



The Employer's Guide to

The Family and Medical Leave Act



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

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MESSAGE FROM WAGE AND HOUR DIVISION

Since its enactment in 1993, the Family and Medical Leave Act (FMLA) has served as the cornerstone of the Department of Labor's efforts to promote work-life balance and we have worked in support of the principle that no worker should have to choose between the job they need and the family they love. With the FMLA, our country made it a priority to give workers the ability to balance the demands of work and family. It made the healthy development of babies, healthy families, and healthy workplaces a priority. It was a remarkable accomplishment at the time and, since its enactment, the FMLA has been used more than 100 million times to help workers balance the demands of the workplace with the needs of their families and their own health.

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INTRODUCTION

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons. Eligible employees may take up to 12 workweeks of leave in a 12-month period for one or more of the following reasons:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care, and to bond with the newborn or newly-placed child;
- To care for a spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job, including incapacity due to pregnancy and for prenatal medical care; or
- For any qualifying exigency 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.

An eligible employee may also take up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. An eligible employee is limited to a *combined* total of 26 workweeks of leave for **any** FMLA-qualifying reasons during the single 12-month period.

In addition to providing eligible employees an entitlement to leave, the FMLA requires that employers maintain employees' health benefits during leave and restore employees to their same or an equivalent job after leave. The law sets requirements for notice, by both the employee and the employer, and provides employers with the right to require certification of the need for FMLA leave in certain circumstances. The law protects employees from interference and retaliation for exercising or attempting to exercise their FMLA rights. The law also includes certain employer recordkeeping requirements.

The U.S. Department of Labor's Wage and Hour Division is responsible for administering and enforcing the FMLA for most employees. In most instances, an employee also has the right to file a private law suit under the FMLA in any federal or state court of competent jurisdiction.

The Wage and Hour Division is committed to strengthening compliance with the FMLA by providing assistance to employers and helping increase their knowledge of the law. This *Employer's Guide to the Family and Medical Leave Act* is designed to provide essential information about the FMLA, including information about employers' obligations under the law and the options available to employers in administering leave under the FMLA. The *Guide* is organized to correspond to the order of events from an employee's leave request to restoration of the employee to the same or equivalent job at the end of the employee's FMLA leave. It also includes a topical index for ease of use.

The Department of Labor is providing this *Guide* in an effort to increase public awareness of the FMLA and of the various Departmental resources and services available to the public. This publication is a guidance document that is subject to change in the future. The United States Code, Federal Register, and the Code of Federal Regulations remain the official sources for legislative and regulatory information. For more information about the FMLA, please visit the Department's website at dol.gov/whd/fmla, call us at 1-866-4US-WAGE (1-866-487-9243), or visit [the nearest Wage and Hour Division Office](#).

INTRODUCTION

Visit the [Department's website](#) for resources containing information about the FMLA including:

- Key News
- General Guidance
- The Employee's Guide to the Family and Medical Leave Act
- The Employer's Guide to the Family and Medical Leave Act
- Fact Sheets
- E-Tools
- FMLA PowerPoint
- Posters
- Forms
- Interpretive Guidance
- Law
- Regulations



THE EMPLOYER'S ROAD MAP TO THE FMLA

Covered Employer

Display the FMLA poster & provide General Notice

Employee asks for FMLA or the employer learns the employee's leave may be for an FMLA qualifying reason

Determine if the employee is eligible

Provide Eligibility and Rights & Responsibilities Notices to the employee

Certification Process
Optional →
None Required →

Let the employee know that a Certification will be required

Grant or deny the leave request & provide Designation Notice to the employee

Determine if the leave request is for an FMLA-qualifying reason

Maintain Health Benefits during the leave

Restore the employee to the same or an equivalent position at the end of the leave

Maintain records properly

Covered Employers

The FMLA applies only to “covered” employers. A covered employer may be a private-sector employer, a public agency, or a school. Covered employers must provide FMLA benefits and protections to eligible employees and comply with other responsibilities required under the FMLA and its **regulations at 29 CFR Part 825**.

Private Sector Employer

A private-sector employer is covered by the FMLA if it employs 50 or more employees* in 20 or more workweeks in the current or previous calendar year. An employee is considered to be employed each working day of the calendar week if the employee works any part of the week. The workweeks do not have to be consecutive.

Employees who must be counted include:

- Any employee who works in the United States, or any territory or possession of the United States,
- Any employee whose name appears on payroll records, whether or not any compensation is received for the workweek,
- Any employee on paid or unpaid leave (including FMLA leave, leaves of absences, disciplinary suspension, etc.), as long as there is a reasonable expectation the employee will return to active employment,
- Employees of foreign firms operating in the United States, and
- Part-time, temporary, seasonal, and full-time employees.

Others who do NOT have to be counted include:

- Employees with whom the employment relationship has ended, such as employees who have been laid off,
- Unpaid volunteers who do not appear on the payroll and do not meet the definition of an employee,
- Employees of United States firms stationed at worksites outside the United States, its territories, or possessions, and
- Employees of foreign firms working outside the United States.



DID YOU KNOW?

Once an employer meets the requirement for FMLA coverage, the employer is a covered employer and will remain covered as long as it employs 50 or more employees in 20 or more workweeks in either the current calendar year or in the previous calendar year.

For example, last year during its busy season from June 1st to October 31st, a restaurant had more than 50 employees on payroll. In the current year, the same restaurant employs fewer than 50 employees when an employee requests FMLA leave. Because the restaurant employed more than 50 employees for more than 20 workweeks in the previous year, the restaurant is considered to be covered at the time of the request and must offer the FMLA benefits and protections to its employee, if eligible.



Review [sections 825.104](#) and [825.105 of the FMLA regulations](#) for more information about coverage.

* The term “employee” means any individual employed by an employer. An employee is employed when he or she is “suffered or permitted” to work, as defined under the Fair Labor Standards Act.

COVERED EMPLOYERS UNDER THE FMLA AND THEIR GENERAL NOTICE REQUIREMENTS

Public Agency

Public agencies are covered employers under the FMLA, regardless of the number of employees they employ.

Public agencies include:

- The federal government,
- The government of a state or political subdivision of a state, and
- An agency of the United States, a state, or a political subdivision of a state, including counties, cities and towns, or any interstate governmental agency.
- The term “state” includes any state within the United States, the District of Columbia, and any territory or possession of the United States.



