

2021 US Labor & Employment Webinar Week
Insights and Compliance Strategies for a New World

February 1 – 4, 2021



Managing Overlapping Leave Laws

February 3, 2021

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A top-down view of a desk with a stethoscope, glasses, and a fountain pen. A document titled 'FAMILY MEDICAL LEAVE ACT' is open, with a teal box overlaid on it containing the text 'Family and Medical Leave Act'.

Family and
Medical Leave Act



FMLA Eligibility

Worked for the employer for at least 12 months;
Does not need to be consecutive

Worked at least 1,250 hours over the past 12 months; *AND*

Work at a location where the company employs 50 or more employees within 75 miles

Qualifying Reasons for Leave

12 workweeks of leave available for:

Birth and care of newborn child

Placement of a child for adoption or foster care

Inability to perform functions of position because of serious health condition

Care for spouse, child or parent with serious health condition (doesn't apply to in-laws)

Qualifying exigency (situation arising from military deployment of employee's spouse, child or parent to a foreign country)

26 workweeks available for military caregiver leave

Serious Health Conditions

An illness, injury, impairment, or physical or mental condition that involves:

overnight stay in a hospital

any period of incapacity (or treatment therefore) due to a chronic serious health condition (asthma, diabetes, epilepsy, etc.)

absence of more than three calendar days that also involves continuing treatment by (or under supervision of) a health care provider

a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (Alzheimer's, stroke, terminal diseases, etc.)

any period of incapacity due to pregnancy, or for prenatal care

any absences to receive multiple treatments (including recovery) by a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (chemotherapy, physical therapy, dialysis, etc.)

Is this a Serious Health Condition?

Jane calls in sick for the fourth day and lets Manager know that she has tested positive for COVID-19, has a cough, 101 degree fever and headache. Jane said she went to the doctor for the test, but the doctor said there is nothing to do but rest and to call if her symptoms get worse.

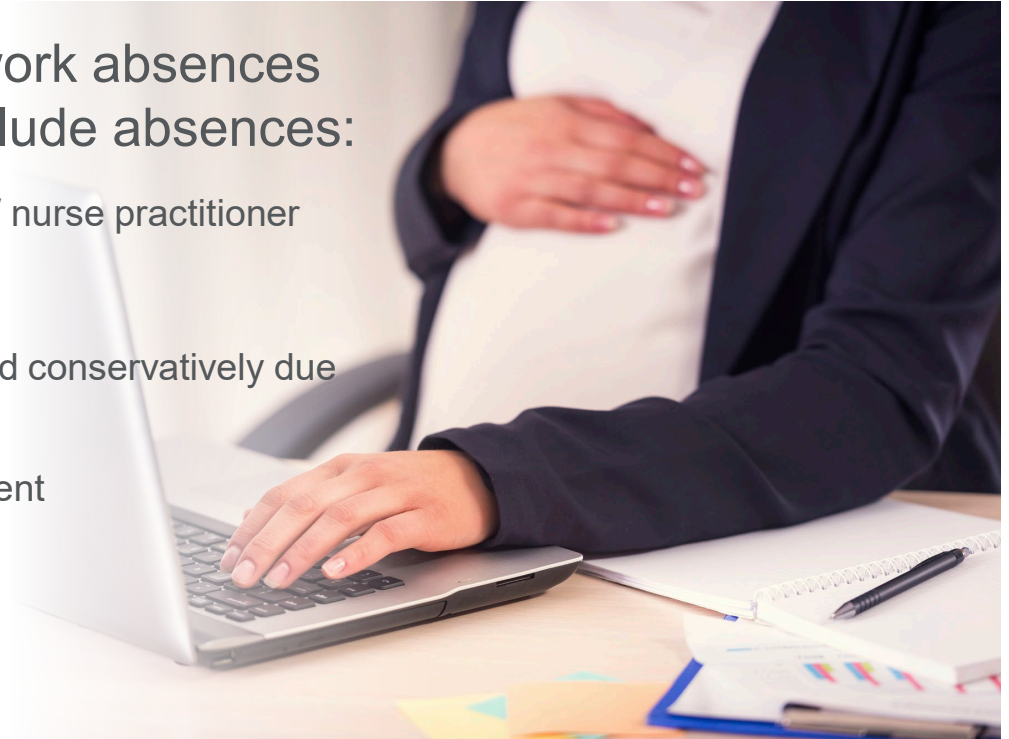
Do you need to give Jane FMLA paperwork?



