

Manager's FMLA Guide: Frequently Asked Questions

Spring, 2009

Qualifications/Eligibility

Are part-time employees eligible to take leave under FMLA?

Yes. Under UMDNJ policy regular full or part-time employees who work 20 hours or more a week and are employed for a minimum of six months are eligible for FMLA. Also, full time temporary employees employed a minimum of six months are eligible.

There is a married couple that works for UMDNJ. How much leave is each spouse entitled to?

For their own serious health condition, they are each entitled to 6 months. However, for the birth or adoption of a child they are entitled to a total of 12 weeks.

Can an employee take more than one type of leave in a 12-month period?

Yes. It is possible for an employee to take leave for their own serious health condition and subsequently be granted a leave for birth/adoption, to care for a seriously ill family member, or military leave. However, the maximum leave should not exceed the total amount of leave provided by UMDNJ policy – 6 months, unless the employee has accumulated sick time greater than 6 months.

What if an employee has more than six months of sick time? Do they get their leave extended?

If an employee has more than six months of sick time, their leave can be extended for up to one year. An employee was hired prior to January 1, 1983 is entitled to utilize all their sick time even if it extends beyond one year.

What is donated sick time and when does it apply?

Donated sick time only applies when an employee is on FMLA due to their own, or a family member's, catastrophic illness (life threatening or terminal) AND they are completely out of their own benefit time (sick, float, vacation). Donated time can extend an

employee's paid leave time, not the total amount of leave for which they are eligible.

Are Per Diems eligible for FMLA?

No, Per Diem employees are not eligible.

Does FMLA apply to people on probation?

An employee on probation can be eligible for FMLA under the following circumstances: 1) probation is due to transfer/promotion so they have already been employed at UMDNJ for at least six months, 2) they had been employed by Adecco for at least 6 months before taking their current position, 3) they had been employed by UMDNJ for more than 1-year in the last seven years. New employees would not be eligible prior to the 6 month time requirement.

If someone goes out on continuous leave for 5 months, comes back to work for 1 month, then requests intermittent medical leave for self, are they eligible for all 12 weeks?

No. They are eligible for 6 months total unless they have accumulated sick time greater than six months.

When can an employee take more than 6 months of leave with a 12-month period?

If the employee has more than 6 months accrued sick time their leave can be extended up to 1-year if justified by the medical certification. Employees hired prior to January 1, 1983 are able to utilize all accrued sick time even if the leave goes beyond 1 year.

Use of Sick Time

If someone is out sick for more than three days are they required to apply for FMLA?

No. If someone is out more than three days you should let them know that they may be eligible for FMLA and let your HR Generalist know that you have an employee who has been out more than three days. If the employee does not apply for FMLA or is not qualified for FMLA the absences should be noted and applied against the attendance control policy.

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Can you ever use sick time to care for a family member?

The only time you can use sick time to care for a family member is when the employee is on approved FMLA to care for a family member with a serious illness. In those cases, an employee can use up to 10 sick days. Otherwise the employee must use float or vacation time.

Is there a maximum amount of sick time you can use before applying for FMLA?

We cannot force someone to take advantage of FMLA. However, if an employee or their family member has a serious health condition it is to their advantage to apply for FMLA so they have full job protection during this period of time. If someone does not apply for FMLA then the supervisor can utilize the guidelines under the Attendance Control Policy to address their attendance issues.

An employee was out for three days with the flu and wants the absence to be covered by FMLA. Is this covered?

The employee in this case was only out 3 days, the base line requirement for FMLA is to be out MORE THAN 3 consecutive days. Generally, the flu is not covered under FMLA. However, if someone has complications from the flu and is either hospitalized or meets the qualifications under "serious health condition", they may become eligible for FMLA.

Do you accrue sick time while on LOA?

If you are using benefit time while on FMLA then you will be accruing sick time and vacation time. If it is an unpaid leave you will not accrue anything.

Use of Benefit Time

Are there options for use of benefit time used (sick, float, vacation) when you are on FMLA?

No. Depending on the type of leave your benefit time will be used in a defined sequence as outlined in the policy. The only circumstance under which an

employee can choose not to use their Float/Vacation time is if they are on Short Term Disability. However, in order to qualify for disability they must first use all their sick time.

How do you track time used when someone is on FMLA?

It is the manager's responsibility to track intermittent FMLA. Each day the employee is out, you need to track the number of hours and apply the benefit time based on the policy. For example, if the employee is on FMLA to care for a family member, they can use 10 days of sick time, if they have it available. After that, they should be using float and vacation time. If they run out of all benefit time, they begin unpaid leave which is noted as Salary Delete on the time sheet.

