

Expanded Quick Guide to the Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) is a federal law that allows eligible employees to take up to a total of 12 weeks of unpaid, job-protected and health insurance-protected leave, per year:

- For their own serious medical condition;
- For the care of a parent, child, or spouse with a serious medical condition;
- For the birth of a son or daughter, and for bonding time with that child;
- For placement of a son or daughter with the employee for adoption or foster care, and for bonding time with that child; or
- For any qualifying exigency (such as deployment) arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.
- Or, for any combination of the qualifying reasons above.

Employers covered by the FMLA:

- Private employers, that have 50 or more employees during 20 or more workweeks in the current or preceding calendar year;
- Public agencies, including local, state, or federal agencies, regardless of number of employees; or
- Public or private elementary or secondary schools, regardless of the number of employees.



Employees eligible for leave under the FMLA:

- Work where the employer has at least *50 employees within 75 miles* of the employee's worksite; and
- Have worked for a covered employer for at least *12 months* in the last seven years (note: the 12 months don't have to be consecutive, just cumulative); and
- Have worked at least *1,250 hours* for the employer during the 12 months immediately before a leave.

What hours count toward meeting the work requirement?

The 1,250 hours of work include only those hours actually worked for the employer. Any type of leave, paid or unpaid, will not be included in the calculation. Work for the employer that occurred more than seven years ago could still be counted, if the break in employment was due to fulfillment of military obligations or governed by a collective bargaining or other written agreement.

How is the 12 month period calculated?

Employers can choose one of four 12-month periods to use: a calendar year, the 12-month period measured forward from the date an employee first takes leave, a "rolling" 12-month period measured backward, or any other "fixed 12-month period." You have the right to be notified of which 12-month period your employer uses. An employee handbook or policies and procedures document is often a good place to look for this information. If your employer doesn't have a handbook, you may want to ask the person at your job who handles human resources or employee benefits (e.g., health insurance, payroll, etc.).

After that 12-month period has passed, as measured by your employer, and you have fulfilled the hour requirements, you are again entitled to another 12 weeks of FMLA leave for the next 12 month period.

Note: Any unused weeks do not roll over to the next 12 month period.

What happens to your health insurance if you take time off under the FMLA?

If you receive health insurance coverage from your employer, your employer must continue to offer you that coverage, under the same terms and conditions that were in place before taking leave. For example, if your employer pays 50% of your monthly premium while you are working, they must continue to do so while you are on FMLA leave. Your employer is required to inform you how to make your portion of the premium payments while you are out on leave.

What is a serious health condition under the FMLA?

Serious health conditions are those that make an employee “unable to perform the functions of the position.” Generally, a health condition will be considered serious if it:

- Causes an overnight stay in a hospital, or
- Causes incapacitation for more than three days AND need continuing medical treatment (i.e., multiple appointments or one appointment and follow-up care or prescriptions), or
- Is chronic or requires ongoing treatment over time (2 or more appointments per year).

Who are the eligible family members for whom you can act as a caregiver?

Under the FMLA, you can act as a caregiver for a parent, child, or spouse with a serious medical condition.

Parent: a biological, adoptive, step, or foster parent of an employee or an individual who stood *in loco parentis* to the employee when the employee was a child. An individual is considered *in loco parentis* when they take over the day to day responsibilities of caring for or financially supporting a child, even if there is no other biological or legal obligation. The FMLA law does not include parents-in-law in its definition of parent. For example, you are not legally entitled to FMLA leave to care for a mother-in-law.

Child: a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis of a minor child. A child could be older than 18 if they are “incapable of self-care because of a mental or physical disability.” According to the Department of Labor, cancer qualifies as a disability.

Spouse: a member of any legally married couple, whether opposite-sex or same-sex, or couples married under common law (as long as the common law marriage or same-sex marriage was legal in the state where the marriage took place, even if the couple no longer lives in that state).

What types of activities count as caregiving?

Generally, caregiving can include helping with activities of daily living, providing basic medical, hygienic, nutritional or safety needs, and transportation to and from medical appointments. Providing psychological comfort to a child with a serious health condition who is receiving inpatient care or home care qualifies as caregiving under the FMLA. Other caregiving examples include: bathing, feeding, dressing, housework, paperwork, organizing prescription medication, grocery shopping, and assisting in chores.



What if you are dealing with your own serious medical condition and acting as a caregiver?

Generally, an employee is limited to 12 total weeks of FMLA leave, per year, for a qualifying reason or any combination of qualifying reasons. The only exception is if the employee is requesting leave to care for a seriously ill or injured military service member. In that circumstance only, the employee is entitled to a combined total of 26 weeks of FMLA leave in a year. For example, if you need time off to care for your daughter, an injured soldier, and you also must receive surgery, you can take no more than 12 weeks of FMLA leave in a year for your own serious health condition, and no more than 26 combined weeks total in a year, for both reasons.

For additional resources for caregivers, visit: <http://trriagecancer.org/caregiving>.

How do you ask for FMLA leave?



Check your employee handbook to see if your employer has a process for requesting FMLA leave. Your request for leave does not necessarily have to mention a cancer diagnosis, but does need to contain enough information so the employer can determine if you are eligible for FMLA leave. See below.

If an employer wants additional information about your leave they must ask for it in writing. You then have at least seven days to provide the additional information. An employer has five business days to respond to your request for FMLA leave. If your FMLA leave is denied, your employer must provide you with at least one appropriate reason why you do not qualify for FMLA leave.

What if my employer refuses to allow me to take FMLA leave?

