DEEP DIVE REPORT

Your Guide to the **Family and Medical Leave Act**

HR Employment Law *Advisor*

Contents

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Executive summary

The Family and Medical Leave Act of 1993 is a federal law that grants eligible employees the right to take up to 12 weeks of job-protected unpaid leave to deal with their serious health condition or that of a close family member. In addition, the FMLA provides unpaid leave to workers for reasons related to a family member being called to active military duty or to care for injured service members.

The U.S. Department of Labor administers and enforces the FMLA.

Other federal laws could interact with the FMLA. Disabled applicants and employees are covered by the Americans with Disabilities Act, sometimes allowing them to take limited unpaid leave as a reasonable accommodation. The Pregnant Workers Fairness Act requires reasonable accommodations for pregnancy-related conditions, including time off.

Some states and local governments have laws similar to the FMLA that require employers to grant paid leave so employees can deal with their own or a loved one's serious health condition.

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. Employees who take FMLA leave are entitled to continuation of group health insurance coverage under the same terms and conditions as if they had not taken leave.

Basic FMLA leave provides up to 12 weeks of unpaid leave for three specific situations:

- **Birth or adoption:** Employees can take FMLA leave following the birth, adoption or foster care placement of a child.
- **Self-care:** Employees who suffer from a serious health condition may take up to 12 weeks of unpaid FMLA leave.

- **Care for a spouse or immediate family member:** Employees may take FMLA leave to care for a spouse, parent, child or other immediate family member with a serious health condition.

Congress amended the FMLA in 2008 to cover employees with family members serving in the armed forces. They are eligible for two types of leave:

- **Military deployment:** Employees may take up to 12 weeks of FMLA leave for qualifying exigencies when the employee's spouse, son, daughter or parent is on active military duty or called to active duty as a member of the National Guard, military reserves or regular armed forces. This includes time off to attend military ceremonies, visit the service member during rest and recreation breaks and take care of legal matters related to the absence. DOL regulations set out how many days off are allowed under each qualifying exigent circumstance, up to a total of 12 weeks.
- **Military caregiver leave:** Employees can take up to 26 weeks of caregiver leave to care for a seriously injured or ill-covered service member. That 26 weeks includes the 12 weeks available for other reasons—and is *not* an additional 26 weeks on top of the 12 weeks otherwise available.

FMLA eligibility for employees, employer compliance requirements

Only some employers must comply with the FMLA. The law only covers some employees.

Employer requirements

Any private-sector employer with 50 or more employees working within a 75-mile radius of the "work site" and "engaged in commerce" must comply with the FMLA. Most public employers and educational institutions must also comply.

Courts have interpreted the term "engaged in commerce" so loosely that virtually all types of businesses meet the definition, whether they are engaged in sales, services or some other endeavor.

Thus, there are three main classifications of employers that must provide FMLA leave to qualified employees:

- **Private-sector employer**, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer
- **Public agency**, including a local, state or federal government agency, regardless of the number of employees it employs
- **Public or private elementary or secondary school**, regardless of the number of employees it employs.

For private-sector employers with multiple locations, the employee count includes only those who work within a 75-mile radius. This is sometimes referred to as the 50/75 rule. Thus, it is quite possible to have 50 or more workers and still not be a covered employer because there is no single location where 50 employees work within 75 miles of that location.

The FMLA regulations specifically bar private-sector employers from shifting employees from one work site to another to evade the employee limit. You could not, for example, transfer an employee from one work site to another just so the employee count falls below 50 at one or both locations. Nor can you rely on virtual-only teleworkers who are scattered across the country, none within a 75-mile radius of each other, to avoid coverage. The proper test is what location they report to or receive assignments from. That location is where they work, according to recent DOL guidance addressing virtual employees and the FMLA.

The 50 or more workers must be employed "for each working day during each of the 20 or more calendar workweeks in the current or preceding calendar year." Employees include full- and part-time

or seasonal employees. Thus, workers who would not qualify for FMLA leave because they don't work more than 1,250 hours per year would still count as employees to reach the minimum 50-employee count for private-sector employers.

Because the FMLA looks back one year, the number of employees in the current year could have fallen and the FMLA would still apply. Likewise, even if an employer had few employees the previous year, an increase in employees in the current year means workers otherwise qualified are covered.

This is one reason employers should think seriously about how adding staff might affect FMLA compliance if they are close to the 50-employee threshold. Adding one full-time employee would keep a 48-employee organization under the minimum; adding two part-time employees would mean the employer is covered for the year the employee count hits 50, plus an additional year.

Covered employees

Employees are eligible for FMLA leave if they have worked:

- For their employer at least 12 months
- At least 1,250 hours over the past 12 months
- At a location where the organization employs 50 or more employees within 75 miles.

Employees must meet all three conditions to be eligible to take FMLA leave. Here's how that works.

Length of service

An employee is covered if they have worked for their employer for at least 12 months.

That time need not be continuous service. Employers should count any time the employee worked for the company within the

last seven years. This means seasonal workers may be covered once their total service time hits one year.

Tip: Ask all applicants whether they have worked for your organization in the past, including in other locations. That way, you can locate their employee records and calculate past service. For rehired workers, employers must add their past service within the previous seven years to determine whether the rehires have 12 months of service under their belt. This rule applies even if the new hire worked at a different location in the past.

Employees at a newly acquired company that is considered a successor in interest are eligible from the first day of work if they have one year's seniority with the previous company. In other words, they don't lose their eligibility and start over just because their employer was bought and they continue working for the new company. That's true even if the new company isn't a covered employer but the employees were eligible for FMLA leave with the old company. A company is a successor in interest if essentially there is a continuation of the same business operations at the same facility using the same workforce.

For military-connected employees covered by USERRA, the *Uniformed Services Employment and Reemployment Rights Act*, any time away on active duty must be counted towards FMLA eligibility. Thus, if they are on active duty, there is no gap. Each month of military service counts as a month towards the FMLA's one-year eligibility requirement. For that group of employees, you must go back even further to calculate the 12-month service requirement.

