

Section 100

Overview of Leave Law Compliance in Your Organization

OVERVIEW

There are few day-to-day occurrences in the workplace that raise more legal, logistical, and financial questions than an employee's request for leave. When such a request is made, the employer is faced with the loss of an employee and the accompanying effects on productivity, workflow, and morale. Compounding matters, the employer must navigate through a confusing—sometimes conflicting—maze of federal and state leave obligations in order to determine how to handle the leave request.

This book will provide a map through the maze by addressing in detail the requirements and interactions of five major categories of federal and state laws affecting leave: the federal **Family and Medical Leave Act (FMLA)**; state family and medical leave acts; the federal **Americans with Disabilities Act (ADA)**; state workers' compensation statutes; and other state leave laws affecting leave for military service, jury duty, court appearances, and voting. In addition to the text discussion, you will find quick reference charts as well as samples of the policies and forms needed to address leave issues.

THE FAMILY AND MEDICAL LEAVE ACT

The federal FMLA was signed into law in 1993, in response to a growing national concern about balancing work and family responsibilities. In 2008, the FMLA was amended by the **National Defense Authorization Act (NDAA)**, which expanded the reach of the FMLA by granting leave under certain circumstances to employees with family members in the military. The FMLA was created in response to the needs of a workforce whose demographics had changed drastically. One major demographic change was the influx of women, including those of childbearing age and mothers of small children, into the workforce. Another major change has been the “graying” of the workforce. The post-World War II “Baby Boomers” are maturing, so issues such as disability leaves, medical costs, and insurance coverage have become of prime concern. The 2008 family military leave amendments added new leave rights for employees with family members serving in the military. The FMLA reflects these realities. It was created to protect workers from losing their jobs when they need time off to address critical personal and family matters.

In January 2009, new FMLA regulations became effective, changing the way in which employers must act to comply with the legal requirements of the FMLA. These new regulations also address the NDAA's addition of military family leave.

Leave Circumstances

The FMLA requires covered employers to provide eligible employees with up to 12 workweeks per year of job-protected leave, with continued medical benefits, for the following reasons:

- To care for the employee's newborn son or daughter
- Because of the adoption or foster care placement of a child with the employee
- To care for the employee's spouse, son or daughter, or parent who has a serious health condition
- Because of the employee's own serious health condition
- Because of any qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the armed forces in support of a contingency operation.

The law also allows eligible employees to take up to 26 workweeks for leave during a single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a military service member recovering from a serious injury or illness suffered while on active duty in the armed forces. The 26 workweeks are available during a single 12-month period.

Who Is Covered?

The general rule is that private employers engaged in interstate commerce are covered by the FMLA if they have at least 50 employees for each working day during at least 20 workweeks in the current or the preceding calendar year. Public employers are covered by the FMLA regardless of whether they meet the 50-employee threshold. Public employers include federal, state, and local government offices and agencies. Public and private educational employers, meaning elementary and secondary schools, are also covered regardless of how many employees they have.

Generally, employees are eligible for leave if they have worked for a covered employer for at least 12 months and have worked for the same covered employer for at least 1,250 hours in the previous 12 months. In determining an employee's eligibility for leave under the FMLA, the appropriate measure of "hours of service" is the standard used by the **Fair Labor Standards Act (FLSA)** that only considers actual hours worked by the employee. There are exceptions for time spent by an employee in military service.

The requirements set forth above are the barest essentials of the law. The detailed requirements of the FMLA, as set forth in the statute, the accompanying regulations, and case law, are addressed in the **Official Materials** Appendix of this guide. Review these sections carefully before processing a request for FMLA leave.

State Family and Medical Leave Laws

In addition to the federal FMLA, a majority of states now have laws in place addressing employee rights to leave. In some cases the requirements of these laws mirror those of the federal FMLA and serve only as a reaffirmation of the state's concern for the family needs of workers. In other cases, the requirements of state law differ from those of federal law. Some state statutes apply to employers who do not

meet the employee threshold requirements of the FMLA and extend leave obligations to these smaller employers. An increasing number of state statutes allow employees a longer period of leave than the 12 weeks allowed under federal law, or allow leave for purposes not covered by federal law. The federal FMLA explicitly provides that states may afford employees more expansive leave rights than those granted under federal law.