Review [section 825.108 of the FMLA regulations](#) for more information about public agency coverage.

Federal Government

The Office of Personnel Management administers the FMLA for most federal employees. The Wage and Hour Division administers the FMLA for a limited number of federal employees, including employees of the:

- United States Postal Service,
- Postal Regulatory Commission,
- Federal Aviation Administration, and
- The judicial branch of the United States (in certain circumstances).



Review [section 825.109 of the FMLA regulations](#) for more information about coverage of a federal agency.

Schools

Local educational agencies are covered under the FMLA, regardless of the number of employees they employ. Such educational agencies include:

- Public school boards,
- Public elementary and secondary schools, and
- Private elementary and secondary schools.



Review [section 825.600 of the FMLA regulations](#) for more information about coverage of schools.

Other Ways Employers May Be Covered under the FMLA

Integrated Employers

A corporation is a single employer under the FMLA rather than its separate establishments or divisions; all employees of the corporation, at all locations, are counted for coverage purposes.

In addition, separate businesses may be parts of a single employer for FMLA purposes if they are an integrated employer. Factors to be considered in determining if separate businesses are an integrated employer include:

- Common management,
- Interrelation between operations,
- Centralized control of labor relations, and
- Degree of common ownership or financial control.

For purposes of determining employer coverage under the FMLA, the employees of all entities making up the integrated employer must be counted.



Review [section 825.104\(c\) of the FMLA regulations](#) for more information about coverage for integrated employers.

Joint Employers

Where two or more businesses exercise some control over the work or working conditions of an employee, such as with a temporary employment agency, the businesses may be joint employers under the FMLA. For purposes of determining employer coverage under the FMLA, employees jointly employed by two employers must be counted by both employers, even if the employees are maintained on only one of the employer's payrolls.



DID YOU KNOW?

Two (or more) businesses may simultaneously employ an employee, making them joint employers of the employee. For example, joint employment ordinarily will exist when a temporary employment agency supplies employees to a second employer. In that case, the employee must be counted by both employers when determining FMLA coverage.



Review [section 825.106 of the FMLA regulations](#) for more information about coverage for joint employers.

COVERED EMPLOYERS UNDER THE FMLA AND THEIR GENERAL NOTICE REQUIREMENTS

Successor Employers

An employer may be a covered employer if it takes over the business operations (i.e., becomes a “successor in interest”) of a covered employer. Some of the factors to be considered in determining if an employer is a successor include:

- Continuing the same business operations and providing similar products or services,
- Providing similar jobs and working conditions,
- Continuing to use the same work force and supervisor structure, and
- Using the same location and similar equipment and production methods.



Review [section 825.107 of the FMLA regulations](#) for more information about coverage of a successor in interest employer.

An Employer’s Obligation to Provide Employees with General Notice of FMLA Rights

Every employer covered by the FMLA must provide a general notice to their employees regarding the FMLA. To satisfy the general notice requirement, employers must (1) display or post a general notice (referred to as a poster), and (2) if the employer has any FMLA eligible employees, provide a written general notice to employees.

Posting Requirement

Every employer covered by the FMLA must display or post an informative general notice about the FMLA.

- The poster must be displayed in plain view where all employees and applicants can readily see it, and must have large enough text so it can be easily read.
- The information displayed on the poster must explain the FMLA provisions and provide information on how to **file a complaint with the Wage and Hour Division**.
- This poster must be displayed even if no employees are currently eligible for FMLA leave.
- If a significant portion of an employer’s employees do not read and write English, the employer must provide the General Notice in a language in which they can read and write. Spanish language FMLA posters are available from [the nearest Wage and Hour Division office](#) or online at dol.gov/whd/fmla. When providing FMLA notices to sensory-impaired individuals, employers must also comply with all applicable requirements under federal and state law.



Employers who willfully violate this posting requirement may be assessed a civil money penalty for each separate offense. Employers may use the Department's FMLA Poster, which is free and publicly available on the Department's website, dol.gov/whd/fmla, to satisfy this requirement.

Employers may make the poster available electronically, create their own poster, or use another format, as long as the information provided includes, at a minimum, all the information contained in the Department's FMLA Poster, is viewable by applicants for employment and current employees, and meets all other posting requirements.

Providing General Notice to Employees

In addition to displaying a poster, if a covered employer has any FMLA eligible employees, it must also provide each employee with a general notice about the FMLA in the employer's employee handbook or other written materials about leave and benefits. If no handbook or written leave materials exist, the employer must distribute this general notice to each new employee upon hire.

This general notice requirement can be met by either duplicating the general notice language found on the Department's FMLA Poster or by using another format as long as the information provided includes, at a minimum, all the information contained in the Department's FMLA Poster. The general notice may be distributed electronically provided all the requirements are met.



Review [section 825.300\(a\) of the FMLA regulations](#) for more information about the general notice provisions.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE

Effective communication is critical at all stages of the FMLA process and is a key component of successfully administering the FMLA. Keeping open lines of communication is especially important because employees do not have to specifically request FMLA leave in order to be entitled to it initially.

An Employee's Obligation to Provide Notice of the Need for Leave

Employees must provide notice of their need for FMLA leave. In general, an employer may require that employees comply with the employer's usual and customary policies for requesting leave, unless unusual circumstances prevent the employee from doing so. The employer can take action under its internal rules and procedures if the employee fails to follow its usual and customary rules for requesting leave. Employers may not, however, discriminate against employees taking FMLA leave. An employer may also choose to waive the employee's notice requirement or its own internal rules about leave requests.

Content of an Employee's Notice

An employee's notice of a need for FMLA leave may be oral or written. The first time the employee requests leave for a qualifying reason, he or she is not required to specifically mention the FMLA. However, the employee is required to provide enough information for the employer to know that the leave may be covered by the FMLA. For foreseeable leave, the employee must also indicate when and how much leave is needed.

Once approved for a particular FMLA leave reason, if additional leave is needed for that same reason, the employee may be required to reference that reason or the FMLA. In all cases, the employer may ask additional questions to determine if the leave is FMLA-qualifying.

Timing of an Employee's Notice - Leave that Is Foreseeable

Generally, an employee must give at least 30 days advance notice of the need to take FMLA leave when he or she knows about the need for the leave in advance and it is possible and practical to do so. For example, if an employee is scheduled for surgery in two months, the need for leave is foreseeable and the employee must provide at least 30 days advance notice. If an employee does not provide at least 30 days advance notice, and it was possible and practical to do so, the employer may delay the FMLA leave until 30 days after the date that the employee provides the notice.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE

If 30 days advance notice is not possible because the foreseeable situation has changed or the employee does not know exactly when leave will be required, the employee must provide notice of the need for leave as soon as possible and practical.