Hours worked

To take FMLA leave, an employee must have worked at least 1,250 hours for the employer within the 12 months immediately preceding the leave. Some part-time workers are covered if their hours total 1,250 for the year.

Actual hours worked count toward the 1,250 hours, as does on-call time. However, paid time off such as vacation or sick leave

does not count toward the hours-worked requirement. Neither does time taken off under the FMLA in the preceding 12 months.

Again, special rules apply for military-connected employees returning from military service. Their absence is counted towards FMLA eligibility to reach the 1,250 minimum service hours requirement.

Location

To be eligible for FMLA leave, the employee must work at a location where there are at least 50 employees within 75 miles. Thus, workers at one location can be covered by the FMLA while workers at another location are not. In that case, you will have to decide if you will voluntarily cover all employees to simplify your benefits management and avoid intra-company location resentment.

Setting your FMLA calendar: 4 methods

The FMLA leave entitlement does not accumulate year over year—it is strictly a use-it-or-lose-it proposition. Congress provided options for employers to choose from when determining when employees can take FMLA leave and when the 12 weeks expire.

4 ways to calculate an FMLA year

Employers can calculate the 12-week entitlement using one of four methods:

1. **The calendar-year method** is the simplest. Eligible employees are entitled to 12 unpaid weeks during any calendar year. Eligibility resets Jan. 1. However, this potentially allows an employee to take 24 weeks of continuous unpaid leave if the timing is right. This could happen if leave commenced 12 weeks before the end of the year and the employee still needed leave beginning Jan. 1. They could take 12 weeks of leave at the end of the first year and another 12 weeks at the beginning of the second year.

2. **The fixed 12-month year method** is based on any fixed 12-month "leave year" the employer chooses, such as the employer's fiscal year or the employee's anniversary date. This method also allows the potential for continuous leave up to 24 weeks if the timing is right.
3. **The single 12-month period method** begins on the first day the employee takes leave and ends 12 months later. This method is the only one you can use for military deployment exigency leave, even if you use another method for other FMLA leave.
4. **The rolling 12-month calendar method** measures backward from the date an employee first takes FMLA leave. To use this, you must add up all FMLA leave the employee has taken in the past 12 months and subtract that total from the 12-month allotment. This is sometimes referred to as the look-back method and requires a continual recalculation of leave each time some is taken.

Not choosing a method can be risky. Employers that don't choose must provide leave under the method most beneficial for the employee. That means you will have to calculate leave under all four methods.

Employee FMLA leave request requirements, employer notice requirements

FMLA leave isn't intended as a general sick-leave policy. In fact, federal law does not require employers to provide sick leave for employees for ordinary absences like annual doctor's visits or colds, aches and pains.

Instead, FMLA leave is intended for more serious maladies, adding family members, tending to seriously ill relatives and making arrangements when a family member is ordered to active military services or is injured while serving. The idea is that employees should not have to choose between their jobs and taking time off

to recover from serious illness, care for a family member or welcome a new family member. Thus, FMLA leave is a job-protected entitlement.

The FMLA sets out requirements for both employers and employees that facilitate taking FMLA leave. Those requirements begin with letting employees know about the FMLA and how to request appropriate time off. Employers are entitled to basic information to determine whether the employee is eligible for FMLA leave. Employees are entitled to know how much leave they're eligible for and what is expected of them during that leave up until their return to work.

How employees must request FMLA leave

Employees who want to take FMLA leave must comply with their employer's usual requirements for requesting leave. They must provide enough information for their employer to reasonably determine whether the FMLA may apply to the leave request.

Employees generally must request leave 30 days in advance when the need for leave is foreseeable. When the need for leave is foreseeable less than 30 days in advance or is unforeseeable, employees must provide notice as soon as possible and practicable under the circumstances.

For example, when an employee is scheduling elective surgery, they will often be doing so more than 30 days in advance of the surgery date. They would then be obligated to give their employer 30 days' notice. But if the need is more urgent, and they receive a surgery date one week away, they would need to immediately let their employer know. And if the employee has a medical emergency that requires immediate care, such as a heart attack or a car accident, they are required to notify their employer as soon as possible and practicable under the circumstances, taking into account emergency treatment.

When an employee seeks leave for an FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. No magic words are required.

For example, if the employee calls her supervisor from the emergency room and says her child is being admitted, that's a pretty clear indication that the child may have a serious health condition qualifying the employee for FMLA leave. But if the same employee merely calls and says she won't be in today because of a family issue, that likely would not be enough to trigger the employer's obligation to inform the employee about potential FMLA leave.

If an employee later requests additional leave for the same qualifying condition, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave.

Employer notice requirements

All covered employers must display a poster describing employees' FMLA rights. That's true whether they have any employees who are eligible for FMLA leave. That could happen, for example, when an employer has reached the 50-worker threshold but none of the employees have worked the requisite 1,250 hours yet.

The DOL provides downloadable versions of the FMLA poster here: **www.dol.gov/sites/dolgov/files/WHD/legacy/files/fmlaen.pdf**

Covered employers with employees who are eligible for FMLA leave must:

- Provide employees with general notice about the FMLA.
- Notify employees concerning their eligibility status and rights and responsibilities under the FMLA.
- Notify employees whether specific leave is designated as FMLA leave and the amount of time that will count against their FMLA leave entitlement.

- Specify whether the employer wants the employee to obtain a health-care provider certification, copies of military orders or proof of relationship status when leave is to care for a family member, among other conditions.

General notice requirements

To meet the general notice requirements of the FMLA, covered employers must display a poster (linked above) in plain view for all workers and applicants to see, notifying them of the FMLA provisions and providing information concerning how to file a complaint with the Department of Labor. An employer that willfully violates this posting requirement may be subject to a civil money penalty.

In addition to displaying an FMLA poster, a covered employer that has any eligible employees also must provide a general notice containing the same information that is in the poster in its employee handbook (or other written material about leave and benefits). If no handbook or written leave materials exist, the employer must distribute this general notice to new employees upon hire.

