

# FMLA 101

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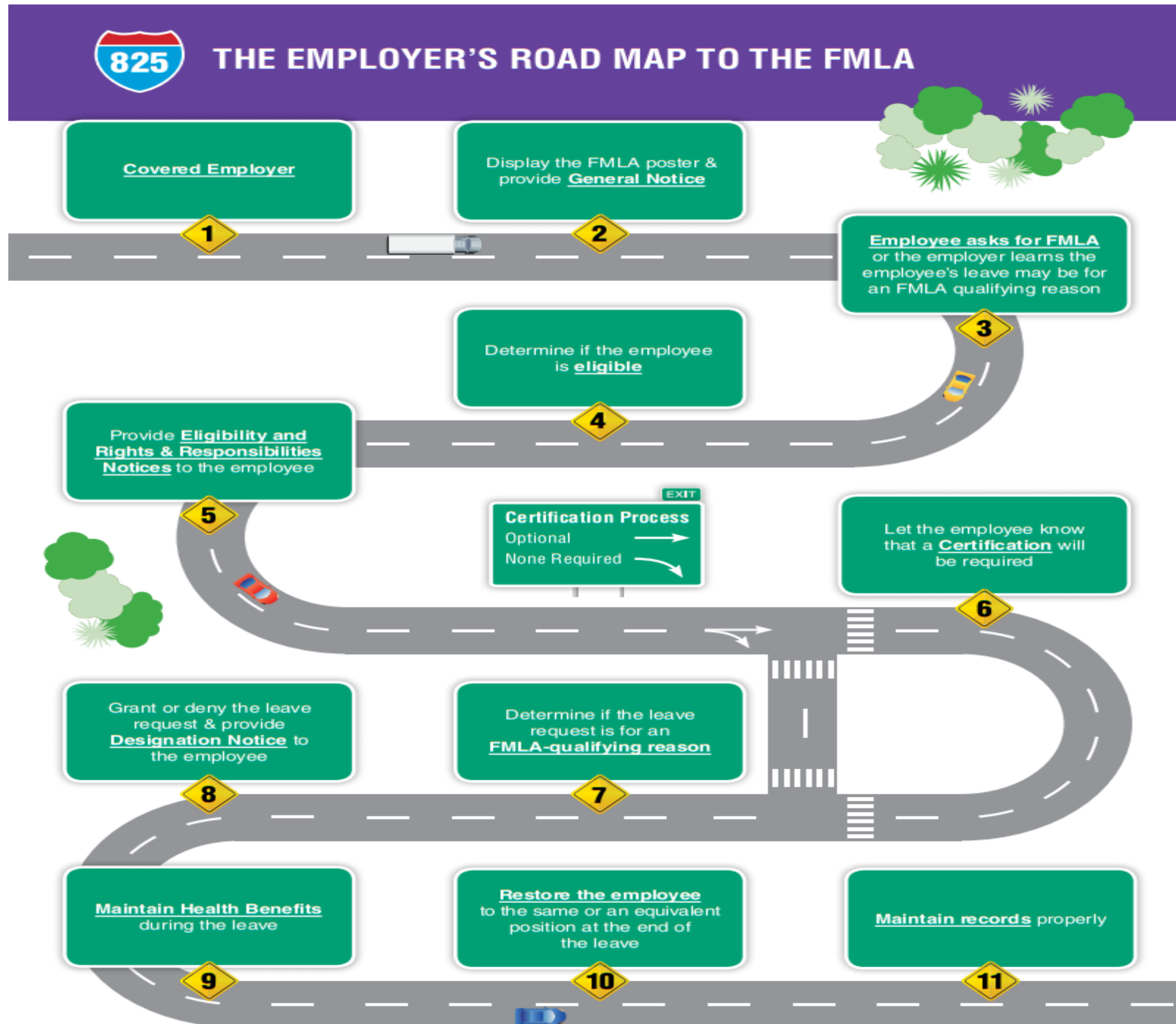
# BACKGROUND

# PURPOSE OF FMLA

- Helps employees balance family and work responsibilities by allowing them to take reasonable unpaid leave for certain family and medical reason.
- Enables employees to take reasonable leave for:
  - Employee's own serious health condition;
  - Caring for an immediate family member with a serious health condition;
  - Introduction of a child through birth, adoption or foster care; or
  - Addressing situations that arise due to service in the military.

