

# HR COMPLIANCE OVERVIEW



## Overlap Between FMLA and Workers' Compensation

When employees are injured or become ill on the job, they may be covered by various laws. For example, workers' compensation is a form of insurance that provides financial assistance, medical care and other benefits for employees who are injured or disabled on the job. Also, the federal Family and Medical Leave Act (FMLA) provides eligible employees up to 12 workweeks of unpaid, job-protected leave a year for various reasons, including medical leave when an employee is unable to work because of a serious health condition. A workers' compensation injury that requires hospitalization or incapacitates an employee for more than three days and requires continuing treatment by a health care provider generally qualifies as a serious health condition under the FMLA.

The FMLA and workers' compensation laws may overlap with respect to various areas, including concurrent leave, light duty, benefits and medical certification. This Compliance Overview highlights the overlap between the FMLA and workers' compensation.

### LINKS AND RESOURCES

- [The Employer's Guide to The Family and Medical Leave Act](#), a publication of the U.S. Department of Labor's Wage and Hour Division
- FMLA [resources](#) from the U.S. Department of Labor
- The best way to learn about state workers' compensation laws is to view the text of the laws and regulations and any available guidance provided by the applicable state. For example, California maintains [comprehensive information](#) on its workers' compensation law. Employers should review such resources and consult with local counsel to ensure compliance with their legal obligations.

## Workplace Injuries

Employees injured on the job may be covered by various laws. For example, workers' compensation provides financial assistance for employees who are injured or disabled on the job, while the FMLA provides job-protected leave for various reasons, including an employee's serious health condition. Some workers' compensation injuries may qualify as serious health conditions under the FMLA.

## Overlap

The FMLA and workers' compensation laws may overlap in various areas, including:

- Concurrent leave;
- Light duty;
- Benefits; and
- Medical certification.



## Background

### **FMLA**

The FMLA provides eligible employees up to 12 workweeks of unpaid leave a year and requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave. Employees are also entitled to return to their same or an equivalent job at the end of their FMLA leave. Among other entities, the FMLA applies to private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year. In order to be eligible to take leave under the FMLA, an employee must work for a covered employer, have worked 1,250 hours during the 12 months prior to the start of leave, work at a location where the employer has 50 or more employees within 75 miles, and have worked for the employer for 12 months.

### ***SERIOUS HEALTH CONDITIONS***

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12-month period to (among other reasons) take medical leave when the employee is unable to work because of a serious health condition. The most common serious health conditions that qualify for FMLA leave are:

- Conditions requiring an overnight stay in a hospital or other medical care facility;
- Conditions that incapacitate an employee or their family member (for example, unable to work or attend school) for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care, such as prescription medication);
- Chronic conditions that cause occasional periods when an employee or their family member is incapacitated and requires treatment by a health care provider at least twice a year; and
- Pregnancy (including prenatal medical appointments, incapacity due to morning sickness and medically required bed rest).

### ***UNPAID LEAVE***

Generally, FMLA leave is unpaid leave. However, the FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. In this context, “substitute” means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay under the employer’s applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee’s ability to substitute accrued paid leave is determined by the terms and conditions of the employer’s normal leave policy.

When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that they must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. If an employee does not comply with the additional requirements in an employer’s paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave that is earned or accrued under the terms of the employer’s plan. If an employee uses paid leave under circumstances that do not qualify as FMLA leave, the leave will

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not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition that is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

## **LIGHT DUTY**

Employees cannot waive, nor may employers induce employees to waive, their prospective rights under the FMLA. For example, employees cannot trade off the right to take FMLA leave against some other benefit offered by the employer. However, this does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light-duty assignment while recovering from a serious health condition. An employee's acceptance of such a light-duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. However, the employee's right to restoration ceases at the end of the applicable 12-month FMLA leave year.

## **PREMIUM PAYMENTS**

During the FMLA leave period, an employee must continue to pay whatever share of group health plan premiums that the employee paid prior to FMLA leave. The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. Maintenance of health insurance policies that are not a part of the employer's group health plan is the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave. If the employee is substituting accrued paid leave for the unpaid FMLA leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

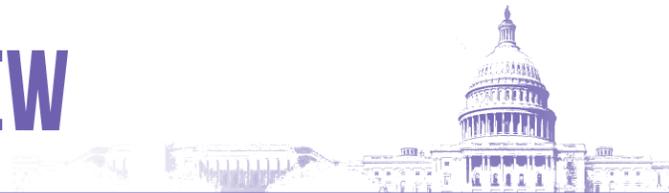
## **MEDICAL CERTIFICATION**

An employer may require that the need for leave for a serious health condition of the employee (or their immediate family member) be supported by a certification issued by a health care provider. FMLA regulations clarify that contact between an employer and an employee's health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. Under the regulations, employers may contact an employee's health care provider for authentication or clarification of the medical certification by using a health care provider, an HR professional, a leave administrator or a management official. In order to address employee privacy concerns, the regulations make clear that in no case may the employee's direct supervisor contact the employee's health care provider. In order for an employee's HIPAA-covered health care provider to provide an employer with individually-identifiable health information, the employee needs to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the employer. Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.

