



HR
PROFESSIONALS
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Texas Municipal Human Resources Association

FAMILY MEDICAL LEAVE ACT (“FMLA”) AND PREGNANCY DISCRIMINATION



FMLA

(Enacted 1993)

FMLA OVERVIEW

THE BASICS

The employee must have worked for at least 12 months *and* worked for at least 1,250 hours during the preceding 12 months.

An eligible employee is entitled to 12 “workweeks” of leave during a 12-month period (26 workweeks if leave to care for a covered service member is involved).

MAY BE TAKEN FOR THE FOLLOWING REASONS

1. Birth of a child, and in order to bond with that child;
2. Placement of a child with the employee for adoption or foster care;
3. Care of a spouse, child or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
4. Employee's own "serious health condition" which makes him or her unable to perform the essential functions of the job, including incapacity due to pregnancy and for prenatal medical care;

MAY BE TAKEN FOR THE FOLLOWING REASONS

5. Qualified exigencies that are the result of a covered service member (son, daughter, spouse, parent or next of kin) being called to duty in the Armed Forces; or
6. To care for a covered service member (son, daughter, spouse, parent or next of kin) who is injured or becomes ill while on covered active duty. (26 workweeks)

FMLA LEAVE FOR CHILD WHO IS 18 YEARS OR OLDER

In order for a parent to take FMLA leave for a child who is 18 years or older, the son or daughter must:

- Have a disability (as defined by the ADA) at the time leave is to commence;
- Be incapable of self-care because of the disability;
- Have a serious health condition; and
- Need care because of the serious health condition.

HOW DO YOU VERIFY “SERIOUS CONDITION”?

Through certification from employee’s health care provider; and

Requires either inpatient care *or* continuing treatment by a health care provider.

IS A “CERTIFICATION” REQUIRED?

No *but* let the employee know if one will be required.

CONTINUING TREATMENT BY HEALTH CARE PROVIDER

1. A period of incapacity of more than 3 consecutive calendar days; and
2. Any subsequent treatment or incapacity relating to that condition that also involves:
 - (a) Treatment 2 or more times within 3 day period; or
 - (b) Treatment by health care provider on at least 1 occasion that results in a regimen of continuing treatment under health care supervision.

12-MONTH PERIOD HOW TO CALCULATE?



Calendar year/fiscal year (fixed 12-month period);

Any fixed 12-month period going forward from the date an employee's first FMLA leave begins; and

Rolling 12-month period measured backward from the date an employee uses FMLA leave.

12-MONTH PERIOD HOW TO CALCULATE?

Employees *must* be told what method the employer is using before they take leave; and, *if* an employer decides to change the method chosen, employees *must* first be given at least 60 days notice.

BIRTH OF A CHILD

WHEN HUSBAND AND WIFE WORK FOR SAME EMPLOYER

Limited to a combined total of 12 weeks of FMLA leave for the birth of a child, the placement of a child with them for adoption or foster care, or if they are needed to care for a parent with a serious health condition. 29 C.F.R. §825.201(b).

NOTICE REQUIREMENTS

IF leave is foreseeable – 30 days

➤ (Failure to provide, can delay for 30 days)

IF leave is *not* foreseeable, the employee must provide such notice “as soon as possible and practical.”

HOW MAY NOTICE BE PROVIDED?

- If the need for leave is not foreseeable, the employee may provide notice either in person or by telephone, telegraph, fax or other electronic means.
- Notice may also be given by the employee's spouse, family member or other responsible party if the employee is unable to do so personally.
- Whoever provides the notice, it must be sufficient enough for the employer to understand that the FMLA is implicated.
- Employee is not required to specifically mention FMLA.

FAILURE TO PROVIDE NOTICE

IF an employee fails to provide 30 days' notice and has no reasonable excuse, the employer may delay the start of the FMLA leave until at least 30 days after the notice is provided. (This provision does not apply to military leave.)

SATTERFIELD V. WAL-MART STORES, INC. *135 F.3RD 973 (5TH CIR. 1998)*

The only communication was from an employee's mother advising that the employee was sick and experiencing "a lot of" pain in her side. A federal appeals court ruled that this was insufficient notice of the need for FMLA leave.

THE CERTIFICATION PROCESS

Employee must provide the requested medical certification within 15 calendar days after an employer's request, unless it is not feasible under the particular circumstances to do so despite the employee's good faith efforts.

*No Certification can be required for leave to bond with newborn child or adoption/foster care.

