



# Top Ten FMLA Leave Mistakes

Insights

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The Family Medical Leave Act (FMLA) grants unpaid, job-protected leave to eligible employees for specified family and medical reasons, also providing them with continuation of group health insurance coverage under the same terms and conditions as if they had not taken leave. Although schools (regardless of size) are required to comply with the notice-and-posting requirements of the FMLA, you need only provide job-protected FMLA leave if the employer is covered by the Act and the employee meets the eligibility requirements.

FMLA leave applies if an employee works at a worksite where at least 50 employees are employed within 75 miles, was employed for 12 months (which need not be consecutive), and worked 1,250 hours in the 12 months preceding the start of the leave. Once you determine that you are covered, you should be aware of these pitfalls which can result in compliance failures.

## 1. Counting Time As Leave That Should Not Be Included

As with other employers, schools can only count time as FMLA leave if the employee would have been working during that time. This can be an issue for schools because they have different periods of time off built into their school years.

For example, if a teacher needs to take FMLA leave and it begins right before spring break, then the period of the break would not count as FMLA leave. Alternatively, if an administrator needs time off and would normally work during summer hours, then that time would be counted against their FMLA time. Keeping in mind these rules will help you properly calculate the amount of leave used by your employees.

## 2. Improperly Designating The Beginning Or End Of The Leave Period

In order to avoid the disruption to the educational process that can result when instructional employees take leave, the FMLA provides special rules for instructional employees – those employees whose principal function is to teach and instruct students in a class, small group, or individual setting.

For example, with regard to leave requested for an employee's own serious health condition, if an instructional employee requests intermittent or reduced leave for planned medical treatment for more than 20% of the total number of working days in the period during which the leave would be used, you have options. Your supervisors may require the employee to elect either to take leave for a

particular duration of time which is not greater than the duration of the planned treatment, or be transferred to an alternative position.

Further, if an instructional employee begins leave more than five weeks before the end of a term, and if the leave will last at least three weeks with the employee returning to work during the three weeks before the end of the term (semester), your supervisors may require the employee to continue taking leave until the end of the term.

Other rules give schools similar flexibility when employees take leave to care for family members. Knowing these leave policies can enable your school to provide leave while reducing the disruption.

### **3. Failing To Count FMLA At The Same Time As Workers' Compensation Leave**

An employee who is injured or suffers an occupational disease while in the course and scope of employment may be granted temporary total disability or other forms of workers' compensation leave. This type of injury is also likely to constitute a "serious health condition" under the FMLA. Therefore, you should be sure to run FMLA leave concurrently with time taken as workers' compensation leave.

### **4. Failing To Continue Benefits While On Leave**

Under the FMLA, any benefits that would be maintained while the employee is on other forms of leave, including paid leave if the employee substitutes accrued paid leave during FMLA leave, must be maintained while the employee is on FMLA leave. For example, healthcare coverage must be continued at the same level as prior to the leave.

If the employee is provided group health insurance, the employee is entitled to the continuation of the group health insurance coverage during FMLA leave on the same terms as if he or she had continued to work. If family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. The employee must continue to make any normal contributions to the cost of the health insurance premiums.

### **5. Not Returning The Employee To The Same Job Or An Equivalent Job**

When an employee returns from FMLA leave, he or she must be restored to the same job or to an "equivalent job." The employee is not guaranteed the actual job held prior to the leave. An equivalent job means one that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location). Failing to reinstate the employee to the same or equivalent position – even, for example making changes to a work area – may be considered retaliatory.

### **6. Not Designating FMLA Leave When It Should Be**

If the employee provides information indicating there is a serious health condition, you need to assess whether an employee is entitled to FMLA leave even if they do not specifically request it. Employees do not need to specifically assert their rights under FMLA, or even mention FMLA, in order to receive it.

order to receive it.

The employee must, however, provide “sufficient information” to make you aware of the need for FMLA leave and the anticipated timing and duration of the leave. This can include whether a condition renders the employee unable to perform the functions of the job. You should inquire further if it is necessary to have more information about whether FMLA leave is being sought.

## **7. Ignoring Possible ADA Accommodations**

Employees who qualified for FMLA leave for their own serious health condition may also qualify for an ADA accommodation, such as allowing them more leave or changing some aspect that will enable them to perform their essential job duties. Be sure to consider this before terminating an employee whose leave has been exhausted but who has not returned to work. Also, be sure to inform the employee when their FMLA leave has expired, as firing them without that notice could be considered retaliation.

## **8. Failing To Provide A Job Description With The Designation Notice**

You may have a policy or practice that requires employees in similar job positions who take leave for similar health conditions to provide a return to work, or “fitness-for-duty,” certification from the employee’s health care provider showing that the employee is able to resume work. You may request a fitness-for-duty certification only with regard to the particular health condition that caused the need for FMLA leave.

If you require a fitness-for-duty certification, you must provide notice of that requirement and whether the certification must address the employee’s ability to perform the essential functions of the job. As long as you have provided the required notice regarding any fitness-for-duty certification requirement, the employee’s return to work may be delayed until the certification is provided.

If a fitness-for-duty certification is required to address the ability to perform essential job functions, a job description is often the best resource for a physician to review in order to be able to certify whether an employee is fit.

## **9. Improper Use Of Certifications**

Under the FMLA, you may require the employee to submit a certification from a health care provider to support the need for FMLA leave to care for a covered family member with a serious health condition or for the employee’s own serious health condition. All certification forms should be returned within 15 days, unless it is impracticable to do so despite the employee’s diligent, good faith efforts.

If an employee fails to furnish a complete and sufficient certification despite receiving an opportunity to timely cure the problem, you may deny the leave. If the certification is returned but is incomplete, you should advise the employee in writing of the additional information necessary to render the form complete and sufficient. A health care provider may be contacted pursuant to certain limitations in order to clarify the certification. However, you should be aware that, except under certain limited circumstances, a recertification cannot be requested more than every 30 days.

## 10. Terminating Or Taking Disciplinary Action

The FMLA protects employees who take FMLA leave. You cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions. While it may seem obvious, you should be cautious when disciplining employees who have returned from leave, and should carefully document any performance issues to ensure that any negative employment action is not viewed as retaliation for the employee having taken FMLA leave.

Properly administering FMLA leave can be challenging, but doing so will foster employee loyalty while saving your school money by reducing its liability against future potential claims.

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*For more information, contact the author at [SGuerette@fisherphillips.com](mailto:SGuerette@fisherphillips.com) or 610.230.2133.*

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**Susan M. Guerette**

Partner

610.230.2133

Email

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