In the case of FMLA leave for a qualifying exigency of a military family member, the employee must give notice of the need for such leave as soon as possible and practical, regardless of how far in advance the leave is needed.

For planned medical treatment, the employee must consult with his or her employer and try to schedule the treatment at a time that minimizes the disruption to company operations. The employee should consult with the employer prior to scheduling the treatment in order to arrange a schedule that best suits the needs of both the employee and employer. Of course, any schedule of treatment is subject to the approval of the treating health care provider.

Timing of an Employee's Notice - Leave that Is Unforeseeable

When the need for leave is unexpected, the employee must provide notice as soon as possible and practical. It should usually be reasonable for the employee to provide notice of leave that is unforeseeable within the time required by the employer's usual and customary notice requirements. Whether the employee's notice of unforeseeable leave is timely will depend upon the facts of the particular case.

For example, if the employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee is not required to leave the child to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.



DID YOU KNOW?

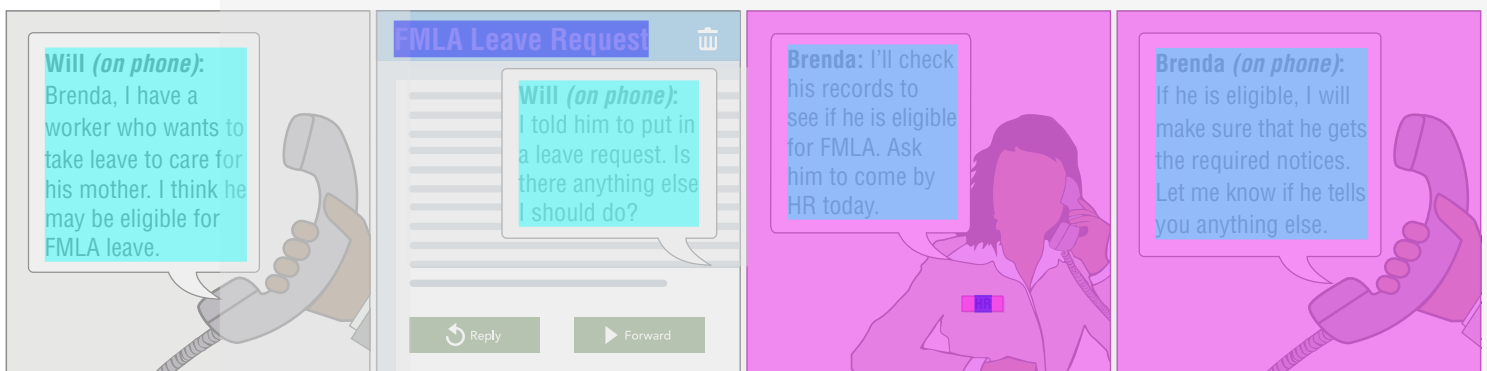
As soon as an employer has enough information that indicates an employee's need for leave may be for an FMLA-qualifying reason, the employer should begin the FMLA leave process. An employer's management team and leave administrators play a vital role in ensuring FMLA compliance. Managers, assistant managers, supervisors and leave administrators must be able to recognize FMLA-qualifying reasons for leave and properly initiate the required notifications and eligibility checks. Providing FMLA training regularly helps to make sure those responsible for implementing the FMLA are up-to-date on the requirements of the law and the employer's policy, procedures and practices. Keeping everyone informed, for example by using the FMLA power point found on the Wage and Hour Division's [FMLA webpage](#), can help an employer stay in compliance with the law.



Review [sections 825.302](#) and [825.303 of the FMLA regulations](#) for more information about employee notice requirements.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE

Employee Eligibility



The first step in determining an employee's entitlement to the benefits and protections of the FMLA is to establish if he or she is eligible for FMLA leave. The eligibility requirements are the same for all employees, regardless of the reason for the leave request. There are four criteria.

An eligible employee is one who:

1. Works for a covered employer,
2. Has worked for the employer for at least 12 months as of the date the FMLA leave is to start,
3. Has at least 1,250 hours of service for the employer during the 12-month period immediately before the date the FMLA leave is to start (a different hours of service requirement applies to airline flight crew employees), and
4. Works at a location where the employer employs at least 50 employees within 75 miles of that worksite as of the date when the employee gives notice of the need for leave.

12 Months of Employment

The 12 months of employment do not have to be consecutive:

- Part-time, temporary, or seasonal work generally counts towards the 12 months of employment;
- If an employee is maintained on the payroll for any part of a week, that week counts as a week of employment;
- Any combination of 52 weeks equals 12 months, and
- If the employee has a break in employment that lasted seven years or more, the employer is not required to count the time worked prior to the break, unless:
 - The break in employment is due to service covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA), or
 - There is a written agreement, including a collective bargaining agreement, outlining the employer's intention to rehire the employee after the break in employment;
 - An employer may voluntarily consider periods of employment prior to a break of more than seven years, but it must do so uniformly for all employees with similar breaks in employment.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE

1,250 Hours of Service

The hours of service requirement will be met if an employee has worked a total of 1,250 hours of service in the 12 months immediately preceding the start of the FMLA leave. This averages to a little more than 24 hours of work a week in the 12-month period.

- Generally, the principles for compensable hours of work under the Fair Labor Standards Act (FLSA) are used in determining the hours of service that an employee has worked.
- Only the time actually worked, including overtime hours worked, is counted. Time not actually worked, including vacation, personal leave, sick leave, holidays, and any other form of paid time off (PTO) is not counted towards the 1,250 hours of service. Unpaid leave of any kind or periods of layoff also are not counted.
- Time worked as a part-time, temporary, or seasonal employee counts toward the requirement.
- An employee returning from fulfilling a USERRA-covered military service obligation is credited with the hours of service that would have been performed but for the period of military service. The employee's pre-service work schedule can generally be used for calculations to determine hours that would have been worked during the period of military service.
- If an employer does not maintain accurate time records of hours worked by an employee, the employer has the burden of showing that the employee has not met the hours of service requirement.



DID YOU KNOW?