Employers may meet this general notice requirement by either duplicating the general notice language found on the FMLA poster or by using another format, so long as the information provided includes, at a minimum, all the information contained in the FMLA poster.

The poster may be posted electronically and the general notice may be distributed electronically provided all other requirements are met.

Eligibility and rights and responsibilities notice requirements

Employers must determine FMLA eligibility and issue a notice of eligibility status the first time an employee takes leave for an FMLA-qualifying reason in the employer's designated 12-month leave year.

The eligibility notice may be either oral or in writing and must:

- Be provided within five business days of the initial request for leave or when the employer learns an employee's leave may be for an FMLA-qualifying reason
- Inform the employee of his or her eligibility status.

If the employee is determined to be ineligible for FMLA leave, the employer must state at least one reason why.

The eligibility notice is not required for FMLA absences for the same qualifying reason during the same leave year or for FMLA absences for a different qualifying reason where the employee's eligibility status has not changed. If the employee requests leave for a different qualifying reason in the same leave year and the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days.

Each time employers are required to provide the eligibility notice, they must also provide employees with a rights and responsibilities notice that tells employees about their obligations concerning the use of FMLA leave and the consequences of failing to meet those obligations.

The rights and responsibilities notice **www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-381.pdf** must be in writing and must include, as applicable:

- Notice that the leave may be counted as FMLA leave
- The employer's designated 12-month period for counting FMLA leave entitlement
- Any requirement for the employee to furnish a certification and the consequences for failing to do so
- Information regarding the employee's right or the employer's requirement for substitution of paid leave and conditions relating to any substitution, and the employee's right to take unpaid FMLA leave if the conditions for paid leave are not met

- Instructions for making arrangements for any premium payments for maintenance of health benefits that the employee must make during leave (and potential employee liability if the employee fails to return to work after FMLA leave)
- Notice of designation as "key" employee and what that could mean
- The employee's right to job restoration and maintenance of benefits.

The rights and responsibilities notice may be distributed electronically provided all other requirements are met. Employers must respond to questions from employees concerning their FMLA leave.

Download the Department of Labor's official Notice of Eligibility & Rights and Responsibilities here: **www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-381.pdf**

Complying with FMLA certification requirements

Understanding and properly using the FMLA medical certification process is essential to controlling FMLA leave abuse. Requiring employees to back up their requests helps cut down on possible leave abuse since workers know they must get the certification form filled out and returned.

Except for time off to welcome a newborn, adopted or foster child to the family, you can and should request that employees complete an FMLA medical certification for leave. FMLA regulations specifically prohibit employers from asking for a medical certification for child bonding. For bonding leave, you can, however, request confirmation of the relationship to the child.

Employers need to understand that there are different FMLA guidelines for different leave needs. For example, FMLA certification forms differ for taking time off for personal illness, caring for a family member and taking military exigency leave. What you should ask for depends on the reason for leave.

The Department of Labor recently updated its web page of FMLA certification forms to make it easier to choose the right form and to provide more information about how medical providers should complete the forms. **www.dol.gov/agencies/whd/fmla/forms**

Designation notice requirements

The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation to the employee. **www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-382.pdf**

This notice must:

- Be provided in writing within five business days of having enough information to determine whether the leave is FMLA-qualifying
- Be provided for each FMLA-qualifying reason per the applicable 12-month period (additional notice is required for any changes in the designation information)
- Include the employer's designation determination, and any substitution of paid leave and/or fitness-for-duty requirements
- Provide the amount of leave that is designated and counted against the employee's FMLA entitlement, if known. If the amount of leave is not known at the time of the designation, the employer must provide this information to the employee upon request, but no more often than once in a 30-day period and only if leave was taken in that period.

If the requested leave is not FMLA-qualifying, the notice may be a simple written statement that the leave does not qualify and will not be designated as FMLA leave.

If an employer is unable to determine whether a leave request should be designated as FMLA-protected because a submitted certification is incomplete or insufficient, the employer is required to state in writing what additional information is needed. The employer may use the designation notice to inform the employee that the certification is incomplete or insufficient and identify what information is needed to make the certification complete and sufficient.

Use the official DOL FMLA forms

When managing FMLA documentation, don't do it yourself! The best practice is to use the latest forms on the Department of Labor's FMLA web page **www.dol.gov/agencies/whd/fmla/forms** rather than creating your own forms. Here's a list of currently available DOL FMLA forms:

- General FMLA rights poster: **www.dol.gov/sites/dolgov/files/WHD/legacy/files/fmlaen.pdf**
- Eligibility Notice: **www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-381.pdf**
- Rights and Responsibility Notice (note that this and the eligibility notice are included on the same form): **www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-381.pdf**
- Designation Notice: **www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-382.pdf**
- Medical Certification Forms. There are five different certification forms, depending on the reason for the leave request. These can be accessed here for individual download: **www.dol.gov/agencies/whd/fmla/forms**

Employers may be required to provide notices in languages other than English where a significant portion of the employer's workforce is not literate in English. Employers are also required to comply with all applicable requirements under federal or state law for notices provided to sensory-impaired individuals.

Consequences of failure to provide notice

Failure to follow the notice requirements may constitute an interference with, restraint or denial of the exercise of an employee's FMLA rights.

An employer may be liable for compensation and benefits lost because of the violation, for other actual monetary losses sustained as a direct result of the violation and for appropriate equitable or other relief, including employment, reinstatement, promotion or any other relief tailored to the harm suffered.

In other words, if you don't follow the rules for allowing FMLA leave to those eligible, you risk a lawsuit. For example, if you failed to post the FMLA notice and you were a covered employer, and a worker never requested leave because he didn't know he was entitled to FMLA leave, your failure to post the FMLA notice could amount to interference with that worker's FMLA rights.

Certifying an FMLA serious health condition

It's sometimes hard to tell if you have enough information to decide if a health condition warrants granting FMLA leave. That's especially true when leave is for self-care or to care for a family member. That's why it's essential to get a certification from a health-care provider that confirms a serious health condition exists.