FMLA and Pregnancy

Examples of pregnancy-related work absences that are covered by the FMLA include absences:

- To attend prenatal visits to doctor / midwife / nurse practitioner
- Due to morning sickness
- Due to a common illness that is being treated conservatively due to the employee's pregnancy
- Due to pregnancy-related illness or impairment
- Due to childbirth



FMLA Notices



Law requires employers to provide written notice designating the leave as FMLA leave and detailing specific expectations and obligations of employee who is exercising his/her FMLA entitlements

Notice should be provided to the employee within one or two business days after receiving the employee's notice of need for leave

FMLA Certification




Law allows the employer to request the employee obtain certification of the employee's or the family member's serious health condition and for a qualifying exigency for military family leave.

Must allow at least fifteen days for return of the certification.

Designation Notice

Must be provided to
employee within 5 days
of receipt of certification

Designation Notice under the Family and Medical Leave Act	U.S. Department of Labor Wage and Hour Division	 <small>WHD: THE HOUR DIVISION</small>
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**DO NOT SEND TO THE DEPARTMENT OF LABOR.
PROVIDE TO EMPLOYEE.** OMB Control Number: 1515-0003
Egide: 6/30/2003

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form is optional, a fully completed Form WH-382 provides employees with the information required by 29 C.F.R. §§ 825.300(d), 825.301, and 825.305(c), which must be provided within five business days of the employer having enough information to determine whether the leave is for an FMLA-qualifying reason. Information about the FMLA may be found on the [WHD website at www.dol.gov/agencies/whd/fmla](http://www.DOL.gov).

SECTION I - EMPLOYER

The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice to the employee. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, an employer may not delay designating such leave as FMLA leave, and neither the employee nor the employer may decline FMLA protection for that leave.

Date: _____ (mm/dd/yyyy)

From: _____ (Employer) To: _____ (Employee)

On _____ (mm/dd/yyyy) we received your most recent information to support your need for leave due to:
(Select as appropriate)

- The birth of a child, or placement of a child with you for adoption or foster care, and to bond with the newborn or newly-placed child
- Your own serious health condition
- The serious health condition of your spouse, child, or parent
- A qualifying exigency arising out of the fact that your spouse, child, or parent is on covered active duty or has been notified of an impending call or order to covered active duty with the Armed Forces
- A serious injury or illness of a covered servicemember where you are the servicemember's spouse, child, parent, or next of kin (Military Caregiver Leave)

We have reviewed information related to your need for leave under the FMLA along with any supporting documentation provided and decided that your FMLA leave request is: (Select as appropriate)

- Approved. All leave taken for this reason will be designated as FMLA leave. Go to Section III for more information.
- Not Approved. (Select as appropriate)
 - The FMLA does not apply to your leave request.
 - As of the date the leave is to start, you do not have any FMLA leave available to use.
 - Other _____
- Additional information is needed to determine if your leave request qualifies as FMLA leave. (Go to Section II for the specific information needed. If your FMLA leave request is approved and no additional information is needed, go to Section III.)

SECTION II - ADDITIONAL INFORMATION NEEDED

We need additional information to determine whether your leave request qualifies under the FMLA. Once we obtain the additional information requested, we will inform you within 5 business days if your leave will or will not be designated as FMLA leave and count towards the amount of FMLA leave you have available. Failure to provide the additional information as requested may result in a denial of your FMLA leave request.

If you have any questions, please contact: _____ at _____
(Name of employer FMLA representative) (Contact information)

Incomplete or Insufficient Certification
The certification you have provided is incomplete and/or insufficient to determine whether the FMLA applies to your leave request. (Select as applicable)

- The certification provided is incomplete and we are unable to determine whether the FMLA applies to your leave request. "Incomplete" means one or more of the applicable entries on the certification have not been completed.

Form WH-382, Revised June 2010

When faced with any request for leave, hint of medical issue or disability...



Remain neutral: many cases involve an employee that the supervisor/other employees simply did not like or get along with. Keep your feelings out of it.

No magic words are needed to put employer on notice that leave may qualify for FMLA; supervisors must be trained to recognize issues.

It is inaccurate to tell an employee he/she only gets 12 weeks of job-protected leave. It's true under FMLA, but remember ADA may require additional leave as an accommodation.

Document all call-ins in detail.