An employer has the burden of showing that the employee has not met the hours of service requirement even if it is not required to maintain time records for that employee. This may be the case with certain employees, such as school teachers, who may work additional time outside of the classroom or at home.

50 Employees within 75 Miles of the Employee's Worksite

- The 50 or more employee count is determined based on the number of employees on payroll regardless of whether they are part-time, temporary, or seasonal employees.
- The 75 miles are measured from the employee's worksite by surface miles, using surface transportation over public streets, roads, highways, and waterways by the shortest route possible.
- The worksite is ordinarily the site the employee reports to, or from which the employee's work is assigned. A worksite can refer to a single location, a group of buildings, such as a campus or industrial park, or to separate facilities in geographic proximity to one another.
- An employee's personal residence is not a worksite. For employees who work from home under "telework" or "flexi-place" arrangements, or other employees, such as salespersons who may leave to work from and return to their residence, the worksite is the office to which they report or from which they receive assignments.
- For employees with no fixed worksite, such as construction workers, transportation workers, and airline flight crew employees, the site to which they report, from which their work is assigned, or the location to which they are assigned as their home base, is their worksite.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE

For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago.

If 50 employees are employed within 75 miles from the employee's worksite, the employee meets the requirements for the test, regardless of where the employee is currently performing his or her duties.



DID YOU KNOW?

If the employee does not meet the eligibility requirements, an employer may not designate the leave as FMLA even if the leave would otherwise qualify for FMLA protection. If the employee is not eligible for FMLA leave, the employer may grant the employee leave under the employer's policy. Once the employee becomes eligible and the leave is FMLA-qualifying, any of the remaining leave period taken for an FMLA-qualifying reason becomes FMLA-protected leave.

For example, a pregnant employee has been with the company for 11 months as of December 1. She has more than 1,250 hours of service and works at a location that has more than 50 employees. The employee takes leave under the employer's policy beginning on December 1. One month later, on January 1, when she has reached 12 months of service, she becomes immediately eligible for FMLA and can now take up to 12 workweeks of FMLA-protected leave.



Review [section 825.110 of the FMLA regulations](#) for more information about employee eligibility.

Public Agency and School Employees

Although public agencies and elementary and secondary schools are covered employers without regard to the number of employees they employ, public agency and school employees must still meet FMLA eligibility requirements.

This means that an eligible employee of a public agency or school is one who:

- Will have worked for the employer for at least 12 months as of the date the FMLA leave is to start,
- Will have at least 1,250 hours of service for the employer during the 12-month period immediately before the date the FMLA leave is to start, and
- Works at a location where the employer employs at least 50 employees within 75 miles as of the date when the employee gives notice of the need for leave.

Generally, a public agency is treated as a single employer for purposes of determining employee eligibility. For example, a state is a single employer, a county is a single employer, and a city is a single employer.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE



DID YOU KNOW?

School employees who are employed permanently or who are under contract are considered “on the payroll” during any portion of the year when school is not in session, and are counted when determining the number of employees at a worksite.



Review [section 825.108\(c\) of the FMLA regulations](#) for more information about the eligibility of public agency employees, and [section 825.600\(b\)](#) for more information about the eligibility of school employees.

Special Eligibility Rule for Airline Flight Crew Employees

A special rule applies to the hours of service requirement for airline flight crew employees, including pilots, co-pilots, flight attendants, and flight engineers. The special rule does not apply to other employees of the airlines, such as employees of reservations and baggage departments.

Whether an airline flight crew employee meets the FMLA hours of service requirement is determined by assessing the number of hours the employee has worked or been paid over the previous 12 months. An airline flight crew employee will meet the hours of service requirement if, during the previous 12 months, he or she has:

- worked or been paid for not less than **60 percent of the employee’s applicable monthly guarantee, and**
- worked or been paid for not less than **504 hours.**

The applicable monthly guarantee for an airline flight crew employee who is not on reserve status (**line holder**) is the minimum number of hours an employer has agreed to *schedule* the employee. The applicable monthly guarantee for an airline flight crew employee who is on **reserve status** is the minimum number of hours an employer has agreed to pay the employee.

The hours an employee has *worked* during the previous 12 months is the employee’s **duty hours** during that time. The hours an airline flight crew employee has been *paid* during the previous 12 months is the number of hours for which the employee received wages during that time. The 504 hours do not include personal commute time or time spent on vacation, medical, or sick leave.



Review [section 825.801 of the FMLA regulations](#) for more information about the hours of service requirement for airline flight crew employees.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE

An Employer's Obligation to Provide Employees with an Eligibility Notice

After an employer has determined an employee's FMLA eligibility status, the employer must:

- Provide an Eligibility Notice to the employee, either orally or in writing, informing the employee whether he or she is eligible for FMLA leave;
 - If the employer determines that the employee is not eligible for FMLA leave, it must state at least one reason why the employee is not eligible.
- Provide the Eligibility Notice to the employee within five business days of the initial request for leave or of learning that an employee's leave may be for an FMLA-qualifying reason, unless there are extenuating circumstances;
- Provide the Eligibility Notice the first time the employee takes leave for an FMLA-qualifying reason in the designated 12-month leave year, and
- If a significant portion of the employer's workforce is not literate in English, provide the Eligibility Notice in a language in which employees are literate.

Employers are not required to provide a new Eligibility Notice for:

- FMLA absences for the same qualifying reason during the same leave year, or
- FMLA absences for a different qualifying reason where the employee's eligibility status has not changed.

Employers can use the Wage and Hour Division prototype form WH-381, **Notice of Eligibility and Rights and Responsibilities**, which is available on the Department's website at dol.gov/whd/fmla, or from the nearest Wage and Hour Division office, or may create their own version.



DID YOU KNOW?

An employer could be exposing itself to liability by failing to make a timely eligibility determination or failing to provide timely notice to its employees. Failure to timely notify employees of their eligibility status may constitute interference with, restraint, or denial of the exercise of an employee's FMLA rights.



Review **section 825.300(b) of the FMLA regulations** for more information about the Eligibility Notice.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE

An Employer's Obligation to Provide Employees with a Rights and Responsibilities Notice

Employers must provide a written Rights and Responsibilities Notice each time the employer provides an eligible employee the Eligibility Notice, within five business days of having notice of the employee's need for leave. If the employee's leave has already begun, the Rights and Responsibilities Notice should be mailed to the employee's address of record. The Rights and Responsibilities Notice details the specific expectations and obligations of the employee relating to his or her FMLA leave.