# BASIC ENTITLEMENTS

- 12 Weeks of Leave in 12-month Period or 26 Weeks for Military Caregiver Leave (Continuous, Reduced Schedule, Intermittent)
- Can Continue Health Insurance at Active Employee Rate While on Leave
- Reinstatement to Same or Equivalent Job (Same or Virtually Identical)



# WHO IS COVERED?

# EMPLOYERS

- Private employers with  $\geq 50$  employees during each of 20 or more weeks during the current or preceding year
- Public agencies
- Public or private elementary & secondary schools

# EMPLOYEES

- Eligible Employees are those who have been employed by a covered employer:
  - For at least 12 months;
  - For at least 1,250 hours of service with the employer over the previous 12-month period; and
  - Who work at a worksite where at least 50 employees are employed within a 75-mile radius.



# 50 EMPLOYEE / 75-MILE RULE

- Employee must work at worksite where at least 50 employees are employed by an employer within 75 miles of that worksite.
- Determined as of date the employee gives notice of the need for leave
- If no fixed worksite, then the worksite is the location either from which the employee's work is assigned or to which the employee reports.

# 50 EMPLOYEE / 75-MILE RULE

- **Example:** The County has 20 employees who work at the courthouse, 15 employees who work at the Sheriff's Department, and 5 employees that work in each of the County's four shops for the Road Department. The Sheriff's Department and each of the four shop locations are within 75-miles of the courthouse.
- Question: Is the County covered by FMLA?
  - YES! The County employs 55 people within a 75-mile radius of the courthouse.

# REASONS FOR LEAVE

# QUALIFYING REASONS

1. Employee's Own Serious Health Condition
2. Immediate Family Member's Serious Health Condition (Spouse, Child, Parent)
3. Bond with Newborn/Adopted/Foster Child
4. Military Exigency of Spouse, Child, Parent
5. Family Military Servicemember's Serious Injury or Illness (Spouse, Child, Parent, or Next of Kin)

# SERIOUS HEALTH CONDITIONS

- Conditions requiring in-patient care (overnight stay) and subsequent treatment in connection with that care
  - Emergency overnight hospitalization
  - Scheduled in-patient surgery
- Conditions requiring multiple treatments without which the condition would result in a period of incapacity of 4 or more consecutive calendar days
  - Chemotherapy
  - Physical Therapy

# SERIOUS HEALTH CONDITIONS

- Chronic conditions (permanent or of unknown duration) that result in recurring “episodes” of incapacity of any length (e.g., 1 day, part of a day, a few hours), provided that employee has at least 2 in-person visits per year to healthcare provider for treatment.
  - Depression
  - Asthma
  - Anxiety
  - Migraines

# SERIOUS HEALTH CONDITIONS

- Temporary, non-chronic conditions that result in a period of incapacity lasting more than 3 full, consecutive calendar days, provided there is: (a) 1 in-person visit to healthcare provider within 7 calendar days of onset of incapacity; and (b) either at the 1st visit the healthcare provider prescribes a regimen of continuing treatment or there is a 2nd in-person visit to healthcare provider within 30 days of onset of incapacity.
  - Strep throat
  - Severe Flu
  - Pink eye, chicken pox, measles

# SERIOUS HEALTH CONDITIONS

- Pregnancy and related conditions
  - Pre-natal visits and tests
  - Severe morning sickness
  - Childbirth and recovery period thereafter
- Irreversible permanent conditions for which treatment may not be effective and no active treatment is involved, but employee is under supervision of a healthcare provider
  - Terminal stages of a disease
  - Alzheimer's