The Department of Labor has standard FMLA certification forms for both circumstances available here: **www.dol.gov/agencies/whd/fmla/forms**. Both forms require that a health-care provider assess medical needs.

Certifying an employee's serious health condition

The self-care FMLA certification asks the health-care provider to answer a series of questions about the nature of the health condition, its treatment and likely duration of FMLA leave.

The form also includes questions about whether the employee can perform the essential functions of the job. Include a current job description with the form for the doctor to use in completing the certification. Otherwise, the health-care provider is left to guess whether your employee can perform the job's essential functions.

Certifying a family member's serious health condition

The form certifying the need to care for a family member includes questions for the employee to answer. For example, it asks her to

identify the person she will care for and the nature of the relationship. It also asks what your employee will be doing to help.

A caution is on order. You can't require that the employee tell you whether anyone else is available to help care for the family member. For example, you can't insist that your employee's siblings take turns caring for an ill parent. If your employee is otherwise eligible to care for a sick parent, it doesn't matter if 10 other siblings are also available.

How to respond to certifications

Sometimes you may doubt the accuracy or authenticity of an FMLA certification form. When that happens, you face several options.

The first is to cast doubt aside and approve the leave.

The second is to contact the medical office that filled out the FMLA form and ask them to verify its accuracy. This can catch fraudulent submissions or alterations. Send them a copy of the form and simply ask whether they filled it out. At this stage, you may not request additional medical information. The request should come from an HR professional, leave administrator or health-care provider. The request cannot come from the employee's supervisor.

The third option is to request a second and third FMLA certification. If you take this route, you must identify a health-care provider you do not routinely use and have them complete a new FMLA certification. The employer pays the cost of this second opinion.

If the first and second certifications don't conflict, you must accept the result and grant leave. However, if they conflict, you can arrange for (and pay for) a third, final tie-breaking FMLA certification. As a practical matter, very few employers take this approach due to the cost and time required for multiple certifications.

Special rules for FMLA military leave

The FMLA military leave provisions were added in 2008, partly in response to the wars in Afghanistan and Iraq, which found many members of the National Guard and military reserves deployed overseas for extended periods.

FMLA certification for military leave depends on what type an employee needs.

- **Military exigency leave** is available for up to 12 weeks of unpaid leave. It applies to employees with a spouse, child or parent in the armed forces serving a foreign deployment.
- **Military caregiver leave** is available for employees to care for a service member with a serious injury or illness. It provides up to 26 weeks off for a service member's spouse, child, parent or next of kin to render care. It also includes leave when the service member is a veteran, which might be the case when injury cuts service short.

Here's how to handle FMLA certifications for military leave.

Military exigency leave

Exigency leave is designed to enable employees to help military-connected relatives manage life details associated with their military service. You are allowed to verify that your employee's relative is a service member who is on active duty or who has been called up for foreign service.

Employees may take leave for exigencies like:

- Making alternative child care arrangements for a child of the deployed service member
- Attending military ceremonies and briefings
- Making financial or legal arrangements to address the servicemember's absence

- Attending counseling
- Taking up to 15 calendar days of leave during the servicemember's rest and recuperation (R&R) leave during deployment.

Military caregiver leave

Your employee may care for a seriously injured or sick service member or veteran for up to 26 weeks. The serious injury or illness must have happened in the line of duty during active duty. It must have caused the service member to be medically unfit to perform his or her military duties. It includes pre-existing injuries or illnesses if they were aggravated in the line of duty. However, the injury or illness does not have to qualify the service member for Department of Veterans Affairs benefits, nor can you require a VA service-related finding.

Employers can request an FMLA certification from either a military or civilian health-care provider. But you must also accept a copy of a military Invitational Travel Order issued to your employee. These are essentially documents authorizing a family member's travel to the injured service member. For example, your employee may have a travel order to go overseas where his wife (the servicemember) is receiving medical care.

You are allowed to verify basic information, including asking for copies of military orders. You can also ask how your employee will care for the service member.

The Department of Labor has created an FMLA certification form for each type of military leave. You can find them here:

Certification for Military Family Leave for Qualifying Exigency under the Family and Medical Leave Act:
www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-384.pdf

Certification for Serious Injury or Illness of a Current Servicemember for Military Caregiver Leave under the Family and

Medical Leave Act:
www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-385.pdf

Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave (Family and Medical Leave Act):
www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh385V.pdf

Managing intermittent FMLA leave

Many employees take their FMLA leave in continuous blocks of 12 weeks. However, the law also allows employees to take leave in smaller increments to attend doctor's appointments for themselves or a family member or when their own or a family member's serious health condition flares up.

This is known as intermittent FMLA leave. Employees may take intermittent leave for just a few days or even just an hour. For that reason, intermittent leave is one of the most difficult aspects of the FMLA to manage. That's especially true when the employee is approved for intermittent leave for a condition that flares up regularly and unpredictably. Often, medical certifications for intermittent leave will include an estimate of the number of times during a typical week or month the employee will need off. That places a burden on supervisors to plan for absences they know are coming, even if they don't know exactly when they will happen.

Intermittent leave is also the form of FMLA leave that employees are most likely to abuse.

Employers can and should insist that employees taking intermittent FMLA leave use your usual call-off procedures when they miss work. Discipline employees who don't call off as required.

Common reasons for intermittent leave

Employees can take intermittent leave for many reasons:

Recurring health issues. While some employees may need to take large chunks of time to address a health issue, others may need to take a little time off here and there. For example, an employee undergoing chemotherapy might need to take a day or two off each week. Health conditions like that may require reduced hours and sporadic days off. In addition, some health conditions may leave employees unexpectedly unable to work, requiring them to call off.

Caring for someone with recurring health issues. Similarly, if a family member needs care, an employee may need intermittent leave to take them to doctor's appointments or to care for them at home.

Prenatal care. Prenatal care can be a qualifying reason for intermittent FMLA leave. Expecting mothers need to attend appointments, could feel unwell at times and may be under doctor's orders to restrict their work and hours.

This is especially true if there are pregnancy-related complications. With the passage of the Pregnant Workers Fairness Act, prenatal time off for conditions related to pregnancy may require reasonable accommodations.