DOL handled 966 FMLA complaints in 2020
48% found violations

Nature of Complaints Investigated

208

Refusal to grant
FMLA leave

357

Termination of
employment

266

FMLA
discrimination

114

Refusal to restore to an
equivalent position
upon return from leave

21

Failure to maintain
health benefits while
on FMLA leave

DOL secured **\$1,168,898** in back wages
as a result of FMLA violations in 2020

DOL Opinion Letter on FMLA

- Employee had serious health condition that required 15 minute breaks every hour; employer wanted opinion on whether those breaks were required to be paid under FLSA (breaks of <20 minutes must be paid)
- DOL assumed the breaks constituted protected FMLA leave
- While short breaks generally benefit the employer, in some instances, like here, benefit employee, and thus do not need to be paid; however the employee must receive as many paid breaks as other workers



DOL Opinion Letter: FMLA Designation is NOT Optional

March 2019 Opinion Letter

- Employers and employees cannot agree to waive FMLA protections for leave covered by the FMLA
- According to the DOL, “[o]nce an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave.”

Employers who fail to promptly designate covered time off as FMLA leave could face liability for FMLA interference claims.

Real World Example

Joe has been with XYZ Company for 5 years when he injures his hand on the job. Joe files a workers' compensation claim. He is released to return to work but with limitations which XYZ Company cannot accommodate.

XYZ Company utilized Claims Administrator for their workers' compensation and FMLA claims. Joe is in contact and files all appropriate workers' compensation paperwork. Claims Administrator processes the workers' compensation claim, but Joe does not realize that FMLA is handled by a separate department.

XYZ terminates Joe's employment when his PTO is exhausted.

Is there any problem with the dismissal?



A man in a wheelchair is seated at a long wooden conference table in a meeting room. He is wearing a dark blue suit jacket and is looking towards a large presentation screen. The screen displays a pie chart with three segments in red, blue, and orange. Other people are seated at the table, but they are out of focus. The room has a bright, professional atmosphere.

Americans with Disabilities Act (ADA)

Refresher of the Law

Must provide reasonable accommodation to an otherwise qualified individual with a disability unless it would be an undue hardship.

Otherwise qualified = able to perform the essential functions

Essential functions = job description (plus other evidence)




Enforcement: Fiscal Year ADA Filings and Settlements



Setting the Scene

John reports to Employer that an old injury has left him with chronic arthritis in his left arm which limits his ability to drive around for his repair job. John asks to be relieved from driving as an accommodation of his disability.





What if John's arthritis
is episodic and comes
and goes?

What if...

John has corrective surgery, but develops complications and cannot return to work after his FMLA leave expires. John requests one month of additional leave until he is medically cleared to return to work.



Intersection Of FMLA/ADA

First, any reasonable accommodation that would allow employee to return to work after FMLA leave?

- Eliminating marginal job functions that the individual cannot do
- Transfer to vacant position that employee can perform

If not, consider additional leave as a reasonable accommodation.

All Requests for Leave Should be Treated as a Request for a Reasonable Accommodation.

- Engage in interactive process
- Assess how absence is impacting your business
- If granting leave, document how it is affecting your business

What is the maximum amount of unpaid leave an employer must give as a disability accommodation under the ADA?



Leave as a Reasonable Accommodation

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability, there is no other effective accommodation and the leave will not cause undue hardship.


Must continue health insurance benefits during leave period only if it does so for other employees in a similar leave status.

Employee entitled to return to same position (not simply an equivalent position as under the FMLA) unless holding open the position would impose an undue hardship.

If it would pose an undue hardship, employer must consider whether it has a vacant, equivalent position to which employee can be reassigned.

Real World Case Study


- Irene was hired in January when she was eight months pregnant; she was open about the pregnancy
- RW Inc. allowed her to take 12 weeks' maternity leave beginning in February even though she was not FMLA-eligible; she was slated to return to work in April
- Irene began to suffer severe post-partum depression and anxiety
- She asked for an extension of leave



Should RW Inc. grant the extension of leave?

Real World Case Study

- RW Inc. allows Irene an extension of leave. Her doctor then submits a return to work form indicating that Irene needs to work a reduced schedule.
- RW Inc. agrees to this on a temporary basis and Irene returns to work at the end of May; RW Inc. states that she has to submit a new certification by the end of June 30.
- Irene failed to submit the certification on June 30, but had several conversations with her boss; in at least one, her boss expressed that she needed to return to work full-time.
- In mid-July, Irene's doctor submits updated certification stating that she needed to maintain a reduced schedule through September.



Can RW terminate Irene's employment?