## BIRTH, ADOPTION, OR FOSTER CARE

- Must be taken within 12 months of the birth, adoption, or foster care placement
- Gender neutral application
- Pre-natal / Pre-placement leave may be appropriate
- “Same Employer” rules
- Intermittent and Reduced Schedule Leave

# MILITARY EXIGENCY

- A non-medical, non-routine activity directly related to and caused by the family member's active duty or call to active duty in a foreign country.
- Includes Activities Related To:
  - (1) Short-notice deployment; (2) Pre-deployment activities and those during deployment; (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Non-medical counseling; (6) Bonding during military rest and recuperation leave; (7) Post-deployment activities; and (8) Others mutually agreed to by employer and employee.

# MILITARY CAREGIVER

- A serious injury or illness incurred in the line of duty on active duty by a current member of the National Guard, Reserves, or Regular Armed Forces that:
  - Involves medical treatment, recuperation, therapy, out-patient treatment that occurs while in the military or within 5 years after discharge, or member is on temporary disability retired list; or
  - Renders the service member medically unfit to perform the duties of his or her office, grade, rank, or rating.
- Employees Eligible to Claim Leave: Spouse, child, parent, or “next of kin” to a servicemember.

# LENGTH OF LEAVE

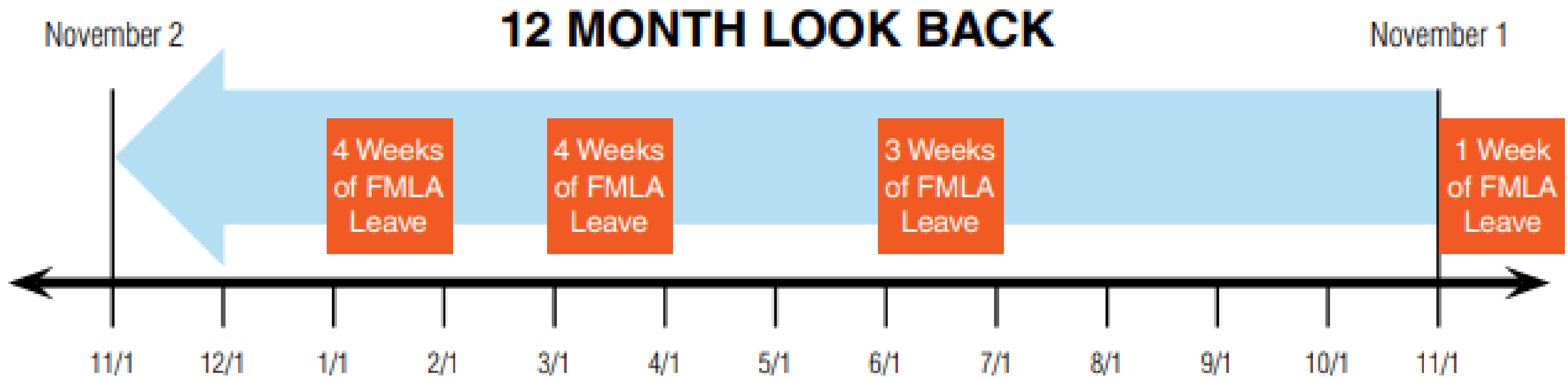
# GENERALLY

- 12 Weeks of Leave in 12-month Period
- 26 Weeks for Military Caregiver Leave
- Leave may be continuous, a reduced schedule, or intermittent

# EMPLOYER DESIGNATED PERIODS

- An employer can choose one of four options for determining how to calculate the 12-month period.
  1. Rolling backwards from each date that leave is used;
  2. Rolling forwards beginning on the date an employee first uses leave and ending upon expiration of that 12-month period;
  3. Any fixed 12-month period; or
  4. Calendar year.
- If no choice is made, then the option providing the greatest benefit to the employee governs.

# DESIGNATED PERIOD



# INTERMITTENT OR REDUCED SCHEDULE LEAVE

- General Requirement: A medical necessity that is best accommodated by an intermittent or reduced leave schedule.
- Temporary reassignments are allowed for planned medical treatments.