Therefore, it is crucial for employers to understand the requirements of any state leave laws that may exist in states where the employer does business. **Section 800** of this guide contains a summary of state family leave laws in each of the 50 states. Employers should be sure to read the subsection for each state in which the employer does business. **Section 900** of this guide is a quick reference chart containing the basic provisions of the various state leave laws.

THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act of 1990 (ADA) was signed by President George H. W. Bush in July of 1990 and amended in 2008 by the **ADA Amendments Act of 2008 (ADAAA)**. The ADA covers most employers with 15 or more employees. Title I of the ADA requires fair employment practices and protection from disability discrimination in employment. The ADA is broken down into five major sections or titles. Title I prohibits discrimination in employment, and Titles II, III, and IV cover public services, public accommodations, and telecommunications. Title V covers a number of miscellaneous issues, including construction, state immunity, attorney's fees, illegal drug use, and exclusions from the definition of "disability."

Title I of the ADA prohibits discrimination against qualified individuals with disabilities in job application procedures, hiring, discharge, promotion, job training, and other similar conditions of employment. In large part, Title I of the ADA was borrowed from the federal **Rehabilitation Act of 1973**, which bars discrimination by federal government contractors and recipients of federal financial assistance. When areas of Title I are unclear or undecided, the courts look to decisions under the Rehabilitation Act for guidance.

One of Title I's most important requirements is that employers must make "reasonable accommodations" for an individual's known disabilities, unless to do so would be an undue hardship. Granting leave to an employee, either paid or unpaid, can be a form of reasonable accommodation, as long as the period of leave does not place an undue burden on the employer. Employers are also required to post notices in a format accessible to applicants and employees describing the applicable provisions of the ADA. The ADA also contains a number of exemptions and exclusions from the term "disability." The issues of reasonable accommodation, undue burden, and exemptions are covered more fully in this book.

The Equal Employment Opportunity Commission (EEOC) enforces the ADA. EEOC has, in many states, entered into agreements with various state human rights commissions and state agencies whereby the state agency or commission is authorized to receive complaints filed under the federal ADA, investigate complaints, and refer valid claims to EEOC for litigation or enforcement.

For complaints of employment discrimination, the ADA specifically adopts the same enforcement procedures and remedies as are found in **Title VII of the Civil Rights Act**. This means that complaints must be filed with EEOC or the authorized state agency, which will investigate and either sue the employer or issue the complaining individual a right-to-sue letter allowing him or her to sue. Under some circumstances, a complainant is entitled to a jury trial.

If an employer is found to have discriminated, remedies can include back pay, reinstatement, compensatory and punitive damages, and reasonable attorney's fees.

The ADA is discussed in detail in **Sections 1000** through **1700** of this guide. Refer to these sections for a thorough review of how the ADA affects leave of absence issues.

STATE WORKERS' COMPENSATION STATUTES

State workers' compensation statutes can have a substantial impact on the administration of employee leave programs. Every state and the District of Columbia has a workers' compensation law, and almost all workers' compensation laws require employers to carry workers' compensation insurance. Even in the two states where coverage is elective (New Jersey and Texas), almost all employers carry workers' compensation insurance to guard against the negligence lawsuits and potentially large damage awards that can result from employee work injury or illness.

Workers' compensation laws differ in detail from state to state but all offer medical benefits, leave, rehabilitation, and wage loss recovery for workers who are injured or made ill on the job.

Workers' compensation provides leave when it's needed to recover from a work injury or illness. Leave may range from a day or two for a minor, temporary injury to months or even years for a major disability. Employers must be mindful to coordinate compensation leave carefully with federal and state family leave and disability laws. For further details on state workers' compensation laws, see **Sections 1800** through **2300** of this guide.

