

Family and Medical Leave Rights

A Guide for Public Employee Union Members in New Jersey

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The right to take time off from work for personal illness or to care for family members without risking one's job is an extremely important employee benefit.

Virtually all union contracts provide for paid sick leave as well as unpaid leaves of absence which may be used for such purposes. In addition, there are two laws—one state and one federal—which guarantee employees the right to take medical or family leaves. These laws are the federal **Family and Medical Leave Act** (or FMLA) and the New Jersey **Family Leave Act** (or FLA).

Although union contracts may provide leave benefits that exceed those guaranteed by the FMLA or FLA, it is important to be familiar with these laws since they often supplement or reinforce employees' contractual rights. Because the federal law is the more inclusive of the two, this guide will focus mainly on the FMLA. Areas in which the FLA is significantly different will be noted.

1. What is the FMLA?

The Family and Medical Leave Act of 1993—commonly known as the FMLA—is a federal law which requires employers to grant leave to their employees for serious health conditions as well as for certain family needs. The statutory citation is 42 U.S.C. 2601 *et seq.* The FMLA regulations adopted by the U.S. Department of Labor are found in 29 CFR Part 825. More information from the Department of Labor can be found at <http://www.dol.gov/dol/topic/benefits-leave/fmla.htm>.

2. What is the FLA?

The Family Leave Act is a state law enacted in 1990 and found at N.J.S.A. 34:11B-1 *et seq.* It is enforced by the Division on Civil Rights, which has promulgated regulations at N.J.A.C. 13:14. More information is available from DCR at <http://www.njcivilrights.com/law.html#FLA>. Like the federal law, the FLA guarantees leave to care for family members. However, unlike the FMLA, the FLA does not provide leave for an employee's own illness. Other differences will be described at the end of this guide.

3. What can FMLA leave be used for?¹

A serious health condition that prevents the employee from performing the functions of his or her position (see Question 7 for the definition of a "serious health condition")

Care of a child, spouse, or parent with a serious health condition

Childbirth or care of an employee's newborn child up to age one

Adoption or foster care placement

(Note: Care of a child is covered only if the child is under 18 or unable to care for himself because of a disability. A parent-child relationship is deemed to exist in the case of a foster child, step-child, or legal ward, or where the "parent" provides daily care and financial support.)

4. Who is eligible for FMLA leave?²

To be eligible, you must work for a covered employer that has at least 50 employees at your

worksite or within 75 miles. (Almost all public employees meet these criteria.)

In addition, you must have been employed by this employer—
for at least 12 months (not necessarily consecutive)

and

for at least 1,250 hours within the previous year (only *worked* time counts)

5. How much FMLA leave can an employee take?

Up to 12 weeks of FMLA leave in a 12-month period (“week” means the employee’s normal workweek).³

6. How is the 12-month FMLA period measured?⁴

The law allows a choice of methods. The simplest is the calendar year method. However, many employers (including the State of New Jersey) have opted to use the “measured forward” method, in which the clock starts when FMLA is first taken. For example, an employee who begins using FMLA leave on September 1 would have until August 31 of the following year in which to use his 12 weeks. If the employee uses 3 of those weeks in September, he will have only 9 weeks left to use during the remainder of the 12-month period. After the 12 months have expired, a new 12-month period will begin the next time the employee begins taking FMLA leave. The employee will then have another 12 weeks of leave available to use.

Note that an employee could “stack” FMLA leave by taking several weeks at the end of his 12-month period and then up to 12 more weeks at the beginning of the next 12-month period.

7. How is a “serious health condition” defined?

For purposes of the FMLA, a “serious health condition” is an illness, injury, physical condition, or mental condition that involves one or more of the following:⁵

Inpatient hospitalization (*i.e.*, overnight)

Incapacity for more than three consecutive calendar days, with continuing treatment by a health care provider⁶

Pregnancy

A chronic condition that—

- requires periodic visits to a health care provider;
- continues over an extended period; and
- may cause episodic periods of incapacity (*e.g.*, asthma, diabetes, epilepsy, depression, arthritis, colitis, migraine headache)

A permanent or long-term incapacity (*e.g.*, severe stroke, Alzheimer’s)

Absence to receive multiple treatments ordered by a health care provider for—

- restorative surgery due to an injury, or
- a condition that would cause incapacity of more than three consecutive days if not treated (*e.g.* chemotherapy for cancer, dialysis for kidney disease).

Simple, uncomplicated illnesses ordinarily will not qualify as serious health conditions—for example, common colds, flu, ear aches, upset stomach, minor ulcers, simple headaches, and ordinary dental problems. Routine physical, dental, or eye exams are also excluded. However, examinations to determine if a serious health condition exists do qualify as “treatments” of a serious health condition.

