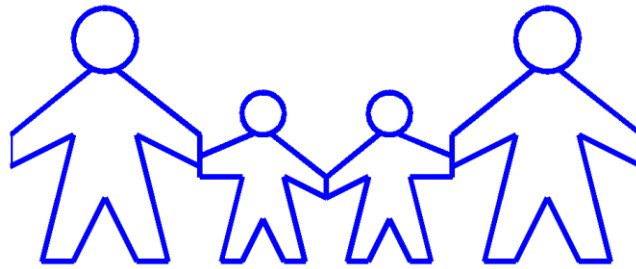


The Family and Medical Leave Act



Alabama Association of
School Business Officials
May 2022

Whit Colvin

Family and Medical Leave Act (FMLA)

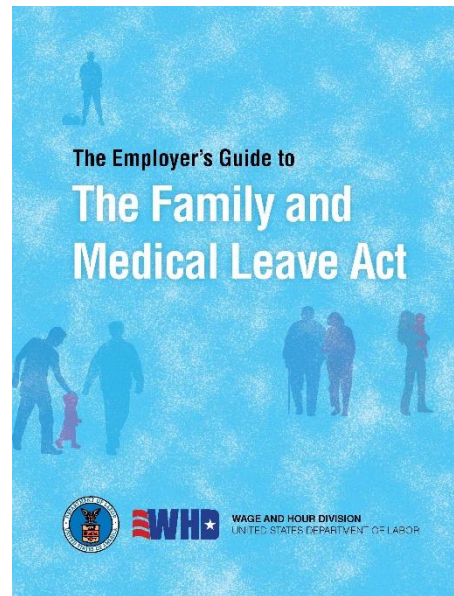
- Federal Law – passed by Congress
- Covers all public agencies and some private employers
- Provides leave for certain employees
- Amended by National Defense Authorization Act

FMLA Intent

- To balance the demands of the workplace with the needs of families
- To promote the stability and economic security of families
- To promote national interests in preserving family integrity
- To entitle employees to take reasonable leave for medical reasons or for family
- To provide that leave in a way that accommodates employees
- To provide that leave in accordance with equal protection
- To promote equal opportunity for men and women

