

Compliance Overview

Highlights

This Compliance Overview provides key guidance for employers on navigating intermittent leave under the FMLA, including:

- FMLA background;
- Definition of intermittent leave;
- Reasons for leave and scheduling;
- Transfer or reassignment;
- Increments of leave;
- Calculation of leave; and
- Overtime.



Navigating Intermittent Leave Under the FMLA

The federal Family and Medical Leave Act (FMLA) provides eligible employees of covered employers with job-protected leave for qualifying family and medical reasons. Employees may take FMLA leave both on a continuous and on an intermittent or reduced schedule basis.

The rules surrounding intermittent or reduced schedule leave are complex. Employers must comply with these rules in order to help ensure employees are afforded their FMLA rights and avoid costly lawsuits. This Compliance Overview provides key guidance for employers navigating intermittent leave under the FMLA.

This document provides general rules for private-sector employers; additional rules and industry-specific requirements may apply. Also, some states have their own family and medical leave laws. Employers should check all applicable laws, including federal, state and local laws, and follow the provisions that provide the greatest benefit to employees.

Links and Resources

- [Family and Medical Leave Act Employer Guide](#), a publication of the U.S. Department of Labor, Wage and Hour Division (WHD)
- [FMLA Frequently Asked Questions](#), from the WHD
- [FMLA regulations](#)

Provided by **Evolution of Benefits**

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FMLA Background

Coverage

The FMLA generally applies to (among other entities) private-sector employers with **50 or more employees**. To be eligible for FMLA leave, an employee working for a covered employer generally must:

- ✓ Have worked **1,250 hours** during the 12 months before 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**.

Amount and Reasons for Leave

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 for one or more of the following reasons:

- ✓ For the **birth** of a son or daughter and to bond with the newborn child;
- ✓ For the **placement** of a child with an employee for adoption or foster care and to bond with that child;
- ✓ To **care for an immediate family member** (spouse, child or parent, but not a parent-in-law) with a serious health condition;
- ✓ To take medical leave when the **employee is unable to work** because of a serious health condition; or
- ✓ For **qualifying exigencies** because the employee's spouse, son, daughter or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves or Regular Armed Forces.

The FMLA also allows eligible employees to take up to **26 workweeks** of unpaid, job-protected leave in a single 12-month period to **care for a covered service member** with a serious injury or illness. (The two types of leave noted above that are related to military service—qualifying exigency leave and military caregiver leave—are referred to as **military family leave**.)

Certification

In certain circumstances, an employer may require that an employee submit a **certification** to support their need for FMLA leave. The certification is completed by the employee and, as appropriate, a healthcare provider.

Key Points: 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 family member has a **serious health condition** (or that facts exist to support an employee's request for military family leave).

In general, an employer may require certification when an employee requests leave for their own or a family member's serious health condition, or for military family leave.

Definition of Intermittent Leave

FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. **Intermittent leave** is FMLA leave taken in **separate blocks of time** due to a single qualifying reason. A **reduced leave schedule** is a leave

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schedule that **reduces an employee's usual number of working hours** per workweek or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

Reasons for Leave and Scheduling

Different rules apply for intermittent leave or leave on a reduced leave schedule depending on whether leave is taken due to medical necessity, birth or placement, or a qualifying exigency.

Medical Necessity

For intermittent leave or reduced schedule leave taken due to medical necessity (i.e., the employee's or family member's serious health condition, or care for a covered service member with a serious injury/illness), the following conditions must be satisfied:

- ☑ There must be a **medical need** for leave; and
- ☑ The medical need can be **best accommodated** through an intermittent or reduced leave schedule.

The treatment regimen and other information in the **certification** of a serious health condition or serious injury/illness, if required by the employer, address the medical necessity for intermittent leave or reduced schedule leave. Such leave may be taken for planned and/or unanticipated **medical treatment** or for **recovery** from treatment, a serious health condition or serious injury/illness. It may also be taken to **provide care or psychological comfort** to a covered family member or a covered service member.

Also, intermittent leave may be taken for treatment by a healthcare provider **periodically, rather than for one continuous period of time**, and may include leave of periods **from one hour or more to several weeks**.

Example #1: Examples of **intermittent leave** would include leave taken on an occasional basis for medical appointments or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Example #2: Pregnant employees may take leave intermittently for prenatal examinations or for their own conditions, such as for periods of severe morning sickness.

Example #3: An employee may take **reduced schedule leave** when they are recovering from a serious health condition and not strong enough to work a full-time schedule.

Also, intermittent or reduced schedule leave may be taken when the employee or family member is incapacitated or unable to perform essential job functions because of a **chronic** serious health condition or a serious injury/illness of a covered service member, **even if they do not receive treatment by a healthcare provider**.

Birth or Placement

When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule **only if the employer agrees**. For example, such a

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schedule reduction might occur where an employee (with the employer's agreement) works part-time after the birth of a child or takes leave in several segments. However, the employer's agreement is **not** required for leave during which an expectant mother has a serious health condition related to childbirth or if the newborn child has a serious health condition.

Qualifying Exigencies

Leave due to a qualifying exigency **may be taken** on an intermittent or reduced leave schedule basis.

Scheduling of Leave

If an employee needs leave intermittently or on a reduced leave schedule for **planned** medical treatment, the employee **must make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer's operations.**

Transfer or Reassignment

If an employee needs intermittent or reduced schedule leave that is **foreseeable based on planned medical treatment** for the employee, a family member or a covered service member (including during a period of recovery), or if the employer agrees to permit intermittent or reduced schedule leave for birth or placement, the employer **may require the employee to transfer temporarily** during the leave period **to an available alternative position.** The employee must be qualified for the position, and it must better accommodate recurring periods of leave than the employee's regular position does.