Birth of a child. After childbirth, both parents may take intermittent leave to care for and bond with their child. However, they are only entitled to take 12 weeks of unpaid leave as one block of time. If both parents work for the same employer, they are limited to a total of 12 weeks of leave for bonding.

An employer is not required to allow intermittent leave in this situation, but they may choose to do so. An employee's entitlement to FMLA leave for birth and bonding expires 12 months after the date of birth, adoption or foster placement.

Adoption or foster care. FMLA leave may be taken before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be entitled to FMLA leave to attend counseling sessions, appear in court, consult with his or her attorney or the birth parent's representative, submit to a

physical examination or travel to another country to complete an adoption before the actual date of placement.

Think of this time as equivalent to the time off an expectant mother would take before giving birth, for doctor's appointments and the like.

An employer is not required to allow intermittent leave after the child is adopted or placed, but they may choose to do so. An employee's entitlement to FMLA leave for the placement of a child for adoption or foster care expires 12 months after the placement.

Many other conditions may warrant intermittent leave. Some examples:

- Depression
- Migraines
- Addiction disorders.

Managing intermittent FMLA leave is complex. That's why we have developed another guide in this series: "How to Manage Intermittent FMLA Leave." In it, you will find detailed information on time frames in which employees can take intermittent leave, the certification process and how to spot and prevent intermittent FMLA leave abuse.

FMLA and ADA: When FMLA leave isn't enough

Employees who have used all their FMLA leave may request additional leave if their situation has not been fully resolved by the end of the FMLA period. Your legal liability to provide it may vary. Generally speaking, employees who have used all their FMLA leave and are not yet eligible for another round do not have the right to more leave under the FMLA. If you do provide more time off, they're not guaranteed to return to the same or a similar position, either. Failure to return from FMLA leave when leave has been used means the employee's additional time off is *not* FMLA leave and thus not job-protected under the FMLA.

However, if an employee is in good standing and a valuable asset, it may be in your best interest to work with them on accommodations. As you will see below, th employee may be entitled to more time off under the ADA as a reasonable accommodation under the right circumstances.

Assuming they adhere to any company policies or state/local leave law, employers may choose to simply work with employees. Below are a few examples of ways to do so:

- Allowing employees to take additional paid or unpaid time off as needed
- Letting employees work flexible schedules to make up hours in the evenings and on weekends
- Adjusting an employee's job responsibilities and/or hours on a semi-permanent basis
- When job duties permit, allow an employee to work remotely as needed.

While an employer may choose to work with an employee to make accommodations, in some situations it may also be required.

Running out of FMLA leave isn't the end of the time-off road

Running out of FMLA leave doesn't mean a seriously ill employee cannot take more unpaid leave. Employers may have to offer additional leave, pursuant to the ADA.

Consider this scenario: An employee is out of work on approved FMLA leave for a properly certified serious health condition. Since taking leave, the employee's condition has not improved, even though she has remained out of work for a substantial period.

The employee repeatedly submits notes from her doctor certifying that she is unable to work. The notes repeatedly extend the date when she can be expected to return to work.

The employee eventually exhausts all of her available FMLA leave and she has no other leave benefits she can draw against. She still cannot yet return to work. What to do now?

If the condition qualifies as a disability, the ADA may require the employer in this scenario to engage in an interactive process to identify a reasonable accommodation that will enable the employee to perform the essential functions of her job. Some, but not all, serious health conditions qualifying her for FMLA leave may also qualify her for reasonable ADA accommodations.

Depending on what information was contained in the prior FMLA medical certification, it may also be necessary for the employer to request additional documentation regarding the employee's condition and her corresponding work limitations. That is, you will want to determine if the serious health condition is also a disability that requires accommodations.

Intersection: ADA accommodations and FMLA leave

Courts have concluded that additional time off can be a reasonable ADA accommodation.

The problem is determining how much more leave a disabled employee may be entitled to. Is one week enough? A month? A year? Obviously, at some point the additional time becomes unreasonable. One court-approved measure is that a doctor can estimate when the employee will be able to return to work. A specific period of recommended leave may be reasonable. Indefinite leave is unreasonable.

Here's how to handle extra time-off requests when an employee has been out on FMLA leave:

- If you are an FMLA-covered employer, grant any remaining FMLA leave for the year.
- Request a return-to-work certification showing the employee can perform the job's essential functions. If she can't, consider whether her condition might be an ADA disability. That

is, does the condition substantially impair a major life function such as eating, walking or breathing? If so, more time off may be a reasonable accommodation. Other options include a reduced schedule or increased breaks. Be aware that if you are going to request a return-to-work certification, you must have told the employee when you approved the original leave request *and* the same rule must apply to all workers returning to work for similar reasons.

- If a doctor recommends more time off, be sure the recommendation spells out the anticipated length. If it's indefinite, you can reject the request. If it's specific, decide whether it would be reasonable under the circumstances. Do you have the staff and flexibility to provide the leave?

What the ADA requires

Employers that fail to look beyond FMLA requirements can easily run afoul of the ADA, even if an employee doesn't qualify for FMLA leave. For example, an employee who has only been on the job for a few months won't qualify for FMLA, but employers should consider their ADA rights. These include an exploration of possible reasonable accommodations. Employers should never immediately terminate a worker who has not yet earned time off without first considering whether the worker is disabled and, if so, engaging in the interactive accommodation process.

The ADA reasonable accommodation process requires an interactive dialog between the employer and employee, discussing the employee's condition, needs and limits the employer deems reasonable. Employers can ask for medical certification of the employee's need for leave but must make the request in good faith.

If their condition is a disability under the ADA and more time off or a flexible arrangement such as working from home is feasible, it may be considered a required reasonable accommodation.

If an employee asks for more time off or to work from home, handle the request just like you would another disabled employee's

reasonable accommodation request. Verify the disability and discuss possible accommodations before you reject the request.

The best approach is to determine whether the request is for a specific period, or for indefinite leave. If doctors can't give a concrete return date, chances are a court will find the ADA doesn't require granting the request.