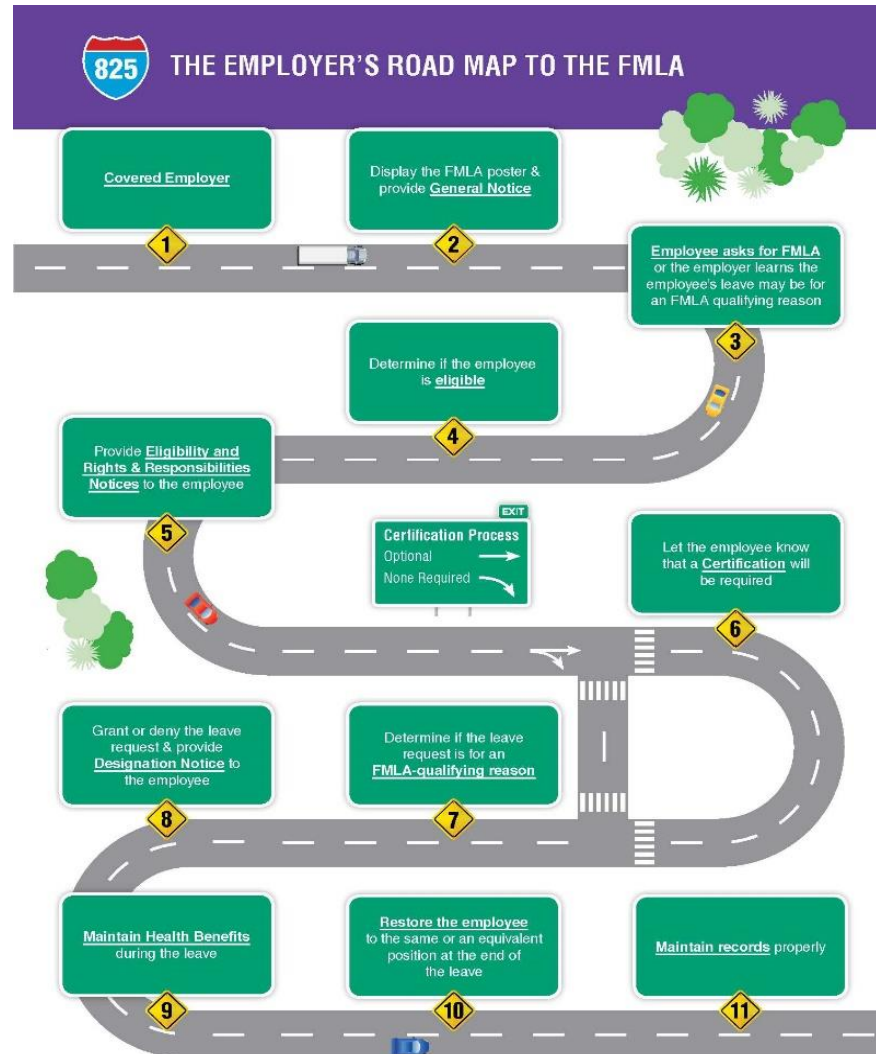
Enforcement and Guidance

- United States Department of Labor enforces
- In 2016, DOL issued comprehensive guidance in a user friendly format



- <https://www.dol.gov/whd/fmla/employerguide.pdf>

The DOL Road Map



Eligibility for FMLA

(1) The employee must have worked for the Board at least 12 months

AND

(2) Employee must have worked at least 1,250 hours during the 12 months prior to the start of the leave

12 Months With Employer

- Employee must have 12 months “history” with Board
- Often looked at in terms of weeks – 52 weeks
- Does not have to be 52 full weeks – instead, just have to work part of those weeks
- Test is whether employee was on payroll, even if not actively working
- Leave can count toward the 52 weeks

Hours Worked

Second Part of Eligibility Test

1,250 hours in 12 months is the eligibility threshold. How do you get to 1,250?

- In calculating whether an employee worked 1,250 hours, only count the hours actually worked
 - No credit for holidays, vacation, paid or unpaid leave
- Calculation method – Fair Labor Standards Act principles
- Count back from the date leave commences

Establishing the “Hours Worked”

- Have to keep accurate records – time sheets
- If Board does not have accurate records, burden is on Board to establish the employee did not meet the threshold
- Full-time teachers are deemed “to meet the 1,250 hour test,” unless the Board “clearly demonstrates” the employee did not work 1,250 hours

FMLA Leave

Does the Reason Qualify?

- Birth and care of newborn or adoption
- Serious health condition of employee
- Serious health condition of family member of employee

Birth and Care of Newborn

- Applies to mothers and fathers
- Applies to adoption and children in foster care
- Covers “placement” and application periods for adopted and foster children
- Entitlement ends after first year
- If both father and mother are employees, get combined leave of 12 weeks

Serious Health Condition

Illness, injury, impairment, or physical or mental condition that involves:

1. Inpatient care (overnight care) and follow up care
2. Continuing treatment by health care provider due to incapacity of more than three (3) consecutive days and any follow-up care that also involves:
 - (a) two or more visits to health care provider, or
 - (b) one visit to provider which results in a regimen of continuing treatment
3. Pregnancy
4. Incapacity due to a chronic , serious health condition, such as asthma, diabetes, epilepsy, etc.
5. Permanent or long-term incapacity for which treatment may not be effective
6. Absence to receive multiple treatments for a condition that would require more than 3 days of incapacity if left untreated (chemo, physical therapy, dialysis)

Serious Health Condition Regulatory Clarification

- “Continuing treatment” definition requires 3 consecutive days of incapacity AND either two follow up visits OR one follow up visit which results in a continuing regimen of care
 - Under the rule, the two follow up visits have to occur within 30 days, with the first visit within 7 days of first day of incapacity
 - If the “continuing regimen of care” applies, the first visit must have occurred within 7 days of first day of incapacity
- “Chronic health conditions” require at least two periodic visits to health care provider per year in order to trigger the Act

What Does All That Mean?

What Qualifies?

- Hospital stays
- Pregnancy
- Terminal diseases, Alzheimer's, Parkinson's, Multiple Sclerosis, etc.
- Asthma, diabetes, epilepsy or other condition which may be controllable but does not go away
- Multiple treatments for the above treatments

What Doesn't Qualify?

- Routine physical exams, eye exams, dental exams
- A regimen of continuing treatment involving merely the taking of over-the-counter medications, bed rest, exercise, drinking fluids or other common treatment options
- Cosmetic treatments such as skin blemish treatments and plastic surgery (although complications from that may qualify)
- Common cold, flu, ear aches, upset stomach, minor ulcers, headaches, routine dental problems
- Absence due to substance abuse UNLESS it is treatment by a health care provider for that abuse

The Elephant in the Room

What about COVID?

