

Family and Medical Leave Act (FMLA)

**Presented by:
Jim Keith**

What is the FMLA?

The FMLA allows **eligible** employees to take up to 12 weeks of unpaid, job-protected leave during a 12-month period for specified family and medical reasons.



out in front.

Who is Eligible for FMLA Leave?

To be eligible for FMLA leave, an employee must:

1. Have been employed with the Company for at least 12 months (does not have to be consecutive but work prior to a service break of 7 years or more need not be counted); **and**
2. Have worked at least 1,250 hours during the 12-month period immediately prior to the leave.

NOTE: Under USERRA, hours an employee would have worked but for his/her military services and time spent in the military are credited towards the employee's required 1250 hours worked for FMLA eligibility.

out in front.

Who is Eligible for FMLA Leave?

1. Only actual hours worked will count toward the 1250 requirement.
2. Determination is made as of the date that the leave commences.
3. Exempt employees for whom no time records are kept are presumed to have worked 1250 hours unless the employer can clearly demonstrate they did not meet the 1250 hour requirement(e.g. teachers).
4. Teachers and principals typically work extra hours after school for which no time records are kept and thus would probably meet the 1250 hour requirement.

out in front.

The 12-month period—Four Methods

1. The calendar year that runs from January 1 through December 31.
2. Any fixed 12-month period of time. For example, July 1 through June 30.
3. The 12-month period measured forward from the first date an employee takes FMLA leave. Next 12-month period begins the first time FMLA leave is taken after completion of the prior 12-month period.
4. A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Each time FMLA leave is taken, the remaining leave entitlement would be the balance of the 12 weeks which has not been used during the immediately preceding 12 months.

out in front.

**Protecting FMLA
Rights**

out in front.

FMLA - Key Fact

ADAMS AND REESE LLP

No employee can ever be punished in any way for taking an absence from work that is covered by the Family and Medical Leave Act.

out in front.

FMLA – Key Fact

ADAMS AND REESE LLP

No employee ever has to specifically request FMLA leave or even mention the FMLA to be covered by this law.

out in front.

FMLA – Key Fact

ADAMS AND REESE LLP

It is enough that the employee provides the employer with sufficient information to determine that the leave is protected by the FMLA.

out in front.

How It Works

ADAMS AND REESE LLP

- First:* Employee calls in and says I will not be at work today.
- Second:* Employee gives a reason for the absence.
- Third:* Person notified by employee must inform someone (principal, central office, business manager, etc.) the reason for the absence.

out in front.

What Does Administrator Do?

ADAMS AND REESE LLP

Someone (principal, central office, business manager, etc.) decides:

1. If the employee is eligible for FMLA leave;
2. Whether the absence is clearly covered by the FMLA;
3. Whether the absence is clearly not covered by the FMLA; and
4. Whether the absence will be provisionally designated as FMLA pending receipt of additional information.

out in front.

What absences are covered by the FMLA?

ADAMS AND REESE LLP

- Birth of a child and caring for a newborn child.
- Adoption of a child.
- Placement of a child with an employee for foster care.



out in front.

Anything else?



- Absences to care for an immediate family member (parent, spouse, child) with a serious health condition.
- Absences to care for the employee’s own serious health condition.

out in front.

Anything Else?

National Defense Authorization Act for FY 2008 (NDA) has now added:

- Absences of a “spouse, son, daughter, parent or **next of kin**” to care for “a member of the Armed Forces undergoing medical treatment recuperation, or therapy, otherwise in outpatient status, or otherwise on the temporary disability retired list, for a serious injury or illness.”
 - (1) Up to 12 weeks of leave for qualifying urgencies arising out of a covered family member’s active military duty, and
 - (2) Up to 26 weeks of leave in a single 12-month period to care for a covered service member recovering from serious illness or injury.

out in front.

What Is A Serious Health Condition?

- Inpatient care (overnight stay)
- Any period of incapacity due to pregnancy
- Any absence for prenatal care
- Any period of incapacity due to a chronic serious health condition (such as asthma, diabetes, or epilepsy)
- A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective (such as severe stroke or Alzheimer’s)

out in front.

What Is A Serious Health Condition?

- More than 3 consecutive calendar days of incapacity; and 2 visits to a health care provider.