Pregnancy/Birth /Adoption

Can birth/adoption leave be taken on an intermittent basis?

No.

If an employee has twins, do they qualify for 24 weeks of leave?

No, just the 12 weeks.

If a child is placed with an employee for foster care and then, after a period of two years, is adopted by the employee, which placement date (for foster care or adoption) qualifies the employee for leave?

According to the Department of Labor, the child would be "newly placed" at the time of the foster care placement rather than when the adoption occurs. Therefore, only the placement for foster care would be an FMLA qualifying event.

Can a pregnant employee take time off for morning sickness?

If an employee is having severe morning sickness due to pregnancy they should consult with HR regarding proper certification for those periods of time to be counted under FMLA. If you have an employee with attendance problems due to this issue, advise them to see HR.

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Family Leave/Definition of Family

An employee requested leave to care for her grandmother, who raised her since she was three. Is she covered by FMLA?

Yes. For the purposes of leave for a serious health condition, the FMLA defines a parent as an eligible employee's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee.

Are grandparents, sisters, brothers included in the definition of family members?

No, unless you are the legal guardian of a brother or sister that is not able to care for themselves due to a disability.

If an employee needs to care for someone not defined under FMLA what can they do?

An employee who needs to be absent from work to care for a family member not covered under FMLA can take vacation or, with supervisory permission, be granted a personal leave. Note that a personal leave is unpaid, does not provide job protection, and is limited to thirty (30) days.

Does an employee qualify for FMLA to take care of her pregnant adult daughter?

No, unless the daughter experiences complications that render her disabled and unable to care for herself.

When an employee goes out on leave to care for a terminally ill family member, what happens when the family member passes away?

The leave technically ends when the relative passes away. The FMLA does not cover time needed to arrange for the funeral, take care of the individual's estate, etc; at this point UMDNJ's Bereavement Policy will take effect.

An employee wants to take FMLA to take care of his adult son after routine surgery. Is this allowed?

No. The FMLA definition of child is: a) under 18, or b) age 18 or older and incapable of self-care because of a mental or physical disability. The employee would need to take vacation time or arrange for a personal leave; both would need to be approved by their supervisor.

Certification/Recertification

If an employee does not follow the time requirements to provide documentation will the leave be denied?

If the employee does not meet the time requirements they will be sent a final letter to produce documentation or return to work. If they do not produce the documentation within a reasonable period of time, leave will be denied or delayed.

When does HR determine if a second opinion is needed? Does the department have any say in this?

Second opinions can be obtained when the documentation does not support the leave request or looks suspicious. In addition, the department can request a second opinion if the leave has been requested after the employee has been denied vacation or if they request leave while having performance issues and there is significant evidence that the leave is an attempt to avoid further discipline. Be aware that the cost of the second opinion is the responsibility of the department. However, determining which Health Care Provider will be used is the responsibility of the University.

Do we require recertification every year for an employee with a chronic condition?

Yes. We require recertification at the end of every leave period. This may be each year but is often more frequent than that. Recertification can be required when employees are on intermittent leave and there has been a significant change in the manner in which employees are using the leave, it no longer conforms to the initial certification.

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Notification

What is the employee's notification requirement when they go on an expected leave?

If the need for leave is foreseeable based on an expected birth/adoption/placement, a planned medical treatment (for either themselves or a family member), or treatment/care of a covered service member, the employee is required to give 30 days' notice.

What are the notification requirements when an employee goes on unexpected leave?

When an employee becomes aware of a need for FMLA leave less than 30 days in advance, or if the need is an emergency and is immediate, the Department of Labor expects that it should be practicable for the employee to provide notice the same, or the next business day following the department's usual and customary call-in procedure.

What are the notification requirements when an employee goes on intermittent leave?

Depending on medical needs, intermittent FMLA may be scheduled (i.e., planned treatments) or unscheduled (i.e., migraines, asthma attacks). Planned leave for treatments should be done as far in advance as possible and in collaboration with the supervisor to minimize operational disruptions. For unscheduled absences, the employee needs to follow the regular department call-in procedure and specifically state that they are absent due to their FMLA qualifying reason. If they don't follow the call-in procedure or don't identify they are absent due to their FMLA, then you should count it as a regular unscheduled absence and apply the attendance control policy, as appropriate.

Can you discipline an employee who does not follow the notification requirements?

If an employee is on intermittent leave and does not follow the regular call-in procedures of the department to report absences due to FMLA, you can discipline the employee for both "not following

internal procedures" and address the absence(s) through the attendance control policy.