Employers are expected to be responsive in answering questions from employees concerning their rights and responsibilities under the FMLA. If a significant portion of an employer's workforce is not literate in English, the Rights and Responsibilities Notice must be provided in a language in which employees are literate.

Contents of the Rights and Responsibilities Notice

The Rights and Responsibilities Notice must be in writing and must include all of the following information, as appropriate:

- A statement of the period of leave that may be designated and counted against the employee's FMLA leave entitlement,
- The 12-month period used to track FMLA leave usage,
- Whether the employee will be required to provide certification of the need for leave,
- The employee's right to use paid leave, whether the employer will require the substitution of paid leave, any conditions related to the substitution, and the employee's right to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
- The employee's status as a "key employee" and potential restoration consequences, if applicable;
 - A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10% of all employees, both eligible and ineligible, within 75 miles of the worksite.
- The employee's right to job restoration and maintenance of benefits,
- Whether the employee will be required to make premium payments to maintain health benefits and any arrangements for doing so, the consequences of failing to make payments on a timely basis, and the employee's potential liability for premium payments made by the employer if the employee fails to return to work; and
- The consequences of failing to meet his or her obligations.

If information provided in the Rights and Responsibilities Notice changes, the employer must inform the employee of the changes, in writing, within five business days of the first time subsequent to the changes that the employee gives notice of need for leave.

WHEN AN EMPLOYEE NEEDS FMLA LEAVE

For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, notice of new arrangements for making health insurance premium payments may be required.

The Rights and Responsibilities Notice may be distributed electronically provided it meets all of the requirements stated above. Employers can use the Wage and Hour Division prototype form WH-381, **Notice of Eligibility and Rights and Responsibilities**, which is available on the Department's website at dol.gov/whd/fmla, or from **the nearest Wage and Hour Division office**, or may create their own version of the notice containing the same basic information.



DID YOU KNOW?

If the employer opts to provide the Eligibility Notice in writing, it may be combined and provided to the employee at the same time that the employer provides the Rights and Responsibilities Notice.



Review **section 825.300(c) of the FMLA regulations** for more information about the Rights and Responsibilities Notice.

QUALIFYING REASONS FOR LEAVE

An employee who meets the FMLA eligibility requirements may take leave for certain FMLA-qualifying reasons.

Circumstances that Qualify for FMLA Leave

Eligible employees may take up to 12 workweeks of FMLA leave in a 12-month period for the following qualifying reasons:

- The birth of a child and to bond with the newborn child within one year of birth,
- The placement with the employee of a child for adoption or foster care and to bond with the newly-placed child within one year of placement,
- A serious health condition that makes the employee unable to perform the functions of his or her job, including incapacity due to pregnancy and for prenatal medical care,
- To care for the employee's spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
- Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.

In addition, eligible employees may take up to 26 workweeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (referred to as military caregiver leave). An eligible employee is limited to a *combined* total of 26 workweeks of leave for **any** FMLA-qualifying reasons during the single 12-month period.



DID YOU KNOW?

The right to take FMLA leave applies equally to male and female employees. Fathers are equally entitled to take up to 12 workweeks of FMLA leave for the birth or placement for adoption or foster care of a child and to bond with the child within 12-months from the date of birth or placement.



Review [section 825.112 of the FMLA regulations](#) for more information about qualifying reasons for FMLA leave.



DID YOU KNOW?

Eligible employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption.



Review [section 825.121 of the FMLA regulations](#) for more information about FMLA leave for adoption or foster care.

QUALIFYING REASONS FOR LEAVE

Immediate Family Members

Employees can take FMLA leave due to a serious health condition of the following immediate family members:

- Spouse
- Parent
- Son or Daughter

Spouse

Spouse means a husband or wife as defined or recognized in the state where the individual was married, including in a common law marriage or same-sex marriage. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States, if the marriage could have been entered into in at least one state.

Parent

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was a child. This term does not include “parents-in-law.”

Son or daughter

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age or who is 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. The onset of a disability may occur at any age for purposes of the definition of an adult “son or daughter” under the FMLA.



DID YOU KNOW?

In order for a parent to take FMLA leave for a child who is 18 or over, the son or daughter must:

- Have a disability as defined by the Americans with Disabilities Act (ADA) at the time the leave is to commence,
- Be incapable of self-care because of the disability,
- Have a serious health condition, and
- Need care because of the serious health condition.



Review [section 825.122 of the FMLA regulations](#) for more information about the definition of family members for purposes of FMLA leave and [Administrator’s Interpretation No. 2013-1](#) for more information about an adult son or daughter incapable of self-care because of a mental or physical disability.

Note: The definition of son or daughter for purposes of FMLA military family leave is different. Information on FMLA military family leave (qualifying exigency leave and military caregiver leave) can be found in [chapter 5](#).

QUALIFYING REASONS FOR LEAVE

In Loco Parentis

An individual stands *in loco parentis* to a child if he or she has day-to-day responsibilities to care for or financially support the child. The person standing *in loco parentis* is not required to have a biological or legal relationship with the child. Although no legal or biological relationship is necessary, grandparents or other relatives, such as siblings, may stand *in loco parentis* to a child under the FMLA where all other requirements are met. The *in loco parentis* relationship exists when an individual intends to take on the role of a parent. Similarly, an individual may have stood *in loco parentis* to an employee when the employee was a child even if the individual has no legal or biological relationship to the employee.



Review [Administrator's Interpretation No. 2010-3](#) for more information about *in loco parentis*.

Documenting the Family Relationship

An employer may, but is not required to, request that an employee provide reasonable documentation of the qualifying family relationship. An employee may satisfy this requirement by providing either a simple statement asserting that the requisite family relationship exists, or other documentation such as a child's birth certificate or a court document. It is the employee's choice whether to provide a simple statement or other documentation. Employers may not use a request for confirmation of a family relationship in a manner that interferes with an employee's exercise or attempt to exercise his or her FMLA rights.

Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves **inpatient care** or **continuing treatment** by a health care provider. The FMLA does not apply to routine medical examinations, such as a physical, or to common medical conditions, such as an upset stomach, unless complications develop.

For all conditions "incapacity" means inability to work, including being unable to perform any one of the essential functions of the employee's position, or inability to attend school, or perform other regular daily activities due to the serious health condition, treatment of the serious health condition, or recovery from the serious health condition. The term "treatment" includes but is not limited to examinations to determine if a serious health condition exists and evaluations of the condition.