NOTE: FMLA regulations require 2 visits to occur within 30 days of the beginning of the period of incapacity (first visit within 7 days of first day of incapacity).

out in front.

What Is A Serious Health Condition?

- Could also involve treatment one time by a health care provider (in-person visit within 7 days of first day of incapacity)
- Followed by a regimen of continuing treatment (e.g. prescription medication)



out in front.

Incapacity

“Incapacity” means inability to work, attend school, or perform other regular daily activities due to a serious health condition, treatment for a serious health condition, or recovery from a serious health condition.

out in front.

Employer and Employee Notice Requirements

out in front.

EMPLOYEE Notice To Employer

- An employee must explain the reasons for the needed leave to allow the employer to determine if it qualifies as FMLA.
 - NOTE: Regulations clarify that employee must provide “sufficient information” to employer’s notice of need for leave and employee must indicate that he/she is unable to perform the functions of the job (or issues with a covered family member), the anticipated duration of the absence, whether he/she (or family member) intends to visit a health care provider or is under the continuing care of a health care provider.
- If the employee does not explain the reason for the absence, leave may be denied.

out in front.

Employee Notice – Intermittent Leave

- If employee fails to properly follow the employer’s call-in procedures when missing work and on FMLA, he/she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer’s policies provide.

out in front.

WHEN Should ***EMPLOYEE*** Notify Employer?

- If foreseeable leave, employee must give 30 days notice
- If unforeseeable leave, as soon as practicable, but recent regulations suggest it should be on **the same or next business day**, absent emergency situations (e.g. prior to start of next shift)

out in front.

Once notified by employee, EMPLOYER must:

- Determine if leave qualifies under FMLA
- If qualifies as FMLA leave, designate the absence as FMLA leave
- Give written notice to the employee of the designation

NOTE: Employer is required to inform the employee of: (1) the number of hours, days or weeks that will be designated as FMLA leave; and (2) whether paid leave will be substituted for unpaid FMLA leave.

out in front.

When Should ***EMPLOYER*** Notify Employee of ***FMLA Leave Designation?***

- As soon as practicable upon learning requested leave qualifies as FMLA leave
- Usually within one to two business days

BUT NOTE: Employer must notify employee of **eligibility status** within **five (5) business days** of employee requesting leave or employer learning employee’s leave may be FMLA-qualifying.

out in front.

Retroactive FMLA Designation

ADAMS AND REESE LLP

Retroactive FMLA designation **is** permitted if an employer fails to timely designate leave as FMLA leave (and notify the employee of the designation).

However, the employer may be liable if the employee can show that he/she has suffered harm or injury as a result. Additionally, an employee and employer may agree to retroactively designate an absence as FMLA-protected.

out in front.

What other paperwork should **EMPLOYER** give employee?

ADAMS AND REESE LLP

Medical certification form



out in front.

Medical Certifications

ADAMS AND REESE LLP

- Employer can require employee to provide medical certifications in certain circumstances.
- Employer can also require employee to obtain subsequent recertifications:
 - on a reasonable basis (Ex. every 30 days)
 - if given reason to question medical status

out in front.

Medical Certification

ADAMS AND REESE LLP

Employer:

1. Is required to state in writing what additional information is necessary to make certification complete and sufficient.
2. Must allow employee **at least seven (7) calendar days** to cure any deficiency, unless seven days is not practicable under circumstances despite employee's diligent good faith efforts.
3. **May** contact employee's health care provider directly for **"authentication"** or **"clarification"** of medical certification, but **ONLY** after employer notifies employee that certification is insufficient or incomplete and employee has had opportunity to cure deficiency.

out in front.

Medical Certification

ADAMS AND REESE LLP

Employer:

1. May contact employee's health care provider through its own health care provider, a human resources professional, a leave administrator or other managerial official.
2. Employee's direct supervisor cannot contact employee's health care provider.
3. Employer may require a second medical opinion at employer's expense from a health care provider not employed by employer on a regular basis.
4. If there is disagreement between the two health care providers, a third opinion from a health care provider agreed upon by employer and employee will be final.

out in front.

Medical Certification

ADAMS AND REESE LLP

Employer:

1. May request recertification for the need for the continuation of the leave at reasonable intervals but no more often than 30 days.
2. May require recertification in less than 30 days if circumstances (duration or frequency of absences, the severity of condition, or complications) as described in the previous certification have significantly changed or if the employer received information that casts doubt on the reasons for the previous certification.

out in front.