MISCELLANEOUS FEDERAL AND STATE LAWS AFFECTING LEAVE

In addition to the leave provisions under the FMLA, ADA, and state workers' compensation statutes discussed above, there are state and federal laws requiring employers to grant leave under specific circumstances such as an employee's absence due to jury duty, court appearances, voting, or military service. For a detailed discussion of state leave requirements for jury duty, court appearances, and military service, see **Section 900** of this guide. The federal laws are discussed below and in more detail in **Section 900** of this guide.

Jury Duty

The federal **Jury System Improvement Act of 1978** (28 USC 1875) prohibits employers from discharging permanent employees because they perform jury duty in federal court. Employers who violate the Act may be sued for back pay, reinstatement, and attorney's fees and may be fined up to \$1,000. Most states have laws that offer similar protection to employees who perform jury duty in state courts. For details, see **Section 900** of this guide.

The federal rules for paying employees while on jury duty are different for exempt and nonexempt employees. Under the federal FLSA, exempt employees who are absent from work for less than 1 week to perform jury service must be paid their full salaries. (Exempt employees are those not covered by the FLSA's minimum wage and overtime requirements.) However, the employer may deduct from the salary any jury duty fees that the employee receives from the court. The FLSA does not require payment when the exempt employee is absent for one or more full weeks during which no work is performed. The FLSA does not require employers to pay nonexempt salaried employees or hourly employees while on leave for jury service. A handful of state laws require employers to pay employees while on jury duty. For details, see **Section 900** of this guide.

Court Appearance

Appearing as a witness or defendant in court is compulsory and can be enforced by subpoena and arrest, if necessary. Official committees and boards of federal and state agencies often have the same power as the courts to subpoena individuals. Some state laws prohibit employers from discharging or otherwise discriminating against an employee who must appear in court, but federal law does not address the issue. For details, see **Section 900** of this guide.

Voting

Although there is no federal law that requires employers to give employees paid or unpaid time off to vote or to serve as election officers, many states do have laws that regulate this area. These state laws may allow employees to take time off to vote when they cannot get to the polls because of their working hours. Some state laws require employers to pay employees for this time. For details, see **Section 900** of this guide.

Military Service

The **Uniformed Services Employment and Reemployment Rights Act (USERRA)** of 1994 prohibits employers from discriminating against any employee or prospective employee because of past, present, or future application for, or membership in, a uniformed service. The law covers all public and private employers. Most states have laws that offer similar protection to employees who perform military duty. For details, see **Section 900** of this guide.

Under USERRA, an employee may take a maximum of 5 years' leave for military service. The 5 years is the maximum cumulative length of absence for all absences (38 USC 4312(a)(2)). There are limited exceptions to the 5-year limit that may increase the maximum leave time allowed. These exceptions include the time for the initial period of obligated service; the time consumed by trouble in obtaining release from service; the time for necessary training; and the time an employee is ordered to stay on active duty under certain federal laws (38 USC 4312(c)).

USERRA requires that upon returning from service, members of the armed services and their reserve components must be reinstated to their private civil jobs without loss of seniority or benefits and without any break in service for pension purposes (38 USC 4301 *et seq.*). The law's protections extend to all military personnel, including those who perform weekend drills, summer encampment, or similar types of training duty. The employer is obliged to reschedule the worker, if possible, to avoid conflicts between work and reserve or National Guard training so the employee may work a full week. Note that USERRA applies only to an employee's period of military service and not to family members' military service. For more details on USERRA, see **Section 900** of this guide.

TEN STEPS TO LEAVE LAW COMPLIANCE

- 1. Read and understand the applicable statutes and regulations.** This sounds basic, but it's essential. Attorneys are formally educated in how to read laws; human resources (HR) managers generally are not. This leads some HR managers to rely exclusively on secondary information. HR managers should read the statutes and regulations, using secondary sources such as this book as guidance. This book can help you to understand the sometimes dense legal language of the laws, but it cannot anticipate every conceivable factual scenario that could arise in the workplace. HR managers who read the law, as well as others' interpretations of it, will be in a better position to completely and accurately respond to unique situations in their own companies.