Treatment of a substance abuse problem also qualifies for FMLA leave, but absence caused by the abuse itself does not.

8. In what increments can FMLA leave be taken?⁷

FMLA leave is usually (but not always) taken in a continuous block of time, such as a full month. A leave can also be as short as one day or just one hour. Employees can not be forced to use a longer

period than necessary. Furthermore, a single FMLA leave may consist of multiple occurrences of time off (*intermittent leave*). This typically occurs when an employee needs periodic medical treatments or when an employee misses work sporadically because of a chronic condition such as asthma or migraines. Also, an employee may be able to use FMLA leave to create a part-time work schedule if necessary (*reduced schedule leave*).

9. When can paid leave be used as FMLA leave?⁸

Although the law does not require employers to grant paid leave, most employers do provide paid sick leave, vacation leave, etc. So long as paid leave is otherwise available for such absences, an employee has the right to use it for FMLA purposes. This is called *substituting* paid leave for unpaid FMLA leave. Sometimes substitution of paid leave is required by the employer.

Whether paid or unpaid, however, the leave is still covered by the FMLA if it otherwise qualifies.

Also, if management knows that an employee is taking paid leave for an FMLA-qualifying reason, it has the right to *designate* the leave as FMLA leave and count it toward the employee's 12-week entitlement. (See also Questions 11 and 12.)

10. How does an employee request FMLA leave?

If the need for FMLA leave is foreseeable—as in the case of elective surgery or childbirth, for example—you must give management 30 days advance notice before beginning the leave (unless the employer's policies allow shorter notice). If the need is not foreseeable, notice must be given as soon as practicable (normally within a day or two after the employee learns of the need).⁹

You do not have to formally request FMLA leave or even mention the name "FMLA" when asking for leave. So long as you give a reason—whether orally or in writing—that falls within the coverage of the FMLA, it is the employer's responsibility to determine that it is FMLA leave. Of course, this may require further inquiry by management to determine if the leave is really for an FMLA-qualifying reason.

You may be required to follow the employer's customary procedures for requesting a leave—such as putting it in writing, providing a starting and ending date, etc. However, these internal procedures can not be used to delay or deny an FMLA leave.¹⁰

11. What notices must the employer provide?

FMLA poster. Every covered employer must have a notice of FMLA rights conspicuously posted for employees to see. If the employer fails to do this, it can not take any adverse action against employees who fail to give advance notice when taking FMLA leave.¹¹

Personnel policy manuals. If the employer has personnel manuals or handbooks to inform employees of their benefits, it must describe the employees' FMLA rights and obligations in these documents.¹²

Explanation of employee obligations. When you request FMLA leave, the employer must give you a written notice explaining the requirements to be followed, along with the consequences of not following them.¹³ Among other things, the notice must tell you—

- that the leave is being counted against your FMLA entitlement
- whether a medical certification is required
- that paid leave can (or must) be "substituted"
- how payment of health insurance premiums will be handled
- whether a fitness-for-duty certification will be required when you return
- that you are entitled to the same job or an equivalent job upon returning

Whenever possible, this notice must be sent within 2 business days after the employee requests an FMLA leave. Notice must be provided every time an FMLA leave is requested, but not more than once every six months.¹⁴

Designation of paid leave. As previously mentioned, if you are taking a paid leave (e.g., sick leave) for an FMLA-qualifying reason, management *may* designate it as FMLA leave and count it against your 12-week entitlement. Normally management must give you notice of this designation within two business days after learning that the leave is being used for an FMLA purpose.¹⁵ If management learns of this after the leave has begun, it can retroactively designate the entire leave as FMLA leave.¹⁶ If management learns about the FMLA purpose upon your return, it has two business days after your return in which to notify you of the retroactive designation.¹⁷

12. What happens if the employer fails to notify me about my FMLA status and obligations?

Employers often fail to give employees the required FMLA notices, even when they know leave is being taken for an FMLA-qualifying reason. In some cases this is due to negligence or ignorance of the law. In other cases management simply doesn't want to be bothered, especially if the leave consists of only a few sick days.

If management fails to give you the required notice about your obligations when you request FMLA leave, you can not be penalized for failing to comply with any of the provisions which are required to be included.¹⁸ For example, if you were supposed to bring a doctor's note but were not given the required notice about your obligations, you can not be disciplined or denied leave for failing to bring it.

Also, if management knows your leave is for an FMLA-qualifying reason (whether paid or unpaid) but fails to notify you that your leave is being designated as FMLA leave, you may be able to argue that management *waived* its right to count the leave against your 12-week FMLA entitlement.¹⁹ As a result, you might still be able to take your full 12 weeks of FMLA leave later. This is based on a legal doctrine called *equitable estoppel*, but it only applies if the lack of notice was prejudicial to you.