The chart below describes the different types of conditions that are serious health conditions under the FMLA. Serious health conditions may include conditions that involve an inpatient hospital stay or ones that include one or more visits to a health care provider and ongoing treatment. Chronic conditions and long-term or permanent periods of incapacity may also meet the requirements. Certain conditions requiring multiple treatments may also be FMLA-qualifying. See the chart on the next page for more information.

QUALIFYING REASONS FOR LEAVE

Inpatient Care

- An overnight stay in a hospital, hospice, or residential medical care facility.
- Includes any period of incapacity or any subsequent treatment in connection with the overnight stay.

Continuing Treatment by a Health Care Provider (any one or more of the following)

Incapacity Plus Treatment

A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

- Two or more in-person visits to a health care provider for treatment within 30 days of the first day of incapacity unless extenuating circumstances exist. The first visit must be within seven days of the first day of incapacity; or,
- At least one in-person visit to a health care provider for treatment within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of the health care provider. For example, the health provider might prescribe a course of prescription medication or therapy requiring special equipment.

Pregnancy

Any period of incapacity due to pregnancy or for prenatal care.

Chronic Conditions

Any period of incapacity due to or treatment for a chronic serious health condition, such as diabetes, asthma, migraine headaches. A chronic serious health condition is one which requires visits to a health care provider (or nurse supervised by the provider) at least twice a year and recurs over an extended period of time. A chronic condition may cause episodic rather than a continuing period of incapacity.

Permanent or Long-term Conditions

A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, but which requires the continuing supervision of a health care provider, such as Alzheimer's disease or the terminal stages of cancer.

Conditions Requiring Multiple Treatments

- Restorative surgery after an accident or other injury; or,
- A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days if the employee or employee's family member did not receive the treatment.

QUALIFYING REASONS FOR LEAVE



DID YOU KNOW?

If an eligible employee requests FMLA leave for surgery which requires and/or results in an overnight stay in the hospital, the leave request would meet the definition of a serious health condition under the inpatient care criteria, even if the surgery is considered elective.



Review [sections 825.113 to 825.121 of the FMLA regulations](#) for more information about serious health conditions.

THE CERTIFICATION PROCESS

In certain circumstances, an employer may require that an employee submit a certification to support the employee's need for FMLA leave. The certification is a document or form that is completed by the employee and, as appropriate, a health care provider.

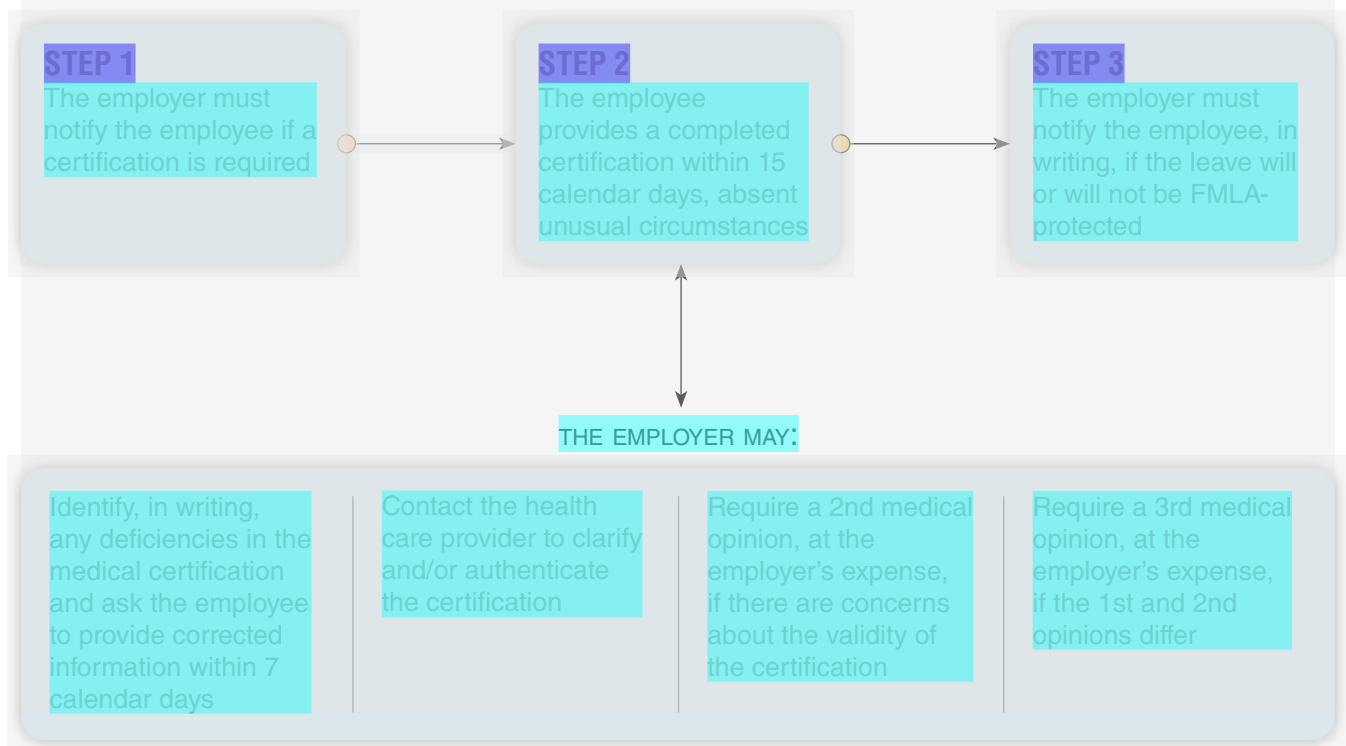
The certification will allow the employer to:

- Obtain information related to the FMLA leave request, including the likely periods of absences; and
- Verify that an employee, or the employee's ill family member, has a serious health condition (or, in the case of military family leave, that facts exist to support the employee's request for such leave).

The employee has the responsibility to provide the initial certification if his or her employer requests it. This includes the responsibility, when applicable, to find a health care provider to provide a complete and sufficient certification, and to pay for the cost of the initial certification.

If the employee does not provide the certification, the employer may deny the employee's request for FMLA leave.