- 2. Determine program management.** Determine who will be responsible for administering the leave program at your company. Depending on the size of the company, it might be wise to have an *ad hoc* leave issues team in place for addressing continuing concerns and developing policies. Some large employers have created new positions to respond to the increasing interest in work, family, and related issues. If your company has such a position, this may be the ideal person to administer leave programs.
- 3. Educate your managers.** Frontline responsibility for compliance with leave laws rests with a company's managers. These managers must be trained to recognize that when an employee is absent, the absence may be covered under one or more state or federal leave laws. For example, an employee might tell his or her manager, "My son is sick; I've got to leave," or "I need to have surgery. I'll be out of work for a while," or "I hurt my back at work yesterday. I won't be in today." In each of these instances, the employee's absence may be covered under the FMLA. Additionally, some of these instances might also be covered by the ADA, a workers' compensation statute, or another law. It is management's responsibility to garner enough information to determine if the employee is eligible for leave.
- 4. Study the interaction between FMLA and other state and federal laws.** Determine which state and federal laws may have an impact on the situation at hand. See **Section 2400** of this guide for this information.
- 5. Develop policies and procedures.** Draft policies and procedures for use in processing leave requests. The forms available in the **Forms** section of this guide may be helpful in completing this task.
- 6. Establish recordkeeping systems.** Working with your payroll and management information systems (MIS) departments, set up a recordkeeping system for leaves. Make sure that it is consistent with your policies.
- 7. Set up procedures for employee payment of medical premiums.** Working with the benefits department, set up a system for handling employee payment of medical insurance and other premiums during leave. Review existing benefits documents, including summary plan descriptions, to ensure compliance with state and federal laws.
- 8. Implement employee communications.** Post notices, as required by law, at all your worksites. See **Section 400** of this guide for information about notice and posting requirements. Revise, as applicable, employee handbooks and supervisor and manager policies and procedures books, to ensure that they reflect appropriate and current information about the FMLA and other state and federal laws affecting leave. Make sure you have copies of the FMLA Notice for employees and include such notice in any handbooks. If you don't use employee handbooks, provide notice to each new employee upon hiring. You can find a copy of the FMLA Notice in the **Appendix** of this guide. If you have a workforce comprised of a significant portion of workers who are not literate in English, you must provide the general notice in a language in which the employees are literate.
- 9. Draft forms you will use.** Remember that forms available in this guide are yours as part of your subscription to photocopy as you wish.
- 10. Keep informed.** Stay up-to-date with regulations, legal cases and challenges, and corporate responses to developing issues. The quarterly newsletter that comes with this book, *FMLA Policy, Practice, & Legal Update*, is an excellent source for this information. Read it and file it in your binder for future reference.

TRAINING: THE KEY TO FMLA COMPLIANCE

It is crucial to train supervisors and managers in the basic requirements of the FMLA. The best way to avoid improper or even illegal handling of protected leave requests is to educate the front-line leave management specialists—also known as your supervisors and managers. The following are some FMLA training basics:

- 1. Contact HR.** Make sure supervisors and managers know to refer employees who have leave requests or questions to HR and to pass along any information they've been given to HR.
- 2. Know the law.** Managers and supervisors should also be given the basic legal requirements of FMLA so that they can identify when an employee needs or is requesting protected leave and refer them to HR. It should be made clear when FMLA applies and that granting or denying leave is not at the manager's discretion.
- 3. Act appropriately during leave.** Tell managers and supervisors that contact with an employee on FMLA leave should be kept to a minimum. Employees on leave should be contacted only when absolutely necessary. Good pre-leave preparation should preclude the need for most contact. Managers and supervisors should also be instructed never to ask or pressure an employee on leave about return dates.
- 4. Think before you terminate.** Train managers to have higher-level review of all termination decisions, especially those involving an employee who is on protected leave of absence or who has recently requested or returned from a protected leave.