- Analyze like other conditions – there were some temporary measures providing special rules for COVID but those have expired
- DOL has guidance and a FAQ providing clarification

Doctor's Excuses

Can We Ask for Proof?

- Yes, employer can require certification related to serious medical conditions
- Employer has to give the employee at least 15 calendar days to get the certification

Certification - What is Sufficient?

Certification “shall be sufficient” if it states:

- The date the condition commenced
- Probable duration of condition
- “Appropriate” medical facts
- If care is for family member, statement that care is needed and estimate of time to provide care
- For serious health care of employee, statement of inability to perform job
- In case of intermittent leave, statement of medical necessity of the time and dates of future treatment
- In case of intermittent leave for family member, statement of necessity and schedule

Certification – What is Sufficient?

Some Changes in New Rule

- Limits those who can ask for certification to a health care provider, Human Resources professional, a leave administrator, or management official, but **CANNOT** be immediate supervisor
- May only ask for information on the certification form
- If certification is incomplete, specify what is missing in writing and give employee 7 days to cure the deficiency

[* Department of Labor has a form *]

Second Opinions

- Board may get a second opinion when it “has reason to doubt the validity of the certification”
- Board gets to choose the doctor
- Board has to pay for the doctor
- If Board’s doctor and employee’s doctor disagree, can get a tiebreaker opinion from a third doctor chosen by the Board and the employee
- Third opinion is final and must be paid for by the Board

Who Counts as a Health Care Provider?

- Licensed physicians
- Licensed podiatrists, dentist, psychologists, optometrists, and chiropractors (for limited purposes)
- Nurse practitioners, midwives, and clinical social workers
- Christian Science practitioners
- Any health care provider recognized by the Board or by PEEHIP
- Foreign providers (review rules carefully in that instance)

Immediate Family Member

- Can take leave to care for an immediate family member with a serious health condition
- Employer may request reasonable documentation concerning the family relationship

Who counts as a family member?

- Spouse: Husband or wife, as defined or recognized under state law for purposes of marriage – can include common law spouses
- Son or Daughter: Includes adopted children, stepchildren, child of person “in loco parentis” either under 18 or over 18 and “incapable of self care because of a mental or physical disability
- Parent: Biological parent or “in loco parentis”

(“in loco parentis” means those who brought up and raised the child; does not include parents “in law”)

Military Family Leave

- Be aware that there are additional provisions covering military families.
- If you have a military leave situation, make sure and review the rules carefully and consult with counsel.

Taking FMLA

How Does it Arise?

1. Employee gets sick or hurt
2. Employee does not make it to work
3. Wants to use sick leave or OJI
4. Stays out for a considerable time
5. Runs out of sick days
6. Tries to join sick leave bank
7. Completely out of days – asks about FMLA leave
8. Coworkers report employee seen cutting grass or at another job
9. Board asks for certification
10. Doctor's letter is insufficient – not very specific
11. Board denies leave
12. Employee doesn't come to work
13. Employee is terminated

How to Make the FMLA Process Smooth (and Legal)

Make expectations clear
and be sensitive, thoughtful
and deliberate

Making Expectations Clear Employer Notice Obligations

New regulations combine all employer notice sections into one section and “simplifies” notice

Making Expectations Clear

Required Types of Employer Notice

- General FMLA Notice
- Eligibility Notice
- Rights and Responsibilities Notice
- Designation Notice

Making Expectations Clear

Notice of FMLA Rights

General FMLA Notice - Poster

- Post notice “explaining the Act’s provisions and providing information concerning filing complaints”
- Must be posted prominently
- Can use Department of Labor’s notice
- Can be electronic

Making Expectations Clear

General Notice of FMLA Rights

Written Guidance

- If have handbook or other written guidance on leave or benefits, have to include FMLA information
- If the Board does not have a handbook, policy or manual, still have to provide “written guidance” – may be distributed upon hiring
- Can use Department of Labor publications
- May be distributed electronically

Making Expectations Clear

Eligibility Notice

- Required when FMLA requested or when employer finds out leave may be FMLA qualifying
- Must inform of eligibility within 5 business days
- Don't have to do for subsequent requests in same 12 month period, if eligibility status is the same

Making Expectations Clear

Eligibility Notice - Contents

- Whether employee is eligible
- If not, the reason why not – number of months worked, number of hours worked, whether employee number is met
- Can be oral or in writing – **DO IT IN WRITING**