If the request includes a specific return date, however, you should consider the request. The shorter the requested leave, the more likely it will be considered a reasonable accommodation.

Remember that the ADA also requires employers to engage in an interactive accommodation process. That applies to unpaid leave, too. Try offering alternatives such as part-time work or working from home to show your good-faith efforts.

In addition, the Pregnant Workers Fairness Act requires you to grant time off for a long list of pregnancy-related conditions, complications and limitations. These include time off for fertility treatments, prenatal care, birth and recovery, abortion, stillbirth and miscarriage, and post-pregnancy conditions like postpartum depression. There's no minimum length-of-service or hours-worked requirement for the PWFA reasonable accommodations provisions to kick in, either. Employers with far fewer employees are covered—you are a covered employer if you have 15 or more workers.

When mental health challenges require FMLA leave

Employees dealing with mental health challenges may have an FMLA serious health condition. Serious mental health conditions often require taking intermittent FMLA leave. For example, a depressed employee may periodically request permission to come to work late when his symptoms are most severe, using intermittent FMLA leave to account for the missing hours.

Make sure the employee understands he must get a certification from his medical provider explaining the need for intermittent leave. The doctor should estimate how often intermittent leave will be necessary and for how long. If you have call-off rules, explain that these need to be followed. Have him call in as he would for any other absence, but report that the late arrival or absence is intermittent FMLA leave.

The regulations interpreting the FMLA list several different circumstances under which a physical or mental condition may be covered by the statute.

One such circumstance is continuing treatment by a health-care provider for a period of incapacity of more than three consecutive calendar days that also involves "treatment by a health-care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health-care provider." The regulations provide that an incapacity includes an inability to "perform any of the essential functions of the employee's position."

Thus, your employee may be eligible for FMLA leave if he is unable to perform the essential functions of his job and is receiving treatment from a psychiatrist who has placed him on drug therapy treatment.

If your employee states that she may require inpatient care for her psychiatric condition, she may also be entitled to FMLA leave for that period.

As with other requests for FMLA leave, you should require a medical certification from a health-care provider verifying that she is suffering from a serious health condition.

Does stress qualify for FMLA leave?

As a general matter, under the FMLA, employees who claim leave based on their medical condition such as stress must show the leave is needed because the employee has a serious health condition that renders her unable to perform the functions of her job. Because the general term "stress" is not a specific medical

condition, the employee would have to show a specific diagnosis that qualifies as a serious health condition. Possibilities include PTSD, anxiety and other conditions tied to stress.

Before the U.S. Department of Labor revised the regulations for implementing the FMLA in 2009, the law specified that mental illness "resulting from stress" may be a serious health condition. That language was deleted in the current regulations to clarify that a mental illness, regardless of its cause, can be a serious health condition under the FMLA if all the regulatory requirements are met.

Currently, under the FMLA, a "serious health condition" means an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health-care provider.

If an employee did not receive inpatient care for a medical condition such as anxiety, the employee must establish that he or she received "continuing treatment" by a health-care provider to qualify for FMLA leave. To do so, the employee must first show he or she was incapacitated for more than three consecutive calendar days. If an employee cannot show that he or she was so incapacitated that it was impossible to perform the job, the employee is not covered under this section of the FMLA.

In several cases in which an employee claimed to suffer from a serious health condition due to stress, the individual failed to show incapacitation. For example, in *Cole v. Sisters of Charity of the Incarnate Word*, the Eastern District of Texas found that an employee failed to establish that she suffered from a serious health condition based on stress when she provided no evidence that she was unable to perform the functions of her job.

Furthermore, once an employee establishes incapacitation, they must still establish that they received "continuing treatment" for the condition. Specifically, for a stress-related condition to qualify as a serious health condition under the "continuing treatment" prong of the FMLA, courts have held that the continuing treatment must relate to the condition that initially caused the incapacity.

The FMLA does not protect an employee who claims his employer "exacerbated" the employee's condition due to increased stress.

Ultimately, if the employee presents a stress-related condition and you are not sure it qualifies as a serious health condition, you must avoid playing doctor. Review the WH 380 form (Certification of Health-Care Provider) to determine whether the condition meets the requirements under the FMLA and its implementing regulations. If the form doesn't provide sufficient information, request clarification.

FMLA leave abuse and how to spot it

FMLA leave is vulnerable to employee abuse. Sometimes that abuse is obvious, as when an employee on intermittent leave always has flare-ups on Fridays or Mondays. Other times, the abuse is not so easy to spot—as when a friendly doctor rubber stamps an FMLA certification request.

If you suspect FMLA abuse

Discipline for FMLA abuse is legal. However, employers should proceed with caution. Even if it appears that an employee is misusing his FMLA leave, you must make discipline or termination decisions based on a rational review of the facts, including the doctor's certification. Additionally, courts have concluded that demanding more than medical certifications without some reasonable suspicion of leave abuse can constitute interfering with an employee's FMLA rights. When in doubt, check with your attorney.

Let's look at one case as an example.

Richard, an IT manager in Massachusetts, took FMLA leave for foot surgery; his certification form said he'd need four to six weeks of recovery. During that recovery time, he went on a scheduled vacation to Mexico. He limited his activities because his foot was still in a medical boot.

When HR found out about the vacation during FMLA leave, it quickly investigated and fired him. He sued.

At trial, the HR director said she believed that employees on FMLA could not take vacation. But the court said that's not automatically true, noting that "an employee recovering from a leg injury may sit with his or her leg raised by the seashore while fully complying with FMLA leave requirements, but they may not climb Machu Picchu without abusing the FMLA process."

The court sided with Richard, awarding him a whopping $1.3 million verdict, including $715,000 in punitive damages. (*DaPrato v. Massachusetts Water Resources Authority*, Mass Sup. Ct.)

11 steps to sniff out suspicious FMLA cases

Use of the medical certification process is the biggest weapon employers have in combating FMLA abuse. It gives you the right to obtain information from the employee's physician about the ailment and, at least for the first certification, to obtain a second or third opinion from an independent physician.