# NOTICE

# EMPLOYER NOTICE REQUIREMENTS

- General notice requirements
  - FMLA poster
  - FMLA information in employee handbook/leave policy
- Eligibility notice (Form WH-381)
  - Provided within 5 business days of initial leave request
  - Inform of eligibility status
  - If ineligible, provide at least one reason why
- Further eligibility notices

# EMPLOYER NOTICE REQUIREMENTS

- Rights & responsibilities notice (Form WH-381)
  - Required to provide each time eligibility notice
  - In writing
    - Notice may be counted as FMLA leave
    - 12-month period designation
    - Certification requirement & consequences for failing to provide
    - Paid leave substitution information
    - Health benefit premium payment arrangements
    - “Key employee” designation & explanation
    - Job protection & benefit information

# EMPLOYER NOTICE REQUIREMENTS

- Designation notice (Form WH-382)
  - Provided in writing within 5 business days of sufficient information to determine whether FMLA-eligible
  - For each FMLA-qualifying reason per 12-month period
    - If not FMLA-qualifying, simple written statement that it does not qualify and will not be so designated
  - Include designation determination and paid leave/return to work requirements
  - Amount of leave designated and counted against 12-week entitlement

# EMPLOYEE NOTICE REQUIREMENTS

- If foreseeable, must give at least 30 days' notice
  - If no reason for less than 30 days' notice, employer can delay until 30 days have passed from initial notice
  - For planned medical treatment (i.e. knee surgery), must schedule so as to minimize employer disruption
- Otherwise as soon as possible & practical
  - For qualifying military exigencies, must give as soon as possible & practical, no matter how far in advance that is
- Can require employee to follow normal leave notice requirements

# EMPLOYEE NOTICE REQUIREMENTS

- If it's the first time for a specific reason or condition, employee must provide enough information for employer to believe it might qualify as FMLA leave.
- For subsequent absences for the same reason or condition during that FMLA leave year, employee must mention "FMLA" or the specific reason or specific condition.

# EMPLOYEE NOTICE REQUIREMENTS

- Certification (WH-380E or F)
  - Timeline
    - Requested within 5 days of employee notice
    - Employee has 15 days to return & 7 days to correct any deficiency
    - Employer has 5 days to approve/deny after satisfactory certification
  - Consistency is key
  - Cannot request certification for care/bonding leave for healthy newborn/foster/adoption
- Authentication or clarification
- Further opinions at employer's expense

# CERTIFICATION

## Certification at a Glance

### STEP 1

The employer must notify the employee if a certification is required

### STEP 2

The employee provides a completed certification within 15 calendar days, absent unusual circumstances

### STEP 3

The employer must notify the employee, in writing, if the leave will or will not be FMLA-protected

#### THE EMPLOYER MAY:

Identify, in writing, any deficiencies in the medical certification and ask the employee to provide corrected information within 7 calendar days

Contact the health care provider to clarify and/or authenticate the certification

Require a 2nd medical opinion, at the employer's expense, if there are concerns about the validity of the certification

Require a 3rd medical opinion, at the employer's expense, if the 1st and 2nd opinions differ

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



# CERTIFICATION FOR INTERMITTENT OR REDUCED SCHEDULE LEAVE

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
<ul style="list-style-type: none"><li>Information that establishes the medical necessity of intermittent or reduced schedule leave</li><li>An estimate of the <b>dates</b> and duration of such treatment and periods of recovery</li></ul>	<ul style="list-style-type: none"><li>Information that establishes the medical necessity of intermittent or reduced schedule leave</li><li>An estimate of the <b>frequency</b> and duration of the episodes of incapacity due to the serious health condition</li></ul>	<ul style="list-style-type: none"><li>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</li><li>An estimate of the <b>frequency</b> and duration of leave</li></ul>

# CERTIFICATION

- Fitness for Duty
  - Uniformly applied policy
  - Designation notice must advise certification will be required & provide essential functions of job
  - Employee paid
  - May delay restoration of employment until received
    - May terminate if never received

