

Compliance Classroom Q&A

The ABC's of FMLA

YOUR QUESTIONS ANSWERED BY PROFESSOR OLIVIA

NOTE: Responses to this Q & A document are provided as general information only and not intended as legal advice. Because FMLA may be modified from state-to-state, please consult your counsel for specific questions regarding interpretation of regulations to any one fact pattern outlined in these questions. Answers below address general components of the federal regulations, and do not attempt to apply any one state's law.

Department of Labor's Wage & Hour Division: Common FMLA Forms

Click a link to view the form:

- [WH-382: FMLA Designation Notice](#)
- [WH-380-E: Certification of Health Care Provider for Employee's Serious Health Condition](#)
- [WH-380-F: Certification of Health Care Provider for Employee's Family Member's Serious Health Condition](#)
- [WH-381: Notice of Rights and Responsibilities](#)

Forms & Recordkeeping

Question 1: Please confirm the FMLA forms an employer must complete.

Answer: [Forms available](#) via the Department of Labor's ("DOL") website may be used by employers; however, use of the form is not required by an employer. Having stated this, however, an employer must generally maintain records and documents relating to medical certifications, etc. created for FMLA purposes (and these must be confidential medical records in files separated from personnel files). Use of the DOL-approved form(s) by an employer is a standard practice and assists with creating employer record(s) regarding the leave. Use of DOL forms also educates the employer and employee about leave entitlement and rights and responsibilities.

Three commonly used forms are:

- (1)** WH-381: Notice of Rights and Responsibilities (information in this form must be provided within five days of the employee notifying the employer of the need for FMLA leave);
- (2)** WH-382 FMLA Designation Notice (indicating to the employee that the employer has determined requested time as FMLA-eligible); and
- (3)** WH-380-E & F: Certification of Health Care Provider for Employee (or Family Member's) Serious Health Condition (for use by the employer if they choose to seek certification by a health care provider related to the leave type).

Payment of Benefits

Question 2: May an employer require that all payment of benefits be made [by the employee] before an unpaid leave? Or, must the employer allow other repayment options?

Question 3: May an employer require the employee to pay their full portion of the benefits prior to going on leave as the only repayment option?

Question 4: Given the requirement that an employer must continue employee health benefits [during qualified FMLA leave], are there any exceptions to this entitlement? For example, 100% employee-paid health benefits and/or ancillary/supplemental benefits?

Answer: Each of the previous three questions addresses maintenance of benefits while an employee is using FMLA leave. Federally, FMLA qualified leave entitles the employee to maintenance of health benefits while on leave as if they had continued to work. The questions above will need to be addressed with local counsel on a case-by-case basis as state law may affect the analysis & interpretation.

When FMLA Leave Expires

Question 5: What actions may I take once an employee has used all eligible FMLA leave? I was told in a seminar that if an employee has not returned [from FMLA leave] and is still under a doctor's care, then it could roll into ADA [leave]. I have also been told that after the [FMLA] leave has expired, the employer may terminate employment. What is the best approach to this?

Question 6: When an employee reaches the end of their FMLA leave, how does a company determine if they can terminate the employee? We have an employee out now who does not have any time frame for returning. Can we go ahead and terminate them now that their leave is over?

Question 7: If an employee fails to return to work after 12 weeks, are there any repercussions? At that point, their job would no longer be federally protected, but is there an official form or notice or next step we should take if they choose to stay out longer?

Answer: Each of the three questions above address concurrent leave entitlement and protections. Remember, federal FMLA protection entitles a qualified employee of a qualified employer twelve weeks (in most cases but there are exceptions for military personnel) of job-protected, unpaid leave. For each of the scenarios above, it is essential to discuss details with your local counsel, analyze federal and state laws that may affect the outcome of the request, and determine how your employer policies and handbook may affect provision of benefits.

Furthermore, employees may qualify for extended leave for reasons other than FMLA such as ADA, STD, LTD or Worker's Compensation coverage. A determination of continuing coverage after FMLA leave has been exhausted, including the possibility of termination of the employee's job should be carefully considered by human resources personnel and legal counsel.