Intermittent Leave

Once leave runs out, how long before you can apply the attendance control policy due to chronic absenteeism? What if the absenteeism is related to the same condition?

Once the employee's leave runs out, all absences should be addressed through the attendance control policy regardless of the reason for the absence. While on FMLA, the employee cannot be disciplined for FMLA related absences but as soon as the leave runs out they should be held to the same standard as the rest of your employees.

Can an exempt employee be docked pay by the hour if they are on intermittent leave and run out of benefit time?

Yes. The Fair Labor Standards Act provides limited circumstances under which an exempt employees' pay may be docked without risking their exempt status. Unpaid leave taken under the FMLA is one of them.

Can I ask for a doctor's note when my employee takes an unscheduled absence while on intermittent FMLA?

No. However, if you are concerned that an employee is abusing their leave, contact HR and it is possible for HR to confirm medical requirements with the Health Care Provider.

If an employee is on intermittent FMLA can I ask that medical appointments be scheduled to accommodate our business needs?

Yes. Employees on intermittent FMLA for planned medical treatment (for themselves or a family member) are obligated to discuss the scheduling of the treatments and make every effort to minimize operational disruptions.

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Abuse of FMLA

What do I do if an employee applies for FMLA after being denied a vacation request?

Make sure to notify HR that the request for leave was preceded by a vacation denial for the same time period and HR may be able to require a second opinion before the leave is approved.

If I observe an employee on intermittent leave having unscheduled patterned absences (i.e., Monday/Friday, before/after holidays) what should I do?

Notify HR immediately and request that HR, or their designee, discuss the attendance pattern with the certifying Health Care Provider.

If you suspect an employee who is on approved FMLA is really not sick, what can I do?

Contact the HR Generalist so this can be investigated appropriately.

Working from Home

If an employee takes a leave to care for a seriously ill family member, can they work from home?

Employees out on FMLA should not be working from home. The Department of Labor is very clear that any time spent working must be counted as "hours worked" and should not count against the employees leave entitlement.

Should I allow someone on intermittent leave to work from home if they are unable to come into work?

Same as above.

Managing Performance

If an employee on intermittent FMLA is not performing their job well, can we use the normal disciplinary process for performance issues?

Yes. Approved FMLA does not void the employee's responsibility to perform their job while they are at work. However, before disciplining anyone who is on approved FMLA review the situation with Labor Relations to ensure the discipline will not be interpreted as retaliation.

I hired a temporary worker to fill in for an employee who needed 12 weeks of leave. The temp is doing a much better job than the original employee. Is there any way I can keep the temp?

The law states that, on return from FMLA leave, employees are entitled to return to the same or an equivalent position. However, in order for the position to be considered equivalent, it must be virtually identical. Therefore, the temp should not be retained, allowing the employee to return to their original position. If there are performance problems with the employee, it must be addressed through the progressive discipline process.

Communicating with Human Resources

When should I notify HR about an employee who may need FMLA?

As soon as you know that an employee may be eligible for FMLA, direct the employee to HR and call your HR Generalist. We are obligated to provide employees with FMLA materials within 5 days of being "put on notice" that leave may be required.

When will Human Resources notify me that an employee has applied for FMLA? When an employee is approved/denied FMLA?

Notification will be sent to the department manager as the application is received by HR and upon approval/denial of the leave.

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Miscellaneous

Can managers be held personally liable for FMLA violations?

Many courts have held that managers can be held individually liable for interfering with - or not facilitating the use of - an employee's FMLA rights. The FMLA defines the employer as "any person who acts directly or indirectly in the interest of an employer to any of the employer's employees". In other words, the Manager acts on behalf of the University and if those actions do not facilitate the use of FMLA, they can be held personally liable.

Can I call an employee at home while they are on FMLA?

We do not recommend calling employees at home while they are on leave. Although we realize that you may just want to "check-in" or "offer support", you do not want the employee to interpret these calls as pressure to return to work before they are ready.

I heard a rumor that an employee does not plan on returning to work when his/her leave ends, but the employee has not contacted me directly. Can I come right out and ask him/her about intent to return?

We recommend that you contact the HR Generalist and let them follow-up with the employee.

Can an employee on FMLA be laid off? Can they be bumped out of their position?

Yes. If the position was identified for layoff, the employee will receive the layoff letter at home. However, you must wait until the employee is medically cleared to return from leave before proceeding with the paper work. At the time the employee is cleared to return from leave, HR will identify and discuss possible vacancies to be filled, bumping rights, and/or the recall list.