If you are eligible for FMLA leave, your employer cannot interfere with your right to take leave. An employer cannot retaliate against you because you are taking FMLA leave. An employer cannot use your FMLA leave against you in decisions related to your job, such as attendance policies, promotion, or discipline.

When should you ask for FMLA leave?

Generally, employees should request FMLA leave as soon as they know they need time off work. If the need for leave is foreseeable, employees must provide employers with at least 30 days' notice. For example, if you know you need surgery in two months, you should request leave within the next month. If the need for leave is unforeseeable, employees must provide employers with notice "as soon as practicable." This generally means notifying an employer within one to two days of when the need for leave arises. For example, you are experiencing side effects from treatment, go to the emergency room and end up being admitted to the hospital. You think that you will miss work for the next few days. You should call your employer as soon as you are well enough to let them know you need FMLA leave.

In these situations, you still need to follow your employer's rules for absences, unless receiving emergency medical care. If you do not follow the rules for your employer, your FMLA leave may be affected.

What medical information do you have to share with your employer to take FMLA leave?

Your employer is entitled to medical certification from a healthcare provider to show you are eligible for FMLA leave. However, your employer doesn't necessarily need to know about your cancer diagnosis if you don't want to share that information. If you are concerned about disclosing your diagnosis to your employer, there are options for protecting your privacy. For example, if you are experiencing pain and neuropathy as side effects, your health care provider could focus on discussing the pain and neuropathy on the medical certification form, and not include information about your underlying cancer diagnosis.

Your employer can ask for this certification as soon as you request FMLA leave, or within five days of the start of an unforeseeable leave. You have at least 15 calendar days to get the certification completed. An employer is also entitled to a second medical opinion, if the employer doubts the legitimacy of your medical certification. The employer is responsible for any costs incurred for the second opinion. Employers are not entitled to copies of medical records and an employee cannot be forced to sign a medical record release or a waiver in order to receive FMLA leave.

Employers may contact the healthcare provider who completed the medical certification form, so long as the employee's direct supervisor is not the one contacting the healthcare provider. However, the employer is only allowed to ask the healthcare provider for clarification (e.g., what does line 2 say) or authentication (e.g., did you sign the form) of what is on the certification form. The employer is not entitled to additional information than what is included on the certification form.

**For more information, see our *Quick Guide to Disclosure, Privacy, & Medical Certification*
Forms: <http://triacancer.org/QuickGuide-Disclosure>**

Be careful of medical certification forms created by employers, which may request more information than what they are entitled to, such as a specific diagnosis. The U.S. Department of Labor has model forms that can be used for guidance as to what information an employer is entitled to:

- Certification for Employee's Serious Health Condition: <http://tragecancer.org/FMLACert-Employee>
- Certification for Family Member's Serious Health Condition: <http://tragecancer.org/FMLACert-Family>

Even on the model form, employers are entitled to the type of practice or specialization of the healthcare provider completing the form. So, if you prefer to keep your cancer diagnosis confidential, you may not want to have your oncologist complete the form. Under the FMLA, there are multiple healthcare providers who can complete the form, including primary care physicians or clinical social workers.

How is the FMLA useful if you are working?

The FMLA allows eligible employees to take FMLA in smaller segments of time, instead of a 12 weeks at once. For example, you will need Mondays off for the next few weeks for chemotherapy. The FMLA also allows for sporadic time off, as needed, called intermittent leave. The medical certification for intermittent leave should give a general idea of the potential lengths of the absences and the medical conditions that justify them.

If employees are taking FMLA leave in installments, instead of taking FMLA leave as one block of time, it is important to remember that employees cannot disturb the typical operations of employers. Employees and employers must work together to create a plan for intermittent FMLA leave as medically necessary, without the employer's business being disrupted. If an employer is concerned that intermittent leave would disrupt operations, then an employer may temporarily place an employee in a different job, which has the same benefits and pay as the employee's previous job, but it can be a job that allows for more flexibility in scheduling. Intermittent leave under the FMLA is still unpaid, job-protected leave.

How does the FMLA work with other types of leave?

Your employer can require you to substitute unpaid leave under the FMLA, with paid leave that you have available. Even if your employer does not require that you use your paid time off concurrently with FMLA, you have the option to do so. For example, you have two weeks of paid sick time saved up and you need 8 weeks off for surgery and recovery. You can use your paid sick time during the first two weeks of your FMLA leave and then the remaining 6 weeks will be unpaid. The benefit to having leave designated as FMLA leave, is that it is job and health insurance protected. For information about how the FMLA works with the Americans with Disabilities Act (ADA) and disability insurance, see our *Quick Guide to How the FMLA Works With Other Benefits*: <http://tragecancer.org/QuickGuide-FMLA-OtherBenefits>

What can you expect when you return to work from FMLA leave?

When you return from FMLA leave, your employer must reinstate you to the same or an "equivalent" job. Generally, an equivalent job is one with the same responsibilities, pay, and benefits as the original job.

Your employer can require a medical certification that you are able to return to work, so long as that requirement would be applied to any employee in a similar situation. If at the end of 12 weeks of FMLA leave you are not ready to return to work, you may be able to request additional time off as a reasonable accommodation under the ADA. See our *Quick Guide to Reasonable Accommodations*:

<http://tragecancer.org/QuickGuide-ReasonableAccommodations>

State Leave Laws: Some states have passed leave laws, which may offer more protection than the FMLA. For information about your state laws, visit <http://tragecancer.org/statelaws>.

For more information about work and cancer: <http://TriageCancer.org/employment>.