Certification at a Glance



THE EMPLOYER MAY DENY FMLA LEAVE IF THE EMPLOYEE FAILS TO PROVIDE A REQUESTED CERTIFICATION

Circumstances When an Employer May Require a Certification

An employer may require a certification when an employee requests leave for:

- The employee's own serious health condition,
 - An employer may also, in certain circumstances, require a fitness-for-duty certification at the conclusion of the employee's leave as a condition to returning the employee to the job (see chapter 6 for information about the fitness-for-duty certification).
- The serious health condition of the employee's parent, spouse, son or daughter, and
- Military family leave (see **chapter 5** for information about certification for military family leave).



DID YOU KNOW?

Employers may **not** request a certification for leave to bond with a healthy newborn child or a child placed for adoption or foster care. However, employers may request documentation to confirm the family relationship (see **chapter 3** for information about documenting the family relationship).

Health Care Providers

If an employer requires a medical certification, part of it must be completed by a health care provider, which is defined as:

- A doctor of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices,
- A podiatrist, dentist, clinical psychologist, optometrist, or chiropractor (with limitations) authorized to practice in the state and performing within the scope of his or her practice;
- A nurse practitioner, nurse-midwife, clinical social worker, or physician assistant authorized to practice in the state and performing within the scope of his or her practice;
- A Christian Science practitioner listed with the First Church of Christ, Scientist, in Boston, Massachusetts; or
- Any health care provider from whom the employer or the employer's group health plan's benefits manager will accept a medical certification to substantiate a claim for benefits.

Medical Certification Notice and Timing

Employers must notify employees each time they require a medical certification. The employer's notice that a certification is required must be included in the written Rights and Responsibilities Notice that the employer gives the employee within five business days of becoming aware of the employee's need for FMLA leave. In some instances, an employer may request a medical certification at a later date if the employer has reason to question the appropriateness of the leave or its duration. When requesting a medical certification, the employer must advise the employee of the consequences of failing to provide a complete and sufficient certification.

THE CERTIFICATION PROCESS

The employee must provide the requested medical certification within 15 calendar days after an employer's request, unless it is not feasible under the particular circumstances to do so despite the employee's good faith efforts, or if the employer permits more than 15 calendar days to return the requested certification. When an employee makes diligent good faith efforts but is unable to meet the 15-calendar day deadline, the employee is entitled to additional time to provide the certification. If an employee fails to return the certification in a timely manner, the employer can deny FMLA protections for the leave following the expiration of the 15-calendar day time period until a complete and sufficient certification is provided. However, the 15-day period and the period of absence beginning the day the certification was received is FMLA-protected leave.

For example, an employer gives an employee 15 calendar days to provide a certification and the employee does not provide certification for 45 calendar days without sufficient reason for the delay, the employer may deny FMLA protections for the period following expiration of the 15-calendar day time period, i.e., from day 16 through day 44.

If an employee fails to provide a certification within 15 calendar days from receipt of the request for certification but made diligent, good faith efforts to do so and the delay was due to extenuating circumstances outside his or her control, the employer may not deny the leave for the period that the certification was late. In all cases, if the employee never produces the certification, the leave is not FMLA-protected leave.



Review **sections 825.305 and 825.313 of the FMLA regulations** for more information about the medical certification and failure to provide the certification.

Contents of a Complete and Sufficient Medical Certification

The medical facts appropriate for inclusion on the certification form will vary depending on the nature of the serious health condition and are to be determined by the health care provider but must be sufficient to support the need for leave. The information requested may relate only to the serious health condition for which the employee is seeking leave.

A complete and sufficient certification need only include the following information:

- Contact information for the health care provider, including name, address, telephone number, fax number, and type of medical practice / specialty;
- When the serious health condition began,
- How long the serious health condition is expected to last,
- If the employee is the patient, whether the employee is unable to work, and the likely duration of this inability;

- If a family member is the patient, whether the family member needs care, and an estimate of the frequency and duration of the leave required to care for the family member;
- Whether the employee's need for leave is continuous or intermittent, and
- Appropriate medical facts about the condition.

Appropriate Medical Facts

At the health care provider's discretion, the medical facts may include information on symptoms, doctor's visits, or a diagnosis. Whether a diagnosis is included in the certification form is left to the discretion of the health care provider and an employer may not reject a complete and sufficient certification because it lacks a diagnosis.

Additional Information for Intermittent or Reduced Schedule Leave

For intermittent or reduced schedule leave, the employer may require certain additional information in the certification:

Planned Medical Treatment for the Employee's Own or Family Member's Serious Health Condition	Unforeseeable Leave for the Employee's Own Serious Health Condition, Including Pregnancy	Unforeseeable Leave for the Family Member's Serious Health Condition
• Information that establishes the medical necessity of intermittent or reduced schedule leave • An estimate of the dates and duration of such treatment and periods of recovery	• Information that establishes the medical necessity of intermittent or reduced schedule leave • An estimate of the frequency and duration of the episodes of incapacity due to the serious health condition	• A statement that the leave schedule is medically necessary for the care of the family member, which can include assisting in the family member's recovery • An estimate of the frequency and duration of leave

THE CERTIFICATION PROCESS

Not all absences caused by certain serious health conditions are predictable. Health care providers are expected to provide only their best informed medical judgment when estimating the need for unforeseeable intermittent leave. The FMLA does not permit an employer to require an exact schedule of leave for such instances.



Review **section 825.306 of the FMLA regulations** for more information about the content of the medical certification.

The employer must accept a complete and sufficient medical certification, regardless of the format. The employer cannot reject a medical certification that contains all the information needed to determine if the leave is FMLA-qualifying.

The employer cannot refuse:

- A fax or copy of the medical certification;
- A medical certification that is not completed on the employer's standard company form, or
- Any other record of the medical documentation, such as a communication on the letterhead of the health care provider.