A wooden gavel with a dark handle and a light-colored head rests on a dark wooden sound block. In the foreground, a rectangular nameplate with a green background and a wooden border is visible, featuring the text 'WORKERS' COMPENSATION LAW' in a serif font. A semi-transparent purple rectangle is overlaid on the right side of the image, containing the text 'Workers' Compensation' in white.

Workers' Compensation

Workers Compensation Background

A program mandated at a state level to ensure employees receive medical care and partial salary compensation for a workplace injury.

Workers Compensation: COVID-19

Many states have passed legislation or issued executive orders so that COVID-19 infections in certain workers are presumed to be work-related and covered under workers' compensation



Paid Family and Parental Leave – State Laws

Paid Family and/or Medical Leave

WASHINGTON

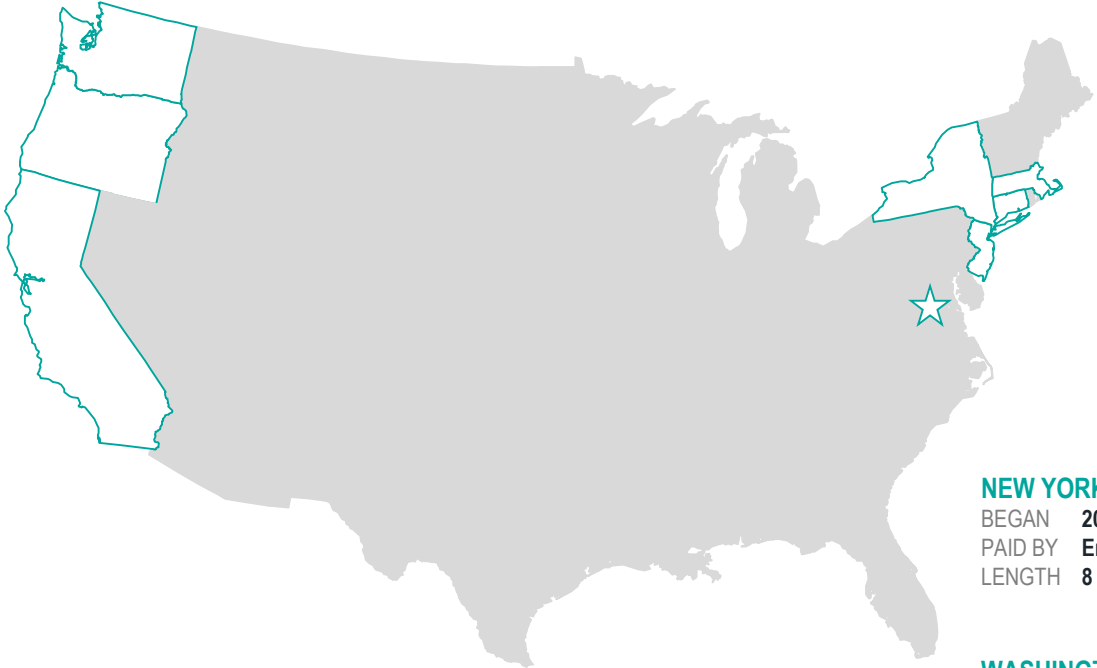
BEGAN 2020
PAID BY Employee-employer
LENGTH 12 weeks*

OREGON

BEGAN 2023
PAID BY Employee-employer
LENGTH 12 weeks*

CALIFORNIA

BEGAN 2004
PAID BY Employee Only
LENGTH 8 weeks



MASSACHUSETTS

BEGAN 2021
PAID BY Employee-Employer
LENGTH 12 weeks

CONNECTICUT

BEGAN 2022
PAID BY Employee Only
LENGTH 12 weeks*

RHODE ISLAND

BEGAN 2014
PAID BY Employee Only
LENGTH 4 weeks

NEW YORK

BEGAN 2018
PAID BY Employee Only
LENGTH 8 weeks

WASHINGTON DC

BEGAN 2020
PAID BY Employer Only
LENGTH 8 weeks

NEW JERSEY

BEGAN 2009
PAID BY Employee-employer
LENGTH 6 weeks

*Can be longer in certain circumstances

Parental Leave

**Generally not required to provide paid leave
(but may want to provide to attract/retain talent)**

**Apart from FMLA,
no federal requirements**

States:

Some have mini-FMLAs
(e.g., CA, NY, WI, WA
and others)

Some have specific
parental leave laws (MA,
San Francisco, et al)


Some require provision of
leave to adoptive parents
as well (e.g., MN, NY)

EEOC Guidance:

- Okay to limit leave related to pregnancy, childbirth or related medical conditions to women affected by those conditions
- However baby bonding leave must be provided to similarly situated men and women on the same terms.

