



Family and Medical Leave **General FMLA Q & A**

Q1: What is the Family and Medical Leave Act (FMLA)?

A: The Family and Medical Leave Act of 1993 is a federal law that provides covered employees with the right to an unpaid leave of absence for up to 12 workweeks within a 12-month period, in order to address certain family and medical responsibilities. There is a provision expanding the leave to 26 workweeks during a single 12-month period to care for certain family members whose serious injury or illness was incurred or aggravated in the line of active military duty.

Q2: Which employees are eligible to take FMLA leave?

A: Employees are eligible for FMLA if they:

1. Have been employed by the State of Georgia for a total of at least 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. In general, employment before a break in service of seven or more years is not counted, unless the break in service is due to an employee's fulfillment of military obligations.
2. Have worked at least 1,250 hours for the State of Georgia in the 12 months immediately before the start date of Family and Medical Leave.
3. Have a qualifying reason for the absence (as outlined in section (5) of this Rule).
4. Have not already exhausted the available Family and Medical Leave entitlement for the 12-month period.

(Time worked for the State of Georgia in any employment capacity will count toward meeting the eligibility requirements. Such employment includes: full-time, part-time, temporary, seasonal, and sporadic employment, whether paid on a salaried or hourly basis, and previous employment with a temporary services agency on assignment with the state.)

Q3: Do the 1,250 hours include paid leave time or other absences from work?

A. No. The 1,250 hours includes only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, holidays, and periods of suspension and furlough are not included.



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Q4: When is an employee entitled to Family and Medical Leave?

A: Eligible State employees are entitled to up to 12 workweeks of unpaid leave during a rolling 12-month period measured backward from the date an employee uses any Family and Medical Leave, for any one or combination of the following reasons:

- For the birth and care of the newborn child of the employee within 12 months of the child's birth;
- When a child under the age of 18 is placed with an employee for adoption or foster care (leave is available for preliminary activities required for the placement and during the first 12 months after placement);
- To care for a spouse, child, or parent (not including in-laws) with a serious health condition;
- When the employee is unable to work because of his or her own serious health condition;
- For any qualifying exigency arising out of the employee's spouse, child, or parent (not including in-laws) being deployed, or on notice of upcoming deployment, to a foreign country as a member of the regular Armed Forces or as a result of a federal call to active National Guard or Reservist military duty in support of a contingency operation (typically during a war or declared national emergency).

An eligible employee is entitled to take up to 26 workweeks of Family and Medical Leave during a single 12-month period to care for a covered service member undergoing medical treatment, recuperation, therapy, or outpatient services, or who is otherwise on the temporary disability retired list, for a serious injury or illness received or aggravated in the line of active military duty.

Q5: How much leave is an employee entitled to under FMLA?

A: If an employee meets the eligibility criteria, he or she will be entitled to up to 12 workweeks of leave during a 12-month period for most types of Family and Medical Leave, or up to 26 workweeks if leave is taken to care for a covered service member.



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Q6: Do employees have to specifically request FMLA leave in order to be entitled to it?

A: No. Employees seeking FMLA leave need not specifically ask for it. The responsibility of the employee is to give the employer enough information to determine if the leave falls within FMLA eligibility. At that point, it is the employer's obligation to inquire further in order to decide whether the leave truly is covered or not.

It is often misunderstood that FMLA is like an accrual that may be "banked" and used at the employee's discretion. Actually, FMLA allows (and arguably requires) an employer to designate qualifying leave as FMLA-covered even though an employee may not want to "use" FMLA leave.

Q7: What is the relationship between FMLA and Workers' Compensation Programs?

A: Employee rights under the FMLA and Workers' Compensation are concurrent. Therefore, an employee with an on-the-job injury that also qualifies as a serious health condition may receive benefits under both the FMLA and state Workers' Compensation laws simultaneously. However, employees cannot receive Workers' Compensation wage loss benefits and *paid* FMLA leave concurrently. If an employee receives Workers' Compensation wage loss benefits, the employee cannot use accrued paid leave during this period of FMLA leave.

Q8: May an employee take FMLA leave "intermittently"?

A: An eligible employee is **entitled** to take FMLA leave intermittently in separate blocks of time, rather than as a continuous absence, or as a reduced work schedule as follows:

1. When such is certified as medically necessary for a serious health condition of the employee, spouse, child, or parent;
2. When certified as medically necessary to care for a covered service member's serious injury or illness;
3. For a qualifying exigency arising out of a spouse's, child's, or parent's military duty;
4. When required for preliminary activities needed for an adoption or foster care placement to proceed.