## **STATE AND LOCAL LAWS**

Employers should be aware that state and local laws may provide additional protections. Many states have enacted their own laws to provide different or additional leave rights for employees than those provided under federal law. Employers should check their state and local laws for any additional requirements and protections that may apply. When employees are covered by both federal and state family and medical leave laws, they are entitled to the greater benefit or more generous rights provided under the different parts of each law.

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## Workers' Compensation

Workers' compensation is a form of insurance that provides financial assistance, medical care and other benefits for employees who are injured or disabled on the job. Except for federal government employees and certain other groups of employees, workers' compensation laws are administered at the state level. Because each state has its own system, coverage varies. As a general rule, workers' compensation laws apply to all employers with one or more employees. In most states, all employees are covered, and an on-the-job injury triggers coverage. Injured employees receive varying amounts of paid leave, depending on the state and the nature of the injury.

Workers' compensation benefits are available to employees who are unable to work because of a work-related injury or illness. The injured employee will be indemnified for lost wages as a result of the work-related injury if the employee is medically authorized to be off from work. Typically, lost time benefits are a percentage of the injured employee's pre-injury wage. In addition to all medical expenses related to the treatment, rehabilitation is typically covered.

Unlike the FMLA, workers' compensation provides wage replacement benefits and generally does not provide job protection. Exceptions may exist depending on an employer's state, so it is important for employers to check their applicable state laws to ensure compliance. For example, in Oregon, if an employer has 21 or more employees either at the time of injury or at the time of demand, the employer must reinstate the injured worker to their former position—assuming the worker is able to perform the required duties and has made a timely demand for the job. If an employer has six or more employees either at the time of injury or when the worker makes a timely demand, the employer must reemploy the injured worker to any available, suitable position.

Even if a state's workers' compensation law does not provide job protection, such laws generally prohibit employers from discriminating or retaliating against workers who get injured on the job or who file workers' compensation claims. For example, in Florida, there is no provision in the workers' compensation law that requires an employer to hold a job open for an employee who is unable to return to work until the doctor releases the employee. However, it is against the law to fire an employee because they have filed or attempted to file a workers' compensation claim.

## Overlap Between FMLA and Workers' Compensation

### Concurrent Leave

A workers' compensation injury that requires hospitalization or incapacitates an employee for more than three days and requires continuing treatment by a health care provider generally qualifies as a serious health condition under the FMLA. An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under the FMLA. The workers' compensation absence and FMLA leave may run concurrently. However, if appropriate, the employer must designate this leave as FMLA-qualifying leave and must give notice of the leave designation to the employee. Failing to designate this leave as FMLA leave may be a violation of the FMLA, and the employee may still be entitled to FMLA leave once the workers' compensation absence has ended.

Because the workers' compensation absence is not unpaid, the FMLA provision for substitution of the employee's accrued paid leave discussed above is not applicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary.

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## Light Duty

If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light-duty job but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light-duty job. As a result, the employee may lose workers' compensation payments but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable, and either the employee may elect or the employer may require the use of accrued paid leave.

If the employee accepts the light-duty position in lieu of FMLA leave or returns to work before the FMLA leave entitlement ends, the employee retains the right to the original or to an equivalent position. However, the period of time employed in a light-duty assignment cannot count against the FMLA leave entitlement. The right to restoration is suspended during the period of time the employee performs a light-duty assignment. That right is not unlimited and ceases at the end of the applicable 12-month FMLA leave year. Restoration under the FMLA is dependent on the employee's ability to perform the essential functions of the same or an equivalent position at the end of FMLA leave.

## Benefits

The FMLA requires group health benefits to be maintained during leave as if employees continued to work instead of taking leave. Thus, if an employee receiving workers' compensation benefits is also on FMLA leave, the employer must maintain the employee's group health plan coverage as if the employee had not taken the leave. Also, if the employer designates the workers' compensation absence as FMLA leave, the employee is entitled to all employment benefits accrued prior to the date on which the leave commenced. The FMLA does not specifically entitle the employee to the accrual of any seniority or employment benefits during any period of FMLA leave, or any right, benefit or position of employment other than that to which the employee would have been entitled had they not taken the leave.

Note that an employee's entitlement to benefits other than group health benefits during a period of FMLA leave (for example, holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave.