CERTIFICATION MUST CONTAIN

1. All contact information for the health care provider and background information of the medical practice (including area[s] of specialization);
2. Approximate date when the condition commenced;
3. Probable duration of the condition; and
4. Appropriate medical facts regarding the condition, including, for example, symptoms, diagnosis, hospitalizations, doctor visits, prescribed medications (at health care provider's discretion).

DEFICIENCIES IN CERTIFICATION

What if there are deficiencies in the certification?

Identify the deficiencies in writing and ask the employee to provide corrected information within 7 calendar days.

Failure to Provide a diagnosis- DO NOT REJECT!!!

CERTIFICATION - EMPLOYEE RESPONSIBILITY

The employee's responsibility is to find a health care provider who will provide a complete certification. The law does not require the certification to take any specific form, but the Department of Labor has provided sample certification forms:

Form WH-380E: for the employee's condition; and
Form WH-380F: for a covered family member

SECOND OPINION

May an Employee Request a Second Opinion?

Yes. If an employer is not satisfied with an employee's original certification, it may require the employee to obtain a second opinion from a health care provider approved and paid for by the employer.

What if the Two Opinions Conflict?

The employer may pay for a third opinion to be delivered by a doctor mutually agreed upon by the employer and employee. The third opinion is final and binding.

REFUSAL TO PROVIDE CERTIFICATION

What if Employee Refuses to Provide Certification, Stating it Violates HIPPA?

If an employee has his or her health care provider complete the FMLA medical certification form and the employee personally gives that form to the employer, the HIPPA privacy rules do not interfere with the disclosure of the protected medical information. The rule is only implicated *if* the employee has the health care provider send the form directly to the employer.

REFUSAL TO PROVIDE CERTIFICATION

What if Employee Refuses to Provide Certification, Stating it Violates HIPPA?

If an employee fails to give consent; or, if the information provided is incomplete or insufficient, he or she may jeopardize the right to FMLA leave.

Employer may not ask health care providers for additional information beyond that contained in the certification.

INTERMITTENT LEAVE

If the leave is foreseeable, the employee must:

- Make a reasonable effort to schedule the leave so as not to unduly disrupt the employer's operations;
- Provide *at least 30 days'* advance notice before the FMLA leave is to begin;
- Employee is not entitled to take intermittent leave for the birth and care of a newborn child or for the placement with the employee of a child for adoption or foster care unless the employer agrees to the arrangement.

CALCULATING INTERMITTENT LEAVE

February 5, 2013 - US Department of Labor clarifies calculating the intermittent leave:

Employer must use the smallest increments to account for FMLA leave usage (subject to one-hour maximum).

RETALIATION CLAIMS

Retaliation – Adverse Employment Action

- Employee's review is affected by FMLA leave
- Employee returns to a different job



PREGNANCY DISCRIMINATION

PREGNANCY PROTECTION ACT (PDA)

Forbids discrimination based on pregnancy as it relates to any aspect of employment.

Requires that employees who are temporarily and medically disabled by pregnancy, childbirth, or related medical conditions be treated the same as employees temporarily and medically disabled by non-work related conditions or injuries.

AMERICANS WITH DISABILITIES ACT

Prohibits discrimination against a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of a job

Job application procedures, hiring, promotion, compensation, training and all other terms, conditions and privileges of employment

EFFECTS OF 2008 AMENDMENTS

- Definition of “disability” expanded
- Determination of whether an individual has a disability should not demand extensive analysis
- Easier to establish a disability (coverage under the Act)
- Rejects holdings in several Supreme Court decisions
- *Sutton v. United Air Lines*

BROAD APPLICATION OF ACT

Have covered entities complied with their obligations under the Act and whether discrimination has occurred???

NOT

Whether the individual meets the definition of disability.
“Should not demand an extensive analysis.”

CAN THE INDIVIDUAL PERFORM “ESSENTIAL JOB FUNCTIONS”??



WHEN IS A JOB DUTY “ESSENTIAL”?

Whether a job duty is “essential” is determined on a case-by-case basis. A job function may be essential because:

- the reason the position exists is to perform that function; or
- limited number of employees available who can perform that function; or
- the function is highly specialized.

WHAT DETERMINES IF A JOB FUNCTION IS “ESSENTIAL”?

The EEOC and Courts look at the following in determining whether a job function is “essential”:

- Employer’s judgment;
- Written job description prepared before advertising or interviewing for the position;
- Amount of time spent performing the function;
- Consequences of not performing the function;
- Terms of a collective bargaining agreement; and
- Work experience of past and present employees in the job.