1. Obtain a medical certification for each request for leave due to a serious health condition. It's important that your sick leave or attendance policy requires a doctor's certification for all absences of three or more days for the leave to be excused. If there's no such requirement and you intend to require paid leave to run concurrently with FMLA leave, you might not be able to require a medical certification, which is the first step in an anti-fraud program.

2. Enforce a policy denying the leave request if an employee fails to submit certification within 15 days. In each instance, assess any appropriate penalties for failure to be at work.

3. Examine the certification closely to ensure it's been properly and fully completed. Many doctors will hastily complete the form. In some cases, they'll intentionally leave some sections incomplete to remain "truthful" while accommodating the desires of the patient/employee for leave.

If the medical certification is incomplete, specify in writing what information is lacking and allow the employee at least seven days to cure the deficiency. If the employee fails to do so, deny the leave request. Of course, if the medical certification doesn't support the existence of a serious health condition, you should deny the request.

4. Require a second opinion if the circumstances are even slightly suspicious and it's an original certification.

5. Once the certification is approved, make a limited inquiry each time the employee requests more leave, particularly in the case of intermittent leave. The goal is to determine whether the leave is for the same qualifying reason.

6. Watch the schedule of absences closely in cases of intermittent leave to determine whether a suspicious pattern develops (e.g., immediately before and after weekends or days off) or whether there's a change in the frequency or timing. Such actions could suggest a change in condition that enables you to request a recertification.

7. Request recertifications as often as the law allows. The frequency of recertification permitted will differ depending on the type of leave and the type of serious health condition.

8. Require accrued leave to run concurrently with FMLA leave when allowed by law. When an employee realizes that taking leave today will affect future vacation time, he or she is more likely to take FMLA leave only when the need is legitimate.

9. Ask the physician to verify that the medical certification is exactly as he or she signed it and has not been altered.

10. Inquire about the intended method of transportation if an employee requests to leave work early because of their serious health condition. If the employee can't work, perhaps an ambulance is needed.

11. Aggressively pursue potential fraud, and if concrete evidence of fraud is discovered, take appropriate disciplinary action.

Always follow up on reports from fellow employees or other sources that the employee does not need leave.

Final note: Even if these actions uncover no fraud, your efforts will still reap dividends.

Once employees become aware that you intend to use these tools to detect fraud, employees otherwise inclined to take advantage of the FMLA will wait until a legitimate need arises.

Return from FMLA leave

An employee who returns from FMLA leave is entitled to be restored to the same or an equivalent job with equivalent pay, benefits and other terms and conditions of employment.

As a condition of restoring an employee whose FMLA leave was for self-care, an employer may have a uniformly applied policy or practice that requires all similarly situated employees to obtain and present certification from the employee's health-care provider that the employee is able to resume work. This is commonly referred to as a fitness-for-duty certification.

Fitness-for-duty certification

The employee has the same obligations to participate and cooperate in the fitness-for-duty certification process as in the initial certification process and is responsible for any associated costs.

If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions must be applied. Any return-to-work physical examination must be job-related and consistent with business necessity.

A fitness-for-duty certification can only cover the health-care condition that was the basis for FMLA leave in the first place. The certification must state that the employee is able to resume work. The FMLA designation notice must include the fitness-for-duty

requirement or the employer loses the right to demand one. If the employer has provided a list of the essential functions of the employee's job by no later than the time the designation notice is provided, then an employer also may require that the certification address those essential functions.

The employer may not delay the employee's return to work pending receipt of the certification. Second or third opinions may not be required on a fitness-for-duty certification.

Bottom line: Employers should assume that an employee is ready to return if they claim to be.

When military-connected employees return from FMLA leave

The FMLA and the *Uniformed Services Employment and Reemployment Rights Act* work together to protect service members who need time off.

Under USERRA, employees can't be punished for their military service. Upon return from military duty, they must be reinstated at the pay and benefit levels they would have attained had they not served.

The FMLA intersects with USERRA in two ways. First, an employee's military absence counts toward their FMLA eligibility. Second, USERRA allows service members extra time to reclaim their jobs—up to two years following a service-related injury. In addition, the returning service member can only be terminated for cause for 12 months following return.

Example: Madeline, an attorney, joined the Army National Guard two months after being hired by a law firm. She was called to active duty for two years and assigned to Afghanistan. There, while assisting deployed soldiers with their legal problems, she was injured in a suicide bombing. She was sent home and underwent rehabilitation for 18 months after the end of her active duty.

She then told the law firm she had left that she wanted to return. The firm reinstated her and adjusted her pay according to its pay schedule to account for missed time. Two months later, service-related complications required her to have surgery. The firm discharged her, telling her she wasn't eligible for FMLA leave.

The law firm violated both the FMLA and USERRA. First, she should have received credit toward FMLA eligibility. Second, she wasn't fired for cause.

An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule. However, if reasonable safety concerns exist regarding the employee's ability to perform his or her duties due to the serious health condition for which the employee took such leave, an employer is entitled to a fitness-for-duty certification for such absences up to once every 30 days. "Reasonable safety concerns" means a reasonable belief of significant risk of harm to the employee or others. The employer may not terminate the employee while awaiting a fitness-for-duty certification for an intermittent or reduced-schedule leave absence.

What's an equivalent job?

An equivalent position is virtually identical to the employee's former position in terms of pay, benefits and working conditions. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority. If an employee is no longer qualified for the position because he or she is unable to attend a necessary course, renew a license, fly a minimum number of hours, etc. as a result of the leave, the employee should be given a reasonable opportunity to fulfill those requirements upon return to work.

Equivalent pay

Equivalent pay includes any bonuses or other payments made to employees. Whether an employee on FMLA leave is entitled to a bonus depends on whether employees on other similar types of leave receive the bonus.

For example, if an employee is substituting accrued annual leave and other employees on annual leave receive the bonus, the employee on FMLA leave should receive the bonus as well. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA

leave, then the payment may be denied unless otherwise paid to employees on an equivalent non-FMLA leave status.