* May use Department of Labor Form *

Making Expectations Clear

Rights and Responsibilities Notice

- Must include with eligibility notice
- If leave has already begun, must be mailed to address of record

Making Expectations Clear

Rights and Responsibilities Notice - Contents

- Must be in language employee can read
- Must include
 - That leave will count against entitlement
 - Certification requirements and consequences of failing to submit
 - Substitution of paid leave provisions (whether required and conditions)
 - Any co-pay requirements for health insurance and consequences
 - “Key employee” provisions
 - Right to be restored to job
 - Potential liability for premiums if fail to return to work
 - Department of Labor has prototype notice
- Optional - may include information about periodic reporting and intent to return to work, but not required

Making Expectations Clear Rights and Responsibilities

- If information in Rights and Responsibilities notice changes, have to provide notice of changes
- “Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA”

Making Expectations Clear

Designation Notice

- Employer's responsibility to designate as FMLA – qualifying within 5 days of receiving enough information to determine if leave qualifies
- Only one notice required per reason per 12 months
- Must be written

* May use Department of Labor Form *

Making Expectations Clear

Designation Notice - Contents

- Whether FMLA qualifying
- Substitution of paid leave
- Fitness for duty/return to work requirements (including essential functions) unless in handbook – then can be oral notice
- Amount of leave counted against FMLA entitlement (if known)
 - If not known, at time of designation notice, required upon request of employee
 - May be communicated orally or in writing – can use pay stubs

Notice of FMLA Rights

- Cooperation required – employer expected to “responsively answer questions”
- Consequences of failure to follow notice provisions – cannot take action against employee for failure to comply with any provision required to be set forth in notice

The Flip Side . . .

- Employee also has a responsibility to provide notice
- and
- That notice has to explain the reasons for the needed leave

Notice of Leave by Employee

Foreseeable Leave

- General Rule – Employee must provide 30 days notice if need for leave is foreseeable
- Notice does not have to specifically request FMLA leave, BUT has to be sufficient to apprise Board of need for “FMLA qualifying” leave
- If not clear, regulations place burden on employer to ask for more details so it can make the determination
- Can be verbal

Notice of Leave by Employee

Foreseeable Leave

- Scheduling procedures or intermittent leave -- should consult with employer so as not to “disrupt unduly” operations
- May require reasons for leave, anticipated duration and anticipated start
- Consequence : New regulations say leave may be “delayed or denied” if employee fails to follow notice requirements and no unusual circumstances justify the failure
- Regulations do not prescribe when may delay and when may deny-be careful!

Notice of Leave by Employee

Unforeseeable Leave

- General Rule – employee must provide notice “as soon as practicable” under the facts and circumstances of the individual case
- Employer policies generally establish what is practicable
- In person, telephone, telegraph, facsimile or electronically
- Can be given by employee or “spokesperson”

Notice of Leave by Employee

Unforeseeable Leave

Contents of Notice

- Sufficient information to determine whether FMLA applies, including:
 - That condition makes unable to do job
 - Pregnant or hospitalized
 - Under continuing care of doctor
 - For military, employee is on active duty or call to active duty
 - Specific reasons under regulations
 - Anticipated duration of leave
 - If for care of family, that condition renders family member unable to care for self

Notice of Leave by Employee

Unforeseeable Leave

- First request need not mention FMLA
- After FMLA has been provided, employee must mention qualifying reason or FMLA – not enough just to call in “sick” without more information
- If employer cannot tell, employer shall ask for more information
- Failure to respond to employer request may result in denial of FMLA protection

Designation of Leave

- Once employee gives notice of need for leave, employer should respond promptly – make a decision and communicate it or ask for more information
- FMLA regulations require an employer to designate leave as “FMLA qualifying”

Penalty for Failure to Designate Leave New Regulations

When employee suffers individualized harm due to a failure to designate leave or provide notice, employer may be liable for interference with rights or other legal theories which are not specified

What To Do ?