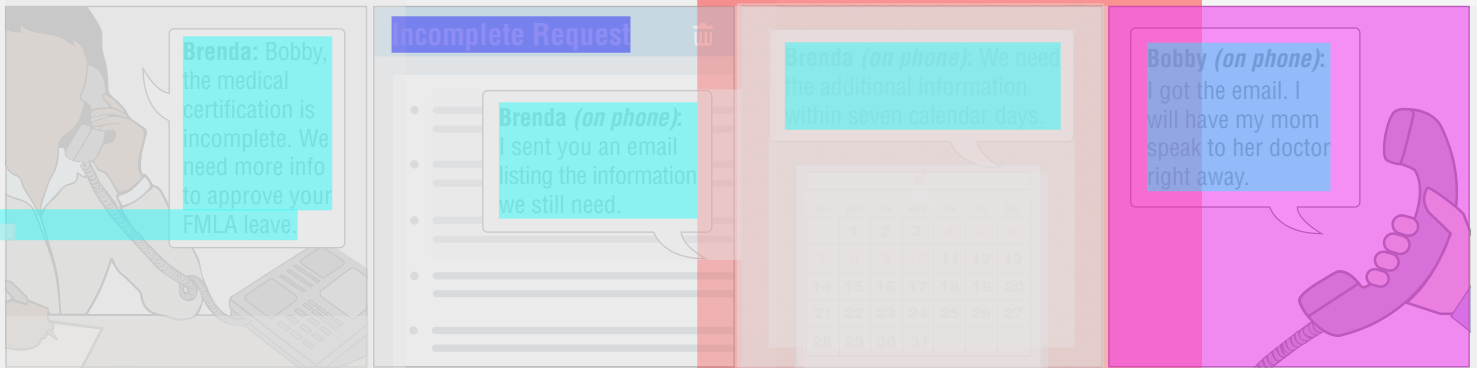
DID YOU KNOW?

The FMLA does not require employees to use any specific certification form. An employer may provide employees with the Department of Labor's optional-use forms, listed below, for obtaining certification.

- WH-380-E, **Certification of Health Care Provider for Employee's Serious Health Condition;**
- WH-380-F, **Certification of Health Care Provider for Family Member's Serious Health Condition;**
- WH-384, **Certification of Qualifying Exigency for Military Family Leave;**
- WH-385, **Certification for Serious Injury or Illness of a Covered Servicemember – for Military Family Leave;**
- WH-385-V, **Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.**

These are available on the Department's website at dol.gov/whd/fmla or from **the nearest Wage and Hour Division office**. An employer may also develop its own certification forms, but it may not request any additional information beyond what is specified in the FMLA and its regulations.

Incomplete or Insufficient Medical Certification



Whenever an employer finds any medical certification “incomplete” or “insufficient,” the employer must give the employee a written notice stating what additional information is necessary to make the certification complete and sufficient. The employer may use the designation notice to inform the employee that the certification is incomplete or insufficient and identify what information is needed to make the certification complete and sufficient. See **chapter 6** for more information about the designation notice.

- A certification is considered **incomplete** if one or more applicable entries have not been completed.
- A certification is considered **insufficient** if the information provided is vague, ambiguous, or non-responsive.

The employer must provide the employee with at least seven calendar days to correct any deficiency in the certification. If it is not practicable under the particular circumstances for the employee to cure any deficiency in the seven-day period despite the employee's diligent good faith efforts, the employer should provide additional time.

If an employee fails to provide a complete and sufficient certification despite the opportunity to cure the deficiency, an employer may deny the employee's request for FMLA leave.



DID YOU KNOW?

After acquiring a complete and sufficient certification, an employer is not permitted to ask for more information, such as requiring a doctor's note for each FMLA-related absence. Requiring a doctor's note for each *unpaid* FMLA related absence may be considered interference with the employee's use of FMLA leave.



Review [section 825.305\(c\) of the FMLA regulations](#) for more information about complete and sufficient certifications.

THE CERTIFICATION PROCESS

Medical Certification from Abroad

If the employee or employee's family member is visiting another country, or a family member resides in another country, an employer must accept a medical certification, including second and third opinions, from a health care provider who is authorized to practice in that country and is performing within the scope of his or her practice. If a certification by a foreign health care provider is not in English, the employee must provide a written translation at the employer's request.

Authentication and Clarification

After the employer has given the employee the opportunity to cure any deficiencies, the employer may contact the health care provider **only** for purposes of authentication and/or clarification of the medical certification.

Under no circumstances may the employee's direct supervisor contact the employee's health care provider. A human resources professional, a leave administrator, or a management official must make the contact.

Authentication means providing the health care provider with a copy of the certification and confirming that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document.

Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.

An employer may not ask health care providers for additional information beyond that in the certification form.

The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule govern the privacy of individually-identifiable health information created or held by HIPAA-covered entities. Therefore, HIPAA requirements must be satisfied for a HIPAA-covered entity to share an employee's or an employee's family member's individually-identifiable health information with an employer. HIPAA requires, among other things, a written authorization by the employee (or the employee's family member) in order to release information for clarification purposes.

An employee may choose to authorize his or her health care provider to provide clarification directly to the employer; however, the employee *may not be required* to do so. If the employee chooses not to provide such authorization and does not otherwise clarify the certification, the employer may deny the FMLA leave request if the certification is unclear. It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

Second and Third Opinions

If an employer has received a complete and sufficient certification but has a reason to doubt that it is valid, the employer may require the employee to obtain a second opinion at the employer's expense. The employer can choose the health care provider to provide the second opinion, but generally may not select a health care provider who it employs on a regular or routine basis.

If the first and second opinions reach different conclusions, the employer may require a third opinion at the employer's expense. The third health care provider must be approved by both the employer and the employee. The opinion of the third health care provider is final.

While waiting for the second (or third) opinion, the employee is provisionally entitled to FMLA leave, including the right to maintain his or her group health benefits. If the certifications do not ultimately establish that the employee is entitled to FMLA leave, the leave is not considered FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policy.

If the employee requests it, the employer must provide copies of second or third opinions within five business days absent extenuating circumstances.

If a second or third opinion health care provider requests information relevant to the serious health condition at issue from the employee's or his or her family member's health care provider, and the employee or their family member does not authorize their health care provider to release such information, the FMLA leave may be denied.



Review **section 825.307 of the FMLA regulations** for more information about authentication, clarification, and second and third opinions.

Recertification

An employer may, under certain circumstances, request that an employee "recertify" his or her serious health condition or the serious health condition of his or her family member within the same leave year.

In general, an employer may request the employee provide a recertification no more often than every 30 days and only when the employee is actually absent or has requested to be absent.

In some instances, an employer must wait longer than 30 days to request recertification. If the initial certification indicates that the minimum duration of the serious health condition will be more than 30 days, an employer must generally wait until that minimum duration expires before requesting recertification. In all cases, an employer may request recertification every six months in connection with an absence. If the initial medical certification indicates that the employee will need intermittent or reduced schedule leave for longer than six months, including cases where the serious health condition has no anticipated end, the employer may request a recertification every six months, but only in connection with an absence by the employee.