Parental Leave – EEOC Enforcement

In August 2017, EEOC sued Estee Lauder alleging that the employer's parental leave policy discriminated against men because it provided six weeks of paid bonding leave to mothers but only two weeks to new fathers. In July 2018, Estee Lauder settled the case for \$1.1 million to the class of fathers and entered into a consent decree



In May, 2019, JPMorgan settled another case brought by the EEOC for \$5.0 million to a class of fathers denied equal baby bonding leave, and entered into a consent decree, enforcing gender-neutral parental leave policies.

Parental Leave – Policy Review

You can set eligibility requirements.

You are not obligated to provide these benefits on day one of employment—can provide after employee has worked for certain period of time, for example.

Okay to treat moms different with respect to medical leave/recovery from childbirth.
For example, okay to give mothers 6-8 weeks for recovery from childbirth and nothing for fathers.

BUT, must treat both parents equally with respect to *bonding* leave.

Make sure you comply with any applicable state laws!

Parental Leave – Policy Review

Recommend requiring FMLA to run concurrently with pregnancy-related medical/recovery and bonding leave.

Okay to require exhaustion of other paid leave prior to parental leave.



What's Market for Parental Leave?



10 weeks paid leave
(includes adoptive parents)



6 weeks paid leave (includes
adoptive and foster parents)



20 weeks paid leave
(includes adoptive parents)



2 weeks paid parental leave
(includes adoptive and foster parents)



4 weeks paid leave
(includes adoptive
parents)

A photograph of a person's hands holding a coffee cup and glasses over a table covered with sticky notes and diagrams. The sticky notes contain various words and phrases, including 'PLAN', 'SCALE', 'HEAVY', 'PLANNING', 'CHECK LIST', 'LEADER', 'STOP', and 'ACTOR'. There are also diagrams, including a Venn diagram with four overlapping circles in red, blue, green, and yellow, and a grid of colored squares. A teal overlay is present on the right side of the image.

Lessons and Best Practices

Lessons and Best Practices


Document, document, document. Both performance issues and any hardship that is being created from an accommodation.

Employer needs to demonstrate real desire to help employee, be honest about how a proposed accommodation will affect the employer, and document interactive process.

If you choose to permit employees who are not FMLA-eligible to take unpaid leave for health conditions have a separate process and separate forms. Do not refer to the leave as “FMLA”.

Best Practices – During and After Leave

Connect with employee during FMLA leave, especially near the end



- Set expectation, ask to contact if assistance is needed to return to work
- If assistance requested, engage in interactive process

If additional leave is requested, can ask for additional information from healthcare provider about the medical condition and need for additional leave

- Any accommodation that would obviate need for leave?
- Does impairment affect employee's ability to perform essential job functions? Which ones?
- If leave is needed, what is expected date of return to work?

Best Practices – During and After Leave

If leave is requested again, explain in writing how absence is affecting operations (undue hardship factors)

- Undue hardship can kick in shortly after FMLA leave is exhausted
- Must assess and document how the employee's absence creates an undue hardship in an ADA-compliant way

Then, on third request for extension, you are prepared to say it would be an undue hardship

Can also request updated information from healthcare provider (such as why was the initial estimate wrong?)

When faced with any request for leave, hint of medical issue or disability...



No magic words needed to request an ADA accommodation or put employer on notice that leave may qualify for FMLA. Supervisors must be trained to recognize issues!

An employee only gets 12 weeks of job-protected leave, right? **WRONG!** It's true under FMLA, but remember ADA may require additional leave as an accommodation.

Document, document, document!!! Document dates and content of requests and responses.

When faced with any request for leave, hint of medical issue or disability...



Be genuine: *“How can I help you?”*

Remain neutral: the majority of ADA cases involve an employee that the supervisor/other employees simply did not like or get along with. Keep your feelings out of it.

Engage and follow-up: Courts don't take kindly to companies who just pay lip service to engaging in the interactive process.

Document performance issues/hardships: Give accurate reviews and document performance issues and hardships caused by accommodations

Real World Lessons

1

Review policies and practices

- ADA, FMLA and Parental Leave
- Ensure leave policies are flexible
- Examine interactions between leave policies (i.e., do they run concurrently?)

2

Ensure job descriptions are up-to-date and accurate

3

Document,
document,
document!

4

Train your managers / supervisors

Questions? Please let us know.



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