# OTHER ISSUES

# INTERACTION WITH PAID LEAVE

- If employee is going to use paid time off for FMLA-eligible leave, employer can require, or employee may elect, to run it concurrently with unpaid FMLA leave.
  - Avoids employee “stacking” leave in order to extend the FMLA-eligible leave past 12 weeks.
  - Example: Employee takes 2 weeks of PTO then 12 weeks unpaid FMLA for a total absence of 14 weeks.
- Accrual while on leave

# JOB PROTECTION & HEALTH BENEFIT CONTINUATION

- Must be returned to same or equivalent position after leave
- Health benefits must be continued
- Intent to return to work

# HEALTH BENEFIT TERMINATION

- Employee would have been terminated if employee was not on FMLA leave (layoff)
- Employee informs does not plan to RTW
- Employee fails to RTW
- Employee continues on leave after exhausting FMLA

# PENALTIES & ENFORCEMENT

- Illegal to interfere with rights or discriminate based on opposition to illegal practice
- Significant damages
  - Interest, liquidated damages, attorneys' fees
- Statute of limitations
  - 2 years from last event
  - 3 years if willful violation

# CONFIDENTIALITY

- FMLA-related info is confidential
- May only be shared on strict “need to know” basis
- Immediate supervisor may have access
- Whoever processes FMLA leave requests or must be consulted may have access
- Certain others may have access in special situations



# RECORDKEEPING

- Covered employers are required to make, keep and preserve certain records for 3 years.
- Records must be available upon request for inspection, copying, and transcription by the DOL.
- FMLA medical certifications must be retained as confidential medical records.
  - Must be maintained in a separate file from usual personnel records.

# OTHER ISSUES

- Communication during leave
- Avoid knee-jerk conclusions
- Be careful regarding documentation

# HYPOTHETICAL

Susan works in the Road's Department. She routinely calls in sick and tells her supervisor that she is suffering from chronic migraines. She uses paid time off that she has accrued under the County's PTO policy.

*Does Susan qualify for FMLA?*

# HYPOTHETICAL

- Potentially, but we need more information about the County, Susan's work history, and her condition.
  - Does the County employ 50 people within a 75-mile radius?
  - Has Susan worked for the County for at least 12-months?
  - Has Susan worked at least 1,250 hours within the last 12-month period?
  - Does her chronic migraines qualify as a serious health condition?

# HYPOTHETICAL

You instruct Susan to contact the County Clerk's office for FMLA designation. Susan refuses to contact the County Clerk, as she does not want to use her FMLA at this time due to an upcoming surgery.

*How should you respond?*

# HYPOTHETICAL

- Explain to Susan that it is to her benefit to use FMLA, as it provides for job protected leave for up to 12 weeks in a 12-month period.
- Contact the County Clerk to explain that Susan may be in contact due to FMLA-related reason.
  - Employers generally may designate leave as FMLA, even if the employee does not wish to take FMLA leave.

# HYPOTHETICAL

- David is a full-time employee in the Sheriff's Department. In March 2020, he took four weeks off to care for his young daughter whose daycare closed due to a coronavirus outbreak. The County uses a 12-week look back period.

*Assuming David has not used any other FMLA-leave, how many weeks of FMLA does David have left?*

# HYPOTHETICAL

- David injured his knee in a skiing accident. He starts FMLA-leave on January 4, 2020 and exhausts his FMLA leave by March 1, 2021. At the end of this time, David is not medically cleared to return to work. His doctor plans to re-evaluate his condition in a few weeks at their next follow up appointment.

*How should the County respond?*



# HYPOTHETICAL

- The County may have a legal obligation to provide unpaid leave as a reasonable accommodation under the Americans with Disabilities Act.
- Note: If the County is able to provide leave as a reasonable accommodation without undue hardship, David's April 2020 FMLA-leave will "fall-off" the 12-month look back period in April 2021. If further leave is needed, it will be protected by FMLA.

**THANK YOU!**