An employee is also entitled to any unconditional pay increases that may have occurred during the FMLA leave period, such as cost-of-living raises. Pay increases conditioned upon seniority, length of service or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to the same or equivalent pay premiums, such as a shift differential and, ordinarily, the opportunity for overtime hours (and overtime pay).

Equivalent benefits

Benefits include all benefits provided or made available to employees by an employer, such as:

- Health insurance
- Retirement benefits
- Sick leave
- Annual leave
- Disability insurance
- Group life insurance
- Educational benefits.

At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the leave affecting the entire workforce unless otherwise elected by the employee. That is, any changes that apply to all other situated workers will also apply to the returning worker.

Upon return from FMLA leave, an employee cannot be required to requalify for any benefits he or she enjoyed before the leave began. Employers may find it necessary to modify life insurance

and other benefits programs to restore employees to equivalent benefits upon return from FMLA leave, to make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave or to pay these costs subject to recovery from the employee on return from leave.

Benefits accrued at the time leave began must be available to an employee upon return from leave. An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.

If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

Any period of unpaid FMLA leave cannot be treated as a break in service for purposes of vesting and eligibility to participate in pension and other retirement plans. If the plan requires an employee to be employed on a specific date to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date will be deemed to have been employed on that date. Unpaid FMLA leave periods, however, need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

Other terms and conditions

An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position. For example:

- The employee must be reinstated to the same or a geographically proximate work site.
- The employee is ordinarily entitled to return to the same shift, or the same or an equivalent work schedule.

- The employee must have the same or an equivalent opportunity for bonuses, profit-sharing and other similar discretionary and non-discretionary payments.

The FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule or position that better suits the employee's personal needs on return from leave, or to offer a promotion. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes. The requirement that an employee is restored to the same or equivalent job with the same or equivalent pay, benefits and terms and conditions of employment does not extend to *de minimis*, intangible or unmeasurable aspects of the job.

Joint employers have shared responsibilities for employee reinstatement.

When can you fire a worker who is on FMLA leave?

A common misconception is that workers can't be fired while on FMLA leave. That's not true—*if* you have good reason to terminate and you document *everything.* Employers must show that they would have fired the worker whether they took FMLA leave or not.

Common reasons to fire workers on FMLA leave include:

- **Worker wrongdoing necessitating discipline.** Employees don't get a pass because they're on FMLA leave. Be prepared to show you disciplined all workers who broke the same rule and didn't single out leave-takers. If you were finalizing a discharge based on insubordination when the worker requested FMLA leave, you can move forward.
- **Poor productivity.** But make allowances for time missed while on FMLA leave or ADA accommodations leave, or for

military service absences. In other words, adjust quotas, goals and sales targets to zero out the effect of lost time.

- **Discovery of mistakes or poor performance during FMLA leave.** Sometimes, it takes an employee's absence to see that the worker wasn't doing the job you thought. An absence may mean the employer moves another worker into the position to get the work done. He or she may discover uncompleted or error-filled work or other irregularities. If you would terminate *any* employee over the errors or irregularities, you can terminate the employee even while on FMLA leave. She may then have been fired while on FMLA leave, but not *because* she was.
- **A reorganization that eliminates or restructures jobs, assigns new functions to some jobs or eliminates others.** FMLA requirements don't demand that you retain workers you otherwise would terminate under a reorganization.
- **Across-the-board budget reductions during economic downturns or simply a desire to maximize profits.** As long as you don't use past or future FMLA leave as a factor, workers can be fired while on FMLA leave to cut costs.

Q&A: Unusual FMLA situations

What happens when FMLA leave is exhausted before a baby is born?

Q An employee is expecting a baby but has had some complications and has been put on bed rest. She is currently on FMLA leave. By the time the baby is born, she will have already used 10 weeks of FMLA. Does the birth start a new FMLA leave cycle or is it a 12-week max within a year regardless of reason(s)?

A The Family and Medical Leave Act provides up to 12 weeks of job-protected leave in a 12-month period. Thus, the employee would have two more weeks of leave available. In addition, depending on which benefit year method her employer selected, she could be immediately eligible for more time off at the beginning of a new calendar year. Some jurisdictions offer additional leave through state or local legislation, with or without rights to reinstatement at the end of the leave. Your policies also may be more generous.

For example, your employee may be eligible for short-term disability benefits for some weeks after the baby is born. You would follow your plan's rules. You may want to invite the employee to speak with you about her plans and the options available to her if her condition permits.

In addition, as of 2023, the Pregnant Workers Fairness Act (PWFA) provides reasonable accommodations for pregnancy-related conditions. The EEOC, which administers the PWFA, takes the position that time off to recover from childbirth—among other pregnancy-related matters—is a reasonable accommodation under the new law. Thus, running out of FMLA leave does not automatically mean the employee isn't entitled to more unpaid time off to recover.

FMLA leave for domestic violence

Q **I have an employee who is suffering from domestic violence issues. Can she take FMLA leave for reasons related to these issues and for various problems like counseling and insomnia? Is she eligible?**

A FMLA leave may be available to address certain health-related issues resulting from domestic violence. An eligible employee may take FMLA leave because of his or her serious health condition or to care for a qualifying family member with a serious health condition that resulted from domestic violence. For example, an eligible employee may be able to take FMLA leave if he or she is hospitalized overnight or is receiving certain

treatment for post-traumatic stress disorder that resulted from domestic violence. In addition, mental or physical conditions accompanying recovery from domestic violence may be disabilities under the ADA, requiring reasonable accommodations including time off for counseling and treatment.

FMLA leave for organ donation

Q I have an employee who volunteered to donate an organ to a stranger. He wants FMLA leave. Is he eligible?

A Yes, an organ donation can qualify as a serious health condition under the FMLA when it involves either inpatient care or continuing treatment as defined in the regulations. Organ-donation surgery commonly requires overnight hospitalization, and that alone suffices for the surgery and the post-surgery recovery to qualify as a serious health condition. While it may seem that donating an organ is a voluntary act, that does not preclude FMLA time off.

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