REASONABLE ACCOMMODATION IS REQUIRED

“Reasonable Accommodation” is required in at least the following three regards:

1. To permit an applicant or employee to perform the essential functions of a job;
2. In testing and the application process; and
3. To permit an employee with a disability to enjoy the benefits and privileges of employment that are equal to those afforded similarly situated non-disabled employees. The EEOC has stated that substantially equivalent benefits and privileges are acceptable.

SPECIFIC ACCOMMODATIONS

The ADA has listed the following *specific and reasonable accommodations*

- Making existing facilities (work and non-work areas) accessible to disabled individuals;
- Job restructuring of non-essential, marginal job functions;
- Job reassignment;
- Part-time or modified work schedules;
- Granting unpaid (but not unlimited) leave;
- Acquisition or modification of equipment;
- Providing qualified readers or interpreters, but not personal items such as glasses and hearing aids;
- Adjustment or modification of exams, training materials or policies; and
- Other (a catch-all, leaving room for accommodations not previously listed).

UNDUE HARDSHIP

- An employer may not be required to provide a reasonable accommodation if they can prove an “undue hardship.”
- Generalized conclusions will not suffice to support a claim for undue hardship. Instead, the employer must establish that the proposed accommodation would cause significant difficulty or expense, or would fundamentally alter the nature or operation of the business or service.
- Cost of the accommodation.
- The EEOC has specifically rejected cost measurements based on comparing the cost of the accommodation to the salary level of the position.

DISABILITY EXAMPLES RELATED TO PREGNANCY

Gestational diabetes

Preeclampsia

UAW V. JOHNSON CONTROL

Supreme Court case which involved a policy prohibiting women of child bearing age from working in a potentially hazardous position.

Court ruled that the risk of harm to a pregnant employee or her fetus is not a legal basis for denying a job to a woman.

MEDICAL DOCUMENTATION

Obtain a statement that specifies what duties of the employee's job she can perform and duties that cannot be performed.

What accommodations might be necessary for employee to continue working?

LIGHT DUTY POLICIES

Do you have a written policy?

***URBANO V. CONTINENTAL AIRLINES, INC.,
138F3d 204 (5TH Cir. 1988)***

On the job injury vs. non-occupational injuries.

ENSLEY-GAINES V. RUNYAN

100F3d 1220 (6TH Cir. 1996)

US Postal Service gave different job duties to employees who were injured at work versus those who had non-work related injuries or illnesses.

Court ruled employees are no different in their ability or inability to work than those that are injured on the job, they should be given the same benefits.

EEOC GUIDELINES

If a woman is temporarily unable to perform her job duties due to a medical condition related to pregnancy or childbirth, the employer or other covered entity must treat her in the same way as it treats any other temporarily disabled employee. For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does so for other temporarily disabled employees.

TEXAS LOCAL GOVERNMENT CODE SECTION 180.004

- (a) A municipality or a county shall make a reasonable effort to accommodate an employee of the municipality or county who is determined by a physician to be partially physically restricted by a pregnancy.

- (b) If the physician of a municipal or county employee certifies that the employee is unable to perform the duties of the employee's permanent work assignment as a result of the employee's pregnancy and if a temporary work assignment that the employee may perform is available in the same office, the office supervisor who is responsible for personnel decisions shall assign the employee to the temporary work assignment.

BREAK TIME FOR NURSING MOTHERS UNDER FLSA

Reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express milk.

Required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

BREAK TIME FOR NURSING MOTHERS UNDER FLSA

Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time.



FMLA

&



ADA

FMLA & ADA

The ADA does not grant employees with disabilities any special leave entitlements. However, the EEOC states that unpaid leave for “*necessary treatment*” may be an accommodation.

IF an employee qualifies for leave under the FMLA, he or she must be given as much time off as the laws provide, regardless of whether he or she is considered disabled under the ADA. It is important to remember that an employee who qualifies for FMLA leave is not necessarily disabled under the ADA.

RETURN TO WORK



FMLA requires a return to a *comparable* position.



ADA requires a return to the *same position* unless it creates an undue hardship on the employer; or, if the employee is seeking indefinite leave.

LESSONS TO CONSIDER

- Adopt and circulate a leave policy that complies with FMLA and train employees on the policy
- Confirm the type of leave and communicate with the employee and advise of remaining leave available (interactive Process according to the EEOC)
- During employee's leave, advise employee of the date on which the protected leave will be exhausted
- Is this a disability that requires reasonable accommodation
- Before termination – *consult legal counsel*

NO-FAULT ABSENCE TERMINATION POLICY

Policy language should not prohibit additional leave if necessary for ADA-covered disability

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