13. Do I have to tell management why I need FMLA leave?

Generally, yes. *You must describe the need sufficiently so management will know that it is covered by the FMLA.* If you do not mention the FMLA and do not explain why leave is needed, management will have no obligation under the FMLA, and you will have no FMLA protection.

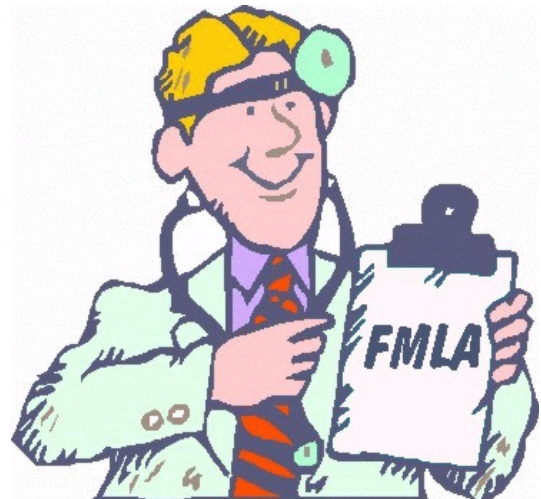
Employees who call in sick often resist identifying their illness because of concerns about confidentiality. However, if you are calling in sick because of a serious health condition as defined by the FMLA, it is important to say what your condition is. In this way you can protect yourself from adverse consequences, such as disciplinary charges for excessive absenteeism. If you failed to give the reason when you initially called in, you can correct this omission by notifying management within two days after your return.²⁰

14. What kinds of medical verification can be required?

If management wants a medical certification to verify that FMLA leave is needed, it must inform you of this fact each time leave is requested.²¹ Whenever a written notice of employee obligations is required, the requirement for a medical certification must be set forth in the notice (see Question 11).

Management must give the employee at least 15 days to provide a medical certification.²²

The DOL regulations spell out exactly what kind of information can be required from your health care provider. This may include the type of "serious health condition," a description of the "medical facts," the expected duration of the leave, and a statement as to whether the employee is completely incapacitated, is unable to perform certain



essential job functions, or must take leave from work for treatment.²³

If you provide a signed, complete medical certification, management can not contact your health care provider directly for more information. However, with your permission, the employer may have its own health care specialist check the information with your doctor.²⁴ In addition, management may require a second opinion from a neutral provider, at the employer's expense.²⁵ In certain situations management may also require the employee to provide a subsequent recertification.²⁶

Finally, if you are on leave because of your own health condition, management may require you to provide a fitness-for-duty report. This may be at your own expense.²⁷

15. What protections does the FMLA provide?

Employees who take FMLA leave have the following rights and protections in addition to the leave itself:

Continuation of employer-provided group health benefits while on leave. If employees are normally required to pay a portion of the premium, arrangements must be made for this while they are on FMLA leave.²⁸

Reinstatement to the same position, or equivalent, upon returning from leave. This includes reinstatement of all benefits, seniority, salary levels, bonus payments, work schedule, and other working conditions that the employee was previously entitled to.²⁹ However, the FMLA does not entitle employees to *accrue* seniority or other benefits such as vacation days or sick days while on leave (unless the employer's leave policies provide for such accruals).³⁰

Confidentiality of medical information. Employee medical information pertaining to the FMLA must be treated confidentially and is required to be kept in separate personnel files in order to limit access.³¹

Protection from adverse employment actions.

Finally, the law prohibits employers from **interfering with** the exercise of FMLA rights or **discriminating against** employees for taking FMLA leave.³² Employees who believe their rights under the FMLA have been violated can either sue in court or file a complaint with the Secretary of Labor.³³ In addition, if an employee is disciplined or otherwise denied rights in violation of the FMLA, the action may be contested through the grievance procedure or appealed to the Merit System Board, as may be applicable.

This protection is extremely important, because employees are often disciplined for excessive absenteeism. The FMLA regulations specifically prohibit employers from counting FMLA leaves for purposes of discipline or other adverse employment actions.³⁴

16. When might an employee use the FLA instead of the FMLA?

Sometimes an employee will be eligible for leave under the FLA but not under the FMLA. The following are some examples of when the FLA might be the better option:

Using family leave after medical leave is exhausted. If an employee uses 12 weeks of medical leave and then needs to take family leave during the same 12-month period, he or she would not be able to do so under the FMLA. However, since the employee's own illness does not count under the FLA, he

The FMLA can protect you from being disciplined for excessive absenteeism.