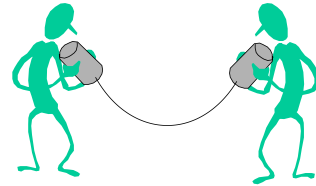
HELPFUL HINT:

If you believe eligible employee is on leave for an FMLA qualifying reason, consider starting the employee's FMLA leave time running as soon as possible by notifying the employee that you are **provisionally** granting the employee's leave as FMLA leave **conditioned** upon the employee providing you with **proper and complete** medical certification.

out in front.

Communicating Vital Information

TO KEEP YOUR EMPLOYEES INFORMED ABOUT FMLA



out in front.

What Every Employee Should Know...

- Who gets leave, why, and for how long
- What they need to do to take FMLA leave
- What happens when they go out/come back
- District policies regarding:
 - Attendance
 - Sick leave
 - Short-term disability (Plans)

out in front.

INTERMITTENT FMLA LEAVE

out in front.

Intermittent FMLA Leave – Typical Potential Issues

- Special status of FMLA absences over other absences
- Healthy people may feel disadvantaged
- Difficulty covering the work
- Recordkeeping
- Malingering suspicions



out in front.

To Prevent Intermittent FMLA Leave From Getting Out of Control

1. Know the rules.
2. Set up policies and procedures to make the most favorable use of the rules.
3. Follow the rules.
4. Enforce the rules.



out in front.

INTERMITTENT FMLA LEAVE: WHAT ARE THE RULES?

out in front.

Intermittent FMLA Leave

- When medically necessary
- May take leave in separate blocks of time due to a single FMLA-qualifying reason, or
- Work a reduced leave schedule which reduces an employee's usual number of working hours per workweek or hours per workday for a limited period of time.

out in front.

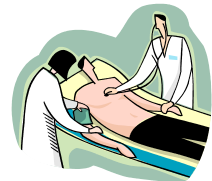
Family Leave

Employers are not required to provide leave for the birth or adoption of a child or to care for a newborn or newly adopted child **INTERMITTENTLY OR ON A REDUCED WORK SCHEDULE** **UNLESS** the employer and the employee agree otherwise.

out in front.

Medical Leave

Leave to care for the employee's parent, child, or spouse's serious health condition **MAY** be taken intermittently or on a reduced work schedule when **MEDICALLY NECESSARY**.



out in front.

Medical Necessity - Examples

1. A serious health condition requires treatment periodically (e.g. chemotherapy).
2. Pre-natal examinations.
3. Morning sickness.
4. Incapacity due to a chronic serious health condition.
5. An employee recovering from surgery is not strong enough to return to work full time.

out in front.

Certification of Medical Necessity

1. The date on which the serious health condition began;
2. The probable duration;
3. The medical facts regarding the condition;
4. The dates on which treatment is expected to be given and the duration of the treatment;
5. A statement of the medical necessity for the intermittent leave and the expected duration of the intermittent leave;
6. A statement that the employee is unable to perform the functions of the employee's position or that the employee is needed to care for a spouse, parent or child.

out in front.

When an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, the employer may require the employee to transfer temporarily, during the period the leave is required, to an available alternative position for which the employee is qualified and which better accommodates the recurring absences.

out in front.

1. Must have equivalent pay and benefits.
2. Does not have to have equivalent job duties.
3. Must not discourage the employee from taking leave.
4. Must not otherwise work a hardship on the employee.
5. Must cease when the employee no longer needs leave.

out in front.

When planning foreseeable FMLA-qualifying medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to unduly disrupt the employer's operations.

out in front.

- Generally, there is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced work schedule.
- Employers, however, can limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.

out in front.

An employer **cannot** require an employee to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave.



out in front.

- FMLA leave is generally unpaid leave.
- Employer may designate leave as both FMLA leave and paid leave under the employer's paid benefit plan (paid sick leave, personal leave, etc.) so that they run concurrently.
 - Paid leave and FMLA leave are exhausted at the same time.
 - This prevents employees from using 12 weeks of unpaid FMLA leave and then using their paid leave to extend the time off.
 - Provides more certainty to employer with regard to the employee's leave status at the end of the 12 weeks of FMLA leave.

out in front.

