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Coverage

- **Employer Coverage**
 - Public agencies, private employers with 50 or more employees in 20 or more workweeks in the current or preceding year
 - 12 months work history (need not be consecutive)
 - Need not count periods before 7-year break in service unless it is due to military service
 - 1,250 hours during previous 12 months
 - Unless military leave
 - 50 or more employees within 75 miles



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FMLA Leave

12 Weeks Job Protected Leave


- **Reasons**
 - Birth/care of child
 - Adoption or foster care
 - Child, spouse, or parent with serious health condition
 - Employee’s serious health condition
 - Qualifying Exigency
 - Care for service member relative



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FMLA Leave: Intermittent


- Blocks of time (hour or week) or reduced schedule
- Medically necessary for own serious health condition or to care for family member with serious health condition
- Qualifying Exigencies or care for service member
- Alternative position
 - Employee can be given an alternative position to accommodate intermittent/reduced leave schedule
 - 1) FMLA leave is foreseeable intermittent, 2) employee is qualified, 3) position better accommodates recurring leave



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Intermittent Leave – How Much is Too Much?


- As of Feb 2023:
 - Eligible employee may use FMLA leave to work a reduced number of hours per day or week for indefinite period of time, as long as it doesn't exhaust their FMLA entitlement
 - Can take leave in smaller increments
 - If employee works more than 40 hours per week, the employee is entitled to more than 480 hours of FMLA leave over a 12-month period.



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Serious Health Condition (SHC)

- Inpatient Care
- Continuing Treatment
 - 3 days' incapacity
 - 2 or more visits within 30 days*; or
 - One visit within 7 days* and continuing treatment
 - Incapacity due to pregnancy /prenatal care
 - Any period of incapacity due to chronic serious health condition
 - Diabetes, asthma, migraines, etc.
 - Chronic = periodic visits (2+/year), continues over extended period, is episodic as opposed to requiring continuing incapacity



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SHC cont . . .

- Incapacity that is permanent or condition for which treatment may not be effective
- Absences to receive multiple treatments due to restorative surgery after an accident/injury
- Substance Abuse
 - In recovery
 - If they test positive during leave, may lose leave
 - FMLA does not protect employee from positive drug test



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What is a Serious Health Condition

- Analysis
 - Whether ill individual was incapacitated for more than 3 consecutive calendar days and needed medical care during that time, or;
 - Individual was under medical care for pregnancy or chronic condition even if intervention not needed
- Unless complications arise, cold, flu, ear-aches, are not qualifying for FMLA
- Incapacity = 3+ days and treatment by health care provider



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What is Continuing Treatment?


- 2 or more times within 30 days of the first day of incapacity, or;
- At least 1 treatment by a HCP that results in a regiment of continuing treatment (PT, prescriptions), or;
- Any incapacity due to pregnancy or for prenatal care
- Any period of incapacity due to chronic serious health condition



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Certification


- Required:
 - Employees serious health condition
 - Serious health condition of family member
 - Military family leave
- Who Can Certify
 - Medical doctors, podiatrist, dentist, clinical psychologist, optometrist, chiropractor, NP, nurse-midwife, clinical social worker, PA, Christian Science practitioners, anyone recognized by employer, HCPs out of the country



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Insufficient Certification



- Employer: Request certification within 5 days of leave request, allow 15 days for return
- Employee: Complete and sufficient certification
 - Medical facts to support the serious health condition
 - Reasons employee cannot perform job
 - If additional treatments are required
 - Diagnosis not needed to request leave



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Certification:


- Authenticate
 - May request health care provider to verify
- Clarify
 - May request clarification of handwriting or meaning

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Certification: Validity


- Second Opinion
 - At expense of employer
 - Employer can choose doctor but not one that employer uses on a regular or routine basis
- Third Opinion
 - If there are inconsistencies
 - Is final and binding
- While waiting 2nd/3rd opinions, employee is provisionally entitled to FMLA



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Recertification


- Every 30 days or stated duration
- Request more frequently:
 - Changed circumstances
 - Doubt on validity
 - Employee requests extension
- Employee’s expense
- Allow 15 days for recertification
- Verify attendance records



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Employee Notice



- Sufficient information to determine whether the request qualifies under FMLA
 - Not required to explicitly ask for FMLA, only need to have qualifying condition
 - Must call in sick and comply with employer’s absenteeism policies



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Employer Notices


- General Notice
 - Poster
- Eligibility Notice
 - In writing
- Rights and Responsibility
 - In writing
- Designation



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FMLA Leave Year


- Calendar Year
- Fixed
- Measure Forward
- Rolling



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Holidays During Leave


- Full workweek = FMLA unit of leave
 - “the fact that a holiday may occur within the week taken as FMLA leave has no effect, the week is counted as a week of FMLA leave.”
- Less than full workweek
 - Holidays don’t count unless otherwise scheduled to work that day.



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Attendance Policies


- No Fault Policies – provision to exclude excused absences
- Call-In Procedures – must follow or not protected by FMLA



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FMLA: Fraud and Abuse


<ul style="list-style-type: none"> • Detecting fraud and abuse • Rolling 12-month period • Run work comp concurrently • Require use of paid leave 	<ul style="list-style-type: none"> • Enforce 15-day certification deadline • Require certification • Push for complete certification <ul style="list-style-type: none"> – Provide job description – Seek clarification • Authentication
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FMLA: Fraud and Abuse cont. . .


<ul style="list-style-type: none"> • Second opinion • Third opinion • Recertification • New Certification • Patterns • Advance notice when foreseeable 	<ul style="list-style-type: none"> • Scheduling treatment • Enforce call-in procedures • Fitness-for-duty certifications • “I’m sick” = Do not count • Prohibit working on leave
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FMLA: Fraud and Abuse


- Alternate position for intermittent leave
- Surveillance



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FMLA – Health Insurance


- Employer must maintain group health insurance (including dependent coverage)
- Can cancel after return 30 days late on premium with 15 days notice
- Stops when not return from leave or notice of not return
- Recovery of premiums



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Termination Issues

- Only if there is a legitimate, non-discriminatory reason for termination
- Confirm compliance first!
- Failure to return to work
- Reduction in force
- Poor performance
- COBRA



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Military Family Leave: Qualifying Exigency

- Short-notice deployment
- Military events
- Childcare
- Financial and legal arrangements
- Counseling
- Rest (15 days)
- Post-deployment
- Parental care
- Additional activities



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Military Caregiver Leave

- 26 Weeks / single 12 month period
- Eligibility
- Covered servicemember
- Covered family member
- Certification



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Military Family Leave

- Notice – 30 days advance notice
- Designating leave as military caregiver first
- Military documents
 - Active-duty orders
- Verification
- Next of Kin – nearest blood relative
- Tracking Leave
 - Starts on first day
- Spouses
 - Limited to a combined 26 workweeks



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Advanced FMLA Issues

- Substituting Paid Leave – runs concurrently
- Reinstatement Rights
 - Equivalent Position
 - Exceptions (layoff, position eliminated, limited term)
- Fitness for Duty Certifications
- Light Duty - voluntary
- Benefits – same as before leave
- Attendance Awards – FMLA may count against award only if non-FMLA leave is treated the same



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Coordinating Leave Years

- FMLA: Employer’s choice
- Qualified Exigency: Employer’s FMLA year
- Caregiver: 26 weeks in a single 12 month period
- Example: Calendar year



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FMLA & ADA

- Serious health condition v. disability
- Leave as reasonable accommodation
- Alternatives to leave
- Interactive Process
- HIPAA
- GINA



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