Key Points: Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act) and state law. Also, transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced schedule leave.

Equivalent Pay and Benefits

The alternative position must have **equivalent pay and benefits**, but it does **not** have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position to make them equivalent to the pay and benefits of the employee's regular job.

The employer may also transfer the employee to a **part-time job** with the same hourly rate of pay and benefits if the employee is not required to take more leave than is medically necessary.

Example #4: An employee desiring to take leave in increments of four hours per day could be transferred to a half-time job or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits.

The employer may **not** eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately **reduce** benefits, such as vacation leave, where an employer's normal practice is to base such benefits on the number of hours worked.

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Limitations

An employer may **not** transfer the employee to an alternative position in order to **discourage** the employee from taking leave or otherwise impose a hardship on the employee.

Example #5: A white-collar employee may not be assigned to perform a laborer's work.

Example #6: An employee working a day shift may not be reassigned to the graveyard shift.

Example #7: An employee working in the headquarters facility may not be reassigned to a branch that is a significant distance away from the employee's normal job location.

Reinstatement

When an employee who has been transferred during leave is able to return to full-time work, the employee **must be placed in the same or an equivalent job** as the job they left when the leave commenced.

Increments of Leave

Minimum Increment

Employers must account for intermittent or reduced schedule leave using an increment **no greater than the shortest period of time** the employer uses for **other forms of leave**, provided that:

- ☒ It is not greater than **one hour**; and
- ☒ An employee's FMLA leave entitlement may **not** be reduced by more than the amount of leave **actually taken**.

Employers generally may **not** require employees to take **more leave than necessary** to address the circumstances that precipitated the leave, and they must count the leave using the shortest increment used to account for any other type of leave.

Different rules apply depending on the increments an employer uses to account for leave.

If...	Then...
An employer uses different increments to account for different types of leave,	The employer must account for FMLA leave in the smallest increment used to account for any other type of leave.
An employer accounts for leave in varying increments at different times of the day or shift,	The employer may also account for FMLA leave in varying increments if the increment is no greater than the smallest increment used for any other type of leave during the FMLA leave.

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An employer accounts for other forms of leave in increments **greater than one hour**,

The employer must account for FMLA leave in increments **no greater** than one hour.

An employer may account for FMLA leave in **shorter increments** than used for other forms of leave. For example, an employer that accounts for other leave in one-hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting will not alter the increment considered to be the shortest period used to account for other leave or the use of FMLA leave in other circumstances.

Key Point: In all cases, employees may **not** be charged FMLA leave for periods during which they are working.

Physical Impossibility

Where it is **physically impossible** for an employee using intermittent or reduced schedule leave to begin or end work **midway** through a shift, the **entire period** that the employee is forced to be absent is designated as FMLA leave and counts against their entitlement. This may occur when, for example, a flight attendant or railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed “clean room” for a certain period of time and no equivalent position is available. The physical impossibility period is limited to the period during which the employer is unable to permit the employee to work **before** a period of FMLA leave, or to return the employee to the same or equivalent position after a period of FMLA leave, due to physical impossibility.

Calculation of Leave

Only the amount of leave **actually taken** may be counted toward an employee’s leave entitlement. The **actual workweek** is the basis of leave entitlement.

Example #8: If an employee who would otherwise work 40 hours a week takes off **eight** hours, the employee would use **one-fifth** ($1/5$) of a week of FMLA leave.

Example #9: If a full-time employee who would otherwise work eight hour days works **four-hour** days under a reduced leave schedule, the employee would use **one-half** ($1/2$) of a week of FMLA leave.

Where an employee works a **part-time** schedule or **variable** hours, the amount of FMLA leave used is determined on a **pro rata or proportional basis**.

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Example #10: If an employee who would otherwise work 30 hours per week works only **20 hours** a week under a reduced leave schedule, the employee's 10 hours of leave would constitute **one-third** (1/3) of a week of FMLA leave for each week the employee works the reduced leave schedule.

An employer may **convert** these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to 12 workweeks of leave (or 26 workweeks for military caregiver leave), and the total hours in those workweeks are dependent on the specific hours the employee would have worked but for the use of leave.

Schedule Changes: If an employer has made a permanent or long-term **change** in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA), the **hours worked under the new schedule** must be used for making this calculation.

Varying Schedule: If an employee's schedule **varies** from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA), a **weekly average of the hours scheduled over the 12 months** before the beginning of leave (including any hours for which the employee took leave of any type) would be used for calculating their leave entitlement.

Overtime

If an employee would normally be **required** to work overtime but is unable to do so because of an FMLA-qualifying reason, the hours the employee would have been required to work **may be counted** against their FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave.

Example #11: If an employee would normally be **required** to work 48 hours in a particular week but is unable to work more than 40 hours that week due to a serious health condition, they would use **eight** hours of FMLA out of the 48-hour workweek (or **one-sixth** [1/6] of a week of FMLA).

Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may **not** be counted against their FMLA entitlement.

Conclusion

FMLA compliance can be tricky, particularly when it comes to intermittent or reduced schedule leave. Even the most experienced employers may inadvertently make mistakes. Employers must comply with complex rules in order to help ensure employees are afforded their FMLA rights and avoid costly lawsuits. Following the guidance in this Compliance Overview can aid employers in navigating intermittent leave under the FMLA.