During the FMLA leave period, an employee must continue to pay whatever share of group health plan premiums the employee paid prior to FMLA leave. An employee who is receiving payment as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. Employers should make sure payment arrangements are in place in advance of the leave or shortly after the leave begins. Likewise, an employer will also want to make prior arrangements for employee payment of other nonhealth benefit premiums when an employee is receiving payment as a result of a workers' compensation injury and is simultaneously taking unpaid FMLA leave.

In general, an employer may recover from an employee its share of health plan premiums paid during the employee's unpaid FMLA leave if the employee fails to return to work after their FMLA leave entitlement has been exhausted or expires. However, because workers' compensation leave is not unpaid leave within the meaning of the FMLA, an employer may not recover its share of health plan premiums when employees on concurrent FMLA and workers' compensation leave do not return to work at the end of FMLA leave.

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## Medical Certification

Under the FMLA, an employer may require that the need for leave for a serious health condition of the employee (or their immediate family member) be supported by a certification issued by a health care provider, and employers may contact an employee's health care provider in certain situations. If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions. That is, the employer may have direct contact with the employee's health care provider in the manner in which the workers' compensation statute provides. The employer may then use this information to determine the employee's entitlement to FMLA leave.

Similarly, under FMLA regulations, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received under such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave.

## When FMLA Leave Ends

If an employee is unable to return to work or is still in a light-duty job after the FMLA leave entitlement has run out, the employee no longer has the protections of the FMLA and must look to the workers' compensation statute or to the federal Americans with Disabilities Act (ADA), if the employee is a qualified individual with a disability, for any further relief or protections. If the employee has a physical or mental condition related to pregnancy, childbirth or related medical conditions, the employee may be covered by the federal Pregnant Workers Fairness Act (PWFA).

State and local laws may also provide additional protections. Many states have enacted their own laws to provide different or additional leave rights for employees than those provided under federal law. Some states have their own family and medical leave laws, and many states provide leave rights for other reasons, such as bereavement leave or civic duty leave. Where an employee's leave is covered by the FMLA in addition to a state leave law, the employer must determine whether the state law permits (or prohibits) the leave to run concurrently with the federal FMLA. Many state leave laws include specific language about their interaction with the federal FMLA.

For example, New Jersey has laws that grant employees job-protected leave for family purposes and provide partial wage benefits during certain types of family leave. Under the state Family Leave Act, New Jersey employers with 30 or more employees must provide up to 12 weeks of unpaid, job-protected leave to eligible employees every 24 months. If an employee requests leave for a reason covered by both the New Jersey Family Leave Act and another law, the leave simultaneously counts against the employee's entitlement under both laws. For example, the federal FMLA provides leave to care for a seriously ill spouse, and the Family Leave Act also provides leave for that reason. Therefore, if an employee takes leave to care for a seriously ill spouse, the leave simultaneously counts against the employee's entitlement under both laws.

However, medical or disability leave an employee takes under other laws but is not covered under the New Jersey Family Leave Act does not count against an employee's leave under the state law. For example, the federal FMLA provides leave for an employee's own disability, but the New Jersey Family Leave Act does not. This means that an employee who takes

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federal FMLA leave because of their own disability may still take an additional 12 weeks of leave within 24 months for any qualifying reason under the New Jersey Family Leave Act.

## Conclusion and Strategies

When employees need time off because of a medical issue, it is important to remember that they may have rights under multiple laws at the same time. In certain circumstances, provisions of the FMLA and workers' compensation laws can apply to the same employee. Depending on the situation, additional laws such as the ADA and the PWFA may apply. In addition, as noted, many states have enacted their own laws to provide different or additional leave rights. When employees are covered by both federal and state family and medical leave laws, they are entitled to the greater benefit or more generous rights provided under the different parts of each law.

Employers may find understanding their responsibilities a challenge. Below are basic strategies employers can follow to determine their responsibilities regarding medical leave requests:

- **Determine which laws apply to employees as a group.** For example, as noted above, the FMLA applies to private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year. On the other hand, as a general rule, workers' compensation laws apply to all employers with one or more employees;
- **Determine which laws cover the particular employee's situation.** For example, if the employee has a serious health condition, as discussed above, the employee may be entitled to FMLA leave. An employer may require that the need for leave for a serious health condition be supported by certification. If there is a work-related illness or injury, workers' compensation may apply;
- **Determine the employee's entitlements under the relevant laws.** When more than one law applies, employers must provide leave under whichever law provides the greater rights to employees; and
- **Evaluate whether the employee is entitled to reinstatement once able to return to work.** Employers may also need to take additional considerations into account, such as accommodations, light duty, or whether an employee's return would pose a direct threat to health or safety in the workplace.

Employers should check their state and local laws for any additional requirements that may apply. Given the complexities and potential liability involved, it is always prudent for employers to work with local counsel to ensure they fulfill their legal obligations and protect employees' rights.