

## Five Common FMLA Mistakes

The Family and Medical Leave Act (FMLA) is difficult for even the most experienced HR person to administer. There are many pitfalls and opportunities to make mistakes. Five common ones include:

1. **Not knowing the eligible players. It's about more than working for a company with 50 employees.**
  - A. **Do you really have 50 or more employees** or 50 or more employees within a 75 mile radius?
    1. You must have had 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Therefore employees aren't eligible for FMLA leave the day you "hit" 50 employees.
    2. Employees on paid or unpaid leave are counted toward the "50" as long as they are expected to return. Part time employees are also counted.
  - B. **Has the employee been working for at least 12 months** (not necessarily consecutive)? If he's been on the payroll for any part of a week, including during paid or unpaid leave during which other benefits have been provided (e.g., worker's comp or group health) then the week counts. Time spent in active duty military service counts toward eligibility.
  - C. **Has the employee worked at least 1250 hours** during the 12 month period immediately before the leave?
    1. Whether 1250 hours have been worked is determined according to "compensable hours" standards of the Fair Labor Standards Act (FLSA).
    2. If accurate records aren't available or if exempt employees are involved, then the employer has the burden to show that the employee hasn't worked the 1250.
  - D. **Has the employee already exhausted the amount of leave available?**

An eligible employee is entitled to a total of 12 workweeks of leave during a 12 month period or 26 weeks for Servicemember (Caregiver) leave. How do you define your leave period? Is it the best definition for the company?
2. **Failing to take notice of employee notice rights.**
  - A. **Do you post the required FMLA notice?** It's available at <http://www.dol.gov/whd/regs/compliance/posters/fmla.htm>.
  - B. **If you have an employee handbook or written policies do you include discussion of FMLA rights?** If you don't have a handbook/policies do you provide written guidance as required? The Department of Labor's (DOL) FMLA Fact Sheet could be used for this purpose.
  - C. **When an employee requests a leave do you respond appropriately?** Do you provide a written notice confirming or denying the leave and providing specifics as to the expectations of obligations? A sample Employer Response is also available from the DOL.
3. **Not knowing a "serious health condition" when you see one.**

Identifying a qualifying "serious health condition" can be as difficult as recognizing a rare species.

**A. What it is.** A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either:

1. “Inpatient care” (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) or subsequent treatment related to the inpatient care or,
2. “Continuing treatment” by a healthcare provider if certain conditions are met (incapacity of more than 3 consecutive days with treatment 2 or more times, or at least one treatment plus ongoing treatment).

Remember too that incapacity due to: pregnancy (morning sickness or time for prenatal visits), chronic conditions (e.g., asthma, migraines, diabetes, epilepsy), permanent/long term conditions requiring medical supervision (e.g., Alzheimer’s, stroke, terminal disease) but not necessarily active treatment, and absences for multiple treatments (e.g., dialysis, chemotherapy) are also covered.

Don’t forget - continuing treatment includes exams to determine if a serious condition exists.

**B. What it isn’t.** Routine medical or dental exams and, unless there are complications, cosmetic treatment, colds, flu, earaches, upset stomachs, etc., are not “serious health conditions” unless complications develop or inpatient care is required. An employee who is incarcerated or incapacitated for drug or alcohol abuse isn’t entitled to FMLA.

**C. What it could be.** Common sense would seem to say that the FMLA wouldn’t apply to apparently minor conditions like colds or flu. But could it? Yes.

A minor allergy, the flu, or a sore throat requiring an antibiotic could be covered under the FMLA if treatment meets the tests of A1) and A2) above. Substance abuse may also be covered if the above requirements are met and the employee’s absence is for treatment.

The bottom line: Examine each employee illness or injury on a case-by-case basis.

#### **4. I’ll Be Back in a Minute—Not correctly dealing with Intermittent & Reduced Leave**

If you think that you’ve figured out how to deal with the FMLA, try applying your knowledge to the Intermittent leave rules.

**A. Can we just say no and deny a request for FMLA leave in hourly or daily increments?**

No, not for a serious health condition of the employee or his/her family member. However, an employer’s permission is required for intermittent or reduced leave for the birth or placement of a child. BUT, if a new mother or her child develops a serious health condition, then permission is not necessary.

**B. Ok, but there’ll be an easy way to track these hours?**

Yeah, sure, and some day the FLSA will be understood by all. Tracking intermittent and reduced leave is a monster headache. You must subtract leave taken from an employee’s leave bank based on her normal work schedule. It becomes tricky with employees who work

less than full time schedules. The DOL also requires that leave be tracked in the smallest increment that payroll uses to track absences, but no longer than 1 hour. Employees can't be charged for more leave than is needed.

#### **Failing to get them back where they belong—Reinstatement Issues**

- C. What's the number one FMLA complaint?** According to the DOL, it's not returning someone to the same or equivalent position after a leave.
- D. It's almost the same job and we're calling it good.** Maybe not. "Equivalent" doesn't mean a similar job. The job should be virtually identical to the employee's former position in terms of pay, benefits, and working conditions. It must involve the same or substantially similar duties, responsibilities, skills, and efforts.
- E. "The seat is occupied" is no excuse.** An employee is entitled to his reinstatement even if he's been replaced or his job has been restructured to accommodate his absence.
- F. There must be exceptions?** In HR law there are always exceptions. But they're limited. An employee is entitled only to the same job protection rights he'd have had if he hadn't been on leave. He's not entitled to reinstatement if he can't perform the essential functions because of a continuing serious health condition, and if he's a "key" employee, the reinstatement requirements aren't applicable.

Exceptions to the Exceptions: If the employee can't perform the essential functions because of a serious mental or physical condition, she may still be protected under the ADA. Also, if someone is no longer qualified for the position (because she couldn't take a course or renew a license) she must be given time to get requalified.

- G. Equivalent pay? How complicated could that be?**
  - 1. Pay increases. Employees on FMLA leave are entitled to unconditional pay increases (such as cost of living increases) that may have occurred during the leave period. Increases conditioned upon seniority, length of service, or work performed needn't be given unless other employees on "leave without pay" receive them.
  - 2. Pay premiums. An employee has the right to be restored to the same or equivalent pay premiums (e.g., shift differential, a typical number of overtime hours).
  - 3. Bonuses. Bonuses for perfect attendance and safety don't actually require performance by an employee, so if an employee has met the requirements for these bonuses before her FMLA leave, she'd be entitled to them. She can't be penalized for having taken the leave. However, if an employee is on leave during any part of the time that a monthly production bonus is calculated, the employee is entitled to be treated in the same way as other employees on paid or unpaid leaves.

**Don't forget your state law.** Many states have their own "mini" FMLAs. And, in case you thought you had nothing to look forward to, the DOL will most likely continue to change the FMLA provisions over time.