Substitution of Paid Leave

ADAMS AND REESE LLP

- FMLA leave may run concurrently with leave under employer's disability leave plan.
- FMLA leave may run concurrently with absence that is covered by workers' compensation.
- Employer cannot require an employee to use paid sick leave with FMLA leave if the employee is being paid pursuant to a disability plan or workers' compensation.
- However, the employer and the employee may agree to have workers' compensation or disability benefits supplemented with paid leave for a full day's pay.

out in front.

Special Rule #1 for "Instructional Employees"

ADAMS AND REESE LLP

- **There are special rules for "Instructional Employees" taking Intermittent FMLA Leave, but who are they?**
- "Instructional employees" – include teachers or other employees whose principal function is to directly provide educational services (29 CFR § 825.600(c))
 - Definition includes special education assistants whose presence in the classroom is necessary, athletic coaches, and driving instructors
 - Does not include teacher assistants, cafeteria workers, counselors and other primarily non-instructional employees

out in front.

Special Rule #1 - 29 CFR § 825.601(a)(1):

ADAMS AND REESE LLP

- If an "instructional employee" requests medical leave that is foreseeable based on a planned medical treatment and the employee would be gone for more than twenty percent (20%) of the working days during the period of leave.
- In such cases, the school may require the employee to:
 - Take leave for periods of a particular duration not to exceed the duration of the planned medical treatment; or
 - Transfer temporarily to another position offered by the employer for which the employee is qualified, as long as the new position has equivalent pay and benefits and better accommodates recurring periods

out in front.

- *Example – Special Rule #1*
- A teacher at a public elementary school who normally works five days a week, needs to take two days of FMLA leave per week over a four-week period.
- The special rules for employees of "local educational agencies" would apply to the teacher because he/she would be on leave for more than 20 percent of the total number of working days during the period over which the leave extends.
- An instructional employee who takes leave constituting less than 20 percent of the working days during the leave would not be subject to transfer to an alternative position.

out in front.

Special Rule #1: Employer's Rights

If the instructional employee does **not** give 30 days notice of foreseeable FMLA leave to be taken intermittently, the employer may:

- require the employee to take leave of a particular duration or to transfer temporarily to an alternative position; and
- require the employee to delay the taking of leave until the required notice is given.

out in front.

Special Rule #2: Leave Requested by "Instructional Employees" near the End of an Academic Term

ADAMS AND REESE LLP

- Special Rule #2 was established to allow teachers to take needed family or medical leave without disrupting the classroom at a critical point in the year.
- Special Rule #2 provides different rules for instructional employees who:
 - (A) begin leave **more** than five (5) weeks before the end of a term,
 - (B) **less** than five (5) weeks before the end of a term, and
 - (C) **less** than three (3) weeks before the end of a term.

out in front.

- *Special Rule #2(A)*
- Local educational facilities or schools may require an instructional employee who begins family or medical leave **more** than five (5) weeks prior to the end of an academic term to continue his or her leave until the end of the term if:
 - The leave period is at least three weeks, and
 - The employee's return to work would occur during the three-week period prior to the end of the term.

out in front.

- *Special Rule #2(B)*
- If the leave is requested **during** the five (5) weeks of the end of the term for a purpose other than the employee's own serious health condition, the instructional employee may be required to continue on leave until the end of the term if:
 - (1) the leave is longer than two weeks, and
 - (2) the employee would return from leave within two weeks of the end of the term.

out in front.

- *Special Rule #2(C)*
- If the leave begins **during** the last three (3) weeks of the end of the term for a purpose other than the employee's own serious health condition, the instructional employee may be required to continue on leave until the end of the term if:
- the leave extends past five (5) days.

Example

- Mary, a teacher, begins family leave to care for her sick child on Oct. 1 and plans to return to work on Nov. 15. The school term ends on Dec. 1. Mary's school may require her to continue on leave until the end of the term because her return to work would occur within three weeks of the end of the school term.

out in front.

DEALING WITH FRAUDULENCE AND MALINGERING



out in front.