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State employers can **choose to allow** their eligible employees to use FMLA leave on an intermittent or reduced schedule basis for other reasons, such as to care for a healthy newborn or newly placed child.

Employees are expected to work with their employer to schedule intermittent leave, when possible, so that it does not unduly disrupt work operations. In some instances, the employer may elect to assign the employee to a temporary alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

Q9: How soon after an employee provides notice of the need for leave must an employer determine whether the individual is eligible for FMLA leave?

- A. Absent extenuating circumstances, an employer must notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five (5) business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

Along with the eligibility notice, the employer provides a notice of FMLA rights and responsibilities. Both notices can be combined into one document, and a US Department of Labor template may be used for this purpose. The rights and responsibilities notice is to include:

- A statement that the time off may count against the employee's FMLA entitlement if the reason for the leave qualifies for FMLA protection;
- Any requirement for the employee to furnish certification for the leave and the consequences for not doing so;
- The employee's right to use paid leave during the absence and whether the agency will require use of available paid leave;
- The employee's right to maintain benefits, any requirement for the employee to make premium payments to maintain health benefits, the arrangements for making payments during leave without pay, and possible consequences for not making payment;
- The employee's potential liability for payment of health insurance premiums paid by the employer during unpaid FMLA if the employee fails to return to work after FMLA leave;
- The employee's status as a key employee, if applicable; and,



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- The employee's right to restoration to the same or equivalent job at the end of FMLA leave.

If the leave has already begun, the notice should be mailed to the employee's address on record.

Q10: How soon after an employee provides notice of his/her need for leave must an employer notify the employee that the leave will be designated and counted as FMLA leave?

- A. When the employer has enough information to determine whether the leave qualifies as FMLA (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five (5) business days absent extenuating circumstances.

Q11: What information does the employer need to provide the employee in the designation notice?

- A. Employers must provide written notice to the employee that designates a leave as FMLA leave. This notice would include the following:
- That the leave will be counted against the employee's 12-workweek FMLA entitlement, or 26-workweek leave entitlement in the case of military caregiver leave;
 - The employee's right to elect to use paid leave for unpaid FMLA leave, whether the employer will require the use of paid leave, and the conditions relating to using paid leave;
 - Any requirement for presenting a fitness-for-duty certification before returning to the job;

Additionally, if the amount of leave needed is known, an employer must inform an employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (e.g., where the leave will be unscheduled and taken as needed medically), an employer must provide this information upon request by the employee, but no more often than every 30 days and only if leave was taken during that period.

If the leave has already begun, the notice should be mailed to the employee's address on record.



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Q12: If an employer fails to tell an employee timely that leave has been designated as FMLA leave, can the employer count the leave against the employee's FMLA leave entitlement?

- A. Retroactive designation is permitted if an employer fails to timely designate and/or notify the employee that leave will be counted as FMLA leave, but only under two circumstances. First, an employee and employer may agree at any time to retroactively designate an absence as FMLA-protected. Second, the employer may retroactively designate leave as FMLA-protected upon giving the appropriate notice to the employee, if the retroactive designation would not cause harm to the employee. The employer would not be able to retroactively designate FMLA leave, however, if the employee can show harm or injury as a result of the untimely designation.



EXAMPLE: An employee plans to take 12 workweeks of FMLA leave beginning in August for the birth of his child. Earlier in the leave year, however, the employee took two workweeks of annual leave to care for his mother following her hospitalization for a serious health condition. The employee's employer failed to notify him at the time of his mother's hospitalization that the time spent caring for his mother would be counted as FMLA leave. If the employee can establish that he would have made other arrangements for the care of his mother if he had known that the time would be counted against his FMLA entitlement, the two weeks his employer failed to appropriately designate may not count against his FMLA entitlement.

The same employee could not claim that the retroactive designation caused him harm if his first absence was because he himself was medically unable to work, rather than caring for someone else. The reason why he could not claim harm is because the employee in this case did not have a choice to come to work and save his FMLA for a future absence; he was medically unable to work and had to take the time off.

Q13: Can the employer count leave taken due to pregnancy complications against the 12 workweeks of FMLA leave for the birth and care of a child?

- A. Yes. An eligible employee is entitled to a total of 12 workweeks of FMLA leave in a 12-month period. If the employee has to use some of that leave for another reason, including a difficult pregnancy, it may be counted as part of the 12-workweek FMLA leave entitlement.

Q14: How much notice must an employee give before taking FMLA leave?

- A. When the need for leave is foreseeable, such as when it is based