Employees who use more than their annual allotment of sick days (especially if the absences are sporadic) can be subject to discipline for chronic or excessive absenteeism. However, any absences that qualify under the FMLA can not be counted—assuming the reasons were known to the employer. Therefore, whenever management is threatening discipline, you should be sure to subtract any absences that are protected by the FMLA from your current total. (Migraines, asthma, and depression are among the protected conditions that typically cause repeated absences.) If the remaining absences are less than your regular entitlement, you should not be disciplined. However, you will only have this protection if management knew you were absent for an FMLA-qualifying reason (see Question 13)!

or she would still be eligible for 12 weeks of family leave under the state law. This sometimes occurs when an employee uses medical leave for pregnancy, then takes family leave after the baby is born.

Employees who do not meet the hours-of-work threshold for the FMLA. Sometimes employees are not eligible for the FMLA because they are part-time or have worked for only part of the year and therefore have not accumulated 1,250 hours of work during the previous 12 months. However, they may still be eligible for the FLA, since the threshold under this law is only 1,000 hours in the past 12 months.

Caring for family members who do not meet the FMLA definition. Under the FMLA, the term “parent” is limited to a biological parent or someone who stood *in loco parentis* to the employee as a child. However, under the FLA, an employee’s “parent-in-law” is included.³⁵

Taking family leave for a newborn which extends beyond the first year. Under the FMLA, leave for a newborn child can be taken only during the first year after birth. However, the FLA only requires that the leave start before the end of the first year.

17. How else does the FLA differ from the FMLA?

As mentioned previously, the FLA does not provide leave for an employee’s own health condition. In addition, the FLA provides 12 weeks of leave every 24 months, instead of every year under the FMLA. The FLA regulations also treat intermittent leave and reduced leave somewhat differently than the FMLA.³⁶ Most of the remaining differences between the two laws are fairly minor.

NOTES

1. See 29 CFR 825.112.

2. See 29 CFR 825.110.

3. See 29 CFR 825.200 and 825.205.

4. See 29 CFR 825.200(b) through (e).

5. 29 CFR 825.114.

6. So long as the same underlying condition has previously caused incapacity for more than three consecutive days, any subsequent treatment or incapacity is covered, even though less than three days. Continuing treatment may consist of two or more treatments by the health care provider, or it may consist of one treatment by the health care provider, followed by a regimen of treatment (such as medication) under the provider’s supervision. 29 CFR 825.114(a)(2)(i).

7. See 29 CFR 825.203.

8. See 29 CFR 825.207.

9. 29 CFR 825.302(a).

10. 29 CFR 825.302(d).

11. 29 CFR 825.300.

12. 29 CFR 825.301(a)(1). If not provided via handbooks, manuals, etc., this information must be furnished to employees periodically when they request FMLA leave.

13. 29 CFR 825.301(b).

14. 29 CFR 825.301(c). If the circumstances referenced in the notice have changed since the previous notice, a new notice must be sent regardless of whether six months have passed.

15. 29 CFR 825.208(b). The initial designation notice may be given orally or in writing. However, if it is oral, management must follow up with a written notice on or before your next payday (provided your next payday falls at least one week later).

16. 29 CFR 825.208(d).

17. 29 CFR 825.208(e).

18. 29 CFR 825.301(f).

19. When the DOL adopted its FMLA regulations, it specifically provided that an employer who fails to properly designate a qualifying leave as FMLA leave can not count it against the employee's 12-week entitlement, even though it remains protected by the FMLA. 29 CFR 825.700(a). Unfortunately the Supreme Court struck down this controversial regulation on the grounds that it would improperly "penalize" employers by effectively granting an employee more than the 12 weeks of leave allowed by the FMLA. *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002).

20. 29 CFR 825.208(c)(1).

21. 29 CFR 825.305. Normally a request for medical certification must be made within two business days.

22. 29 CFR 825.305(b). If it is not practicable to obtain the medical certification on a timely basis despite the employee's diligence, exceptions should be made.

23. 29 CFR 825.306.

24. 29 CFR 825.307(a).

25. 29 CFR 825.307(a)2 and (b). The employer must also make reimbursement for reasonable "out-of-pocket" travel expenses. 29 CFR 825.307(e).

26. 29 CFR 825.308.

27. 29 CFR 825.310.

28. 29 CFR 825.209(b).

29. 29 CFR 825.214(a) and 825.215.

30. 29 CFR 825.215(d)(2).

31. 29 CFR 825.500(g).

32. 29 CFR 825.220.

33. 29 CFR 825.400.

34. 29 CFR 825.220(d).

35. N.J.S.A. 34:11B-3(h).

36. According to the FLA regulations, intermittent leave is limited to a 12-month period and must be in whole-week increments. N.J.A.C. 13:14-1.2 and 1.5(d)2. Reduced leave may be used one day at a time, but can not extend beyond a 24-week period. N.J.A.C. 13:14-1.2 and 1.5(d)3.