Certification of a Serious Health Condition

Question 8: If an employee requests FMLA leave to take care of an ill family member (outside the US) and has indicated they [the employee] are the primary physician for that family member (because of the limited health care offered in that country), who would be the physician to complete the Family Member Serious Health Condition Certification Form? *The employee has ten years of employment, [is taking] unpaid leave, and will be taking the leave in May 2019.*

Answer: For employers seeking certification of an employee or family member's serious health condition, federal FMLA regulations permit employers to require an employee to complete the Certification of Health Care Provider form(s), as applicable.

The employee must submit a timely, complete, and sufficient medical certification form to support the request for FMLA leave. The certification forms do not specify what type of medical provider must complete the form.

However, it is important to note that within each of the certification forms (please reference employer forms provided by the DOL on Page 1 of this document), there are instructions to the health care provider. These instructions differ between the form for employee leave v. employee family member leave. It may be beneficial to review these instructions with the employee requesting leave so that the most appropriate health care provider completes the form.

Question 9: What if an employee refuses to provide the required physician's statement and refuses to apply for FMLA?

Answer: Successful management of FMLA leave requires communication between an employee seeking leave and the employer designating the leave. Federal FMLA leave must be requested by the employee seeking it; they must generally provide thirty days' notice to their employer. Such employee must provide enough information to the employer so the employer can determine if the situation qualifies as FMLA leave.

Employers are permitted to seek certification supporting the need for leave. If the employer feels more information is required, they must provide written notice indicating what additional information is required.

Question 10: Please identify behavioral trends that look like abuse; [how to] counsel employees when abuse is suspected; and stipulate the appropriate healthcare provider who may complete the forms.

Answer: Due to the complex and broad nature of FMLA, these questions are outside the scope of this educational piece. However, it may be helpful to seek guidance from employment groups in your state as well as legal counsel. Please see response to **Question 8** regarding who may complete forms.

Designation of Leave

Question 11: When it [FMLA regulations or Form WH-381] says employers have five days to give notice of designation, does that mean you have to wait until the healthcare provider certification is returned? We've seen this take weeks.

Answer: In short, not necessarily. The first paragraph of Form WH-381 states, in part, that "... a fully completed Form WH-381 provides employees with the information provided by 29 CFR §825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave."

This section of the federal statute indicates (in section (b)(1)) "When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances."

It's important to remember that the *employer designates the leave as FMLA qualifying* and to do this, *the employee must provide enough information* to permit the employer to decide if the leave is FMLA-qualifying. The employer may request additional information from the employee if necessary, to decide. Timing must be balanced; recent guidance from the DOL¹ clarifying that an employer may not delay the designation of FMLA-qualifying leave or designate more than twelve weeks of leave as FMLA leave.

Question 12: What if intermittent FMLA [leave] causes the employer a hardship? What can the employer do? Can Human Resource share medical [information] with [the employee's] supervisor?

Answer: Federally, FMLA entitles a qualified employee for up to twelve weeks of unpaid, job protected leave that may be taken intermittently or continuously. An employee does not need to use leave in one block of time. They may take the FMLA leave intermittently or on a reduced schedule. Regarding the question about sharing medical information: please see the response to **Question 1**. An employer is required to maintain the confidentiality of medical records related to the leave in a separate storage area from personnel files.

Question 13: If we want to change our [FMLA] measurement period (via our Employee Handbook and verbal announcements to our employees), is there a minimum amount of time for advance notice prior to implementation of this change (e.g. 30 days)?

Answer: In short, consult with legal counsel in your state. Federally, nothing in the FMLA statute prevents the employer from amending existing leave and employee benefit programs (provided they comply with FMLA).² In practice, however, several items should be considered before changing a policy.

These include, but are not limited to the following:

- (a) timing;
- (b) how a decision will affect those currently on FMLA leave as well as those who have taken some, but not used all FMLA leave in the measurement period;
- (c) employee morale; and
- (d) other employee benefits.