Abuse of Sick, FMLA, Workers' Compensation, and Other Leave Time

Possible **Red** Flags:

- Pattern of absence on Fridays, Mondays, or before holidays
- Chronic one-day absences for colds, stomach upset, without medical attention
- Leaving voice mail messages rather than speaking to supervisor
 - Someone other than employee calls in to report absences
 - Missing or inadequate medical documentation
 - Leave bank accrual about to be forfeited due to excessive days (e.g., end of the year)

out in front.

Abuse of Sick, FMLA, Workers' Compensation, and Other Leave Time

More Possible **Red** Flags:

- Frequently changes doctors
- Medical reports contain differing versions of how the injury occurred
- Cannot reach the claimant at home
- The accident was not reported in a timely fashion

out in front.

Still More Possible Red Flags:

- Medical documentation does not coincide with treatment plan
- Accident happened without witnesses or in unusual location
- The employee was about to be non-renewed or dismissed
- Frequently misses scheduled doctor appointments

out in front.

Employer witnessed employee engaging in “normal social activities” – Court ruled that was a reasonable basis upon which to request recertification.



out in front.

out in front.

“An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA’s job restoration or maintenance of health benefits provisions.”

29 C.F.R. § 825.312 (g).

out in front.

“If the employer has a uniformly applied policy governing outside supplemental employment, such a policy may continue to apply to an employee while out on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained . . .”

29 C.F.R. § 825.312 (h).

out in front.

General Rule:

An eligible employee returning from an authorized FMLA leave is entitled to return to either:

- the same position the employee previously held; or
- to an “equivalent position.”

out in front.

What does reinstatement to an "equivalent" position mean?

ADAMS AND REESE LLP

"An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority."

- 29 C.F.R. 825.215(a)

out in front.

Equivalent Position

ADAMS AND REESE LLP

ALSO INCLUDES:

- Same or a geographically proximate worksite
- Same shift or same/equivalent work schedule
- Same/equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments

BUT DOES NOT INCLUDE:

- De minimis or intangible, unmeasurable aspects of job

out in front.

Special Rule #3: Reinstatement

- Whether an eligible employee of a local educational agency or school will be restored to an equivalent employment position upon return from leave **must be based on "established school board policies and practices, private school policies and practices, and collective bargaining agreements."**
- The "established policy" must provide substantially the same protections as provided in the FMLA for other restored employees.
 - US Dept. of Labor Opinion Letter – takes the position that a probationary teacher who took a period of unpaid leave subject to the FMLA could not be required, upon returning to work, to begin the probationary period again – to do so would result in an employee losing an earned benefit that accrued prior to when the leave began, contrary to the FMLA.

out in front.

FMLA – Right to Reinstatement Exceptions

ADAMS AND REESE LLP

- (1) "Key Employees"
- (2) Where employee's condition is permanent, the FMLA allows an employer to transfer an employee to any "available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position."
- (3) Where an employee has communicated in no uncertain terms, preferably in writing, that he or she will not be returning to work.

out in front.

FMLA – Right to Reinstatement Exceptions

ADAMS AND REESE LLP

- (4) If an employer can show that an employee would not otherwise have been employed at the time reinstatement is requested, the employer can deny reinstatement, e.g. a Reduction in Force (RIF).
- (5) Employee engages in misconduct for which he or she would be terminated regardless of his/her FMLA leave.

out in front.

TERMINATION/NON-RENEWAL OF EMPLOYEES WHILE ON FMLA LEAVE

out in front.

DOCUMENTATION

ADAMS AND REESE LLP

- (1) Proper documentation is critical.
- (2) You may have to be able to support your decision if it is subsequently challenged.
 - a. Remember you are making a record that needs to be able to withstand a future challenge of your decision.
 - b. If you do not have it, you cannot create it later.

out in front.

DON'T FORGET!

ADAMS AND REESE LLP

A jury can't take a copy of testimony into the deliberation room, but it can take your documentation.



out in front.

Termination/Non-Renewal of Employees

ADAMS AND REESE LLP

PROPER IF DONE AFTER:

- Fair and thorough investigation
- Determination that decision is consistent with employer policies and past practices
- Prior notice, if possible, such as prior warning and/or progressive discipline issued
- Careful documentation
- Absence of other mitigating factors
- Tactful termination procedure followed

out in front.

ADAMS AND REESE LLP

CONCLUSION