseases, etc.); or
- any period of incapacity to receive multiple treatments (including recovery from those treatments) for restorative surgery, or for a condition which would likely result in an incapacity of more than three consecutive, full calendar days absent medical treatment (e.g., chemotherapy, physical therapy, dialysis, etc.).

The regulations specify that if an employee asserts a serious health condition under the requirement of a “period of incapacity of more than three consecutive, full calendar days and any subsequent treatment or period of incapacity relating to the same condition,” the employee’s first treatment visit (or only visit, if coupled with a regimen of continuing treatment) must take place within **seven** days of the first day of incapacity. Additionally, if an employee asserts that the condition involves “treatment two or more times,” the two visits to a health care provider must occur within **30** days of the first day of incapacity. Finally, the regulations define “periodic visits” for treatment of a chronic serious health condition as at least **twice** a year.

Appendix B

Health Care Provider Definition (29 CFR §825.125)

Health care providers who may provide certification of a serious health condition include:

- doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or
- podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a sublimation as demonstrated by X-ray to exist) authorized to practice in the state and performing within the scope of the practice under state law; or
- nurse practitioners, nurse-midwives, clinical social workers and physician assistants authorized to practice under state law and performing within the scope of their practice as defined under state law; or
- Christian Science Practitioners as listed with the First Church of Christ Science in Boston, MA; or
- any health care provider recognized by the employer or employer's group health plan's benefits manager; and
- a health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country.





Appendix C

Employer Response to Employee Request for FMLA (29 CFR §825.300)

The employer may use the U.S. Department of Labor Optional Form WH-381 “Notice of Eligibility and Rights & Responsibilities” and Form WH-382 “Designation Notice to Employee of FMLA Leave.”

These employer notices should be provided to the employee within five business days after receiving the employee’s notice of need for leave and include the following:

- state whether or not the employee is eligible for FMLA and if not must state at least one reason why not;
- that the leave will be counted against the employee’s annual FMLA leave entitlement;
- any requirements for the employee to furnish certification of a serious health condition, serious illness or injury or qualifying exigency and the consequences of failing to do so;
- the employee’s right to elect to use accrued paid leave for unpaid FMLA leave and whether the employer will require the use of paid leave, and the conditions related to using paid leave;
- any requirement for the employee to make co-premium payments for maintaining group health insurance and the arrangement for making such payments;
- any requirement to present a fitness-for-duty certification before being restored to his/her job;
- rights to job restoration upon return from leave;
- employee’s potential liability for reimbursement of health insurance premiums paid by the employer during the leave if the employee fails to return to work after taking FMLA leave; and
- whether the employee qualifies as a “key” employee and the circumstances under which the employee may not be restored to his/her job following leave.



American Federation of State, County
and Municipal Employees, AFL-CIO
1625 L Street, NW
Washington, DC 20036
afscme.org

Lee Saunders
President

Laura Reyes
Secretary-Treasurer