Include provision in policy and written materials that paid or unpaid medical leave will count against FMLA leave and include statement in granting leave that it is FMLA qualifying

Payment for Leave

- FMLA leave is unpaid leave
- School boards have paid leave options for employees
 - Sick leave
 - Personal leave
 - On-the-job injury leave
 - Vacation leave (for some employees)
 - Unavoidable leave
 - Military leave
 - Sick leave bank
- Can require employees to use paid leave when taking leave under FMLA
- In that case, state and local level leave and FMLA leave will run concurrently

Benefits

- Even though FMLA provides for unpaid leave, have to continue benefits on same terms as before leave
- Most notable benefit – health insurance
- Same terms and conditions
 - Board funds its portion
 - If family coverage, employee has to pay his or her share
- Retirement plans, savings plans, elective plans

Special Concern - PEEHIP

- Most Board employees are not twelve-month employees – most work during school year
- Insurance with PEEHIP is for twelve-months
- Summer allocations are earned pursuant to 3/1 Rule
- PEEHIP manual has provisions on FMLA
 - Key Provision – Employees continue to earn Summer allocations under 3/1 Rule
 - Remember, these provisions do not modify FMLA -- do not use as a reference guide or statement of authority
- Do not use up allocation earned under 3/1 Rule during FMLA leave – these are applied at end of leave

Intermittent Leave

- FMLA does not require that leave be taken all at one time -- it may be taken “intermittently” under certain circumstances
 - For birth or adoption, only available, if agreed to
 - If due to serious health conditions of employee or family member, has to be a *medical need*
 - Medical need must be best *accommodated* through intermittent schedule

Intermittent Leave - Schools

- Special rules for schools – instructional personnel
- 20% rule – If the leave will cover more than 20% of the total number of days in the leave period, can require employee to:
 1. Take leave for particular periods, or
 2. Transfer the employee to a position where it is easier to accommodate intermittent leave

FMLA Leave – Schools

End of Academic Term Rules

- More than 5 weeks before end of term, may require employee to take leave through end of term, if:
 - A. Leave is more than 3 weeks or
 - B. Would return within 3 weeks of term end
- Less than 5 weeks before end of term, may require employee to take leave through end of term, if:
 - A. Leave is more than 2 weeks or
 - B. Would return within 2 weeks of term end
- Less than 3 weeks before end of term, may require employee to take leave through end of term, if leave is longer than 5 working days

Job Restoration

- Employee entitled to be returned to same or equivalent position upon return from FMLA
- Equivalent position = virtually identical in terms of pay, benefits and conditions, including privilege and status
 - If no longer qualified because missed a course, renew license, etc., have to give time

Equivalent Position Pay

- Entitled to cost of living and other unconditional pay raises
- Entitled to position with similar overtime

Equivalent Position Benefits

Benefits

- Must be resumed at same level as when leave started
- Can not require “requalification” or re-enrollment
- Not required to permit accrual of additional benefits (seniority, retirement, sick days) while on leave

Equivalent Position Terms and Conditions

- Must be reinstated to same or geographically proximate work site (unless employee requests or agrees to another)
- Same or equivalent work schedule
- Same or equivalent opportunity for bonuses, profit sharing and similar payments

* *

No greater right to job or benefits than if he or she had been continually employed

Fitness for Duty Certification

Serious Health Concerns

- Can adopt uniformly-applied policy for similarly situated employees to provide certification that they are able to resume work
 - Similarly situated = same occupation or same health condition
- Employer may require certification to specifically address employee's ability to perform essential functions of employee's job
 - In that case, have to provide a list of functions
- Can require certification for intermittent leave where reasonable job safety concerns exist (up to every 30 days)
- If requiring fitness duty or "return to work" certification, have to advise employee of requirement in designation notice

Retaliation / Interference With Rights

- **Interference with rights**
 - unlawful to “interfere with, restrain, or deny the exercise of or the attempt to exercise,” rights under FMLA
- **Discrimination**
 - cannot discharge or discriminate for asserting FMLA rights
 - cannot fire or discriminate for filing a charge or making complaints under FMLA, for participating in an investigation, or for testifying about FMLA rights
- **Key provision of the Act**
 - Can subject Board to damages, monetary losses, liquidated damages, equitable relief (which can include promotions and reinstatement) and fees and costs

FORMS

- Department of Labor General Notice “Poster” (Pub. 1420)
- Notice of Eligibility & Rights & Responsibilities (WH-381)
- Designation Notice (WH-382)
- Certification forms
 - Employee’s Serious Health Condition (WH-380-E)
 - Family Member’s Serious Health Condition (WH-380-F)
 - Serious Injury or Illness of Covered Service Member (WH-385)
 - Qualifying Exigency for Military Family Leave (WH-384)
- Frequently Asked Questions about Revisions from DOL
 - FMLA
 - Military Family Leave
 - [COVID](#)

QUESTIONS ?

Whit Colvin

205.251.2881

205.254.3987 fax

wcolvin@bishopcolvin.com



1910 First Avenue North
Birmingham, Alabama 35203
www.bishopcolvin.com