Question 14: In the past, I have had employees who are adamant that they do not need FMLA as they are using sick and/or vacation [time] to cover the week or two that they will be out of the office; in most cases I am aware that the reason they are out of work is due to a medical condition. Do I send a designation form to an employee who has refused FMLA? They did not have certification completed and they are planning on just using sick/vacation time to cover their days out of the office.

Answer: Consult with counsel in your state; as noted in the answer to **Question 11**, the employer is responsible in all cases for designating leave as FMLA qualifying and may not delay the designation of FMLA qualifying leave—even if the employee requests a delay. Employers may require, or the employee may elect, to “substitute” accrued paid leave to cover any part of the unpaid FMLA entitlement period.

Again, federal regulations require employers to provide a written “designation notice” to an employee within five business days—absent extenuating circumstances—after the employer “has enough information to determine whether the leave is being taken for an FMLA qualifying reason.”³

¹ DOL Opinion Letter FMLA2019-1-A dated March 15, 2019.

² 29 CFR § 825.700(b).

³ 29 C.F.R. § 825.300(d)(1).

Question 15: Our company has a policy that if three consecutive days of work are missed for the same medical reason, the employee **MUST** invoke FMLA. What if the reason they are out does not qualify as a “Serious Medical Condition” per the definitions discussed in the workshop? (i.e. you could easily be out for a week with the flu or norovirus, but I don’t believe those qualify based on the definition.)

Answer: FMLA exists to provide qualified employees with job-protected, unpaid leave for up to, but no more than, twelve weeks. Please review responses to **Questions 11 & 14** — a process must be followed to determine if leave qualifies as FMLA. The employer determines whether leave is FMLA qualifying and may require certification from the employee if the employee requests leave for their own or a qualifying family member’s serious health condition.

For a list of what may be considered a “serious health condition” please consult local counsel and review [29 C.F.R. § 825.102](#). Last, it is a best practice to regularly review your employment policies to ensure they comply with federal and state regulations.

Question 16: Can an employee submit multiple [FMLA] certifications? e.g. if he and his children all need medical care?

Answer: An employee may be entitled to FMLA leave for his own serious medical condition or that of a qualified family member (e.g. spouse, parent or child). Confirm with local counsel; the employee is entitled to twelve weeks and this may be taken intermittently as needs arise, whether for his own or his qualified family member’s serious medical condition. The employer will decide whether the leave is qualified as FMLA once the employee provides notice of their intent to take FMLA leave and the employer has enough information to make a determination.

Question 17: Does [FMLA] apply to intermittent leave as well?

Answer: Federal FMLA leave may be taken intermittently; please consult local counsel to verify against state law.

Question 18: Can employers require a certification of fitness for those out on intermittent leave? Or only consecutive leave?

Answer: An employer may request the employee on FMLA leave (whether intermittent or continuous leave) to report periodically on the status and [intent to return to work](#). The employer’s policy regarding such reports may not be discriminatory and the employer must consider all relevant facts and circumstances related to the leave situation.

Question 19: Is the “rolling” 12-month period measured backward the same as the “moving year” timeframe?

Answer: As used in the webinar on March 26th, 2019, a “rolling” 12-month period measured backward is the same measurement as a “moving year” timeframe. Please consult with your human resources and legal counsel to confirm terms applied to an employer’s measurement policy for FMLA leave.

Pregnancy & Child Birth

Question 20: If an employee takes FMLA due to child birth, are they entitled to [a] complete 12 weeks or just 8 [weeks]?

Question 21: What if an employee had a baby prior to qualifying for FMLA [leave]; but the[n] FMLA [leave] qualifying date falls in her six-week STD [leave]?

Answer: Please consult local counsel; federally, pregnancy and child birth qualify as “serious health conditions” eligible for FMLA leave. An eligible employee is entitled to twelve weeks of FMLA leave.

As to **Question 21**, please consult counsel; the interaction between two leave periods should be analyzed carefully as both state and federal law, as well as employer leave policies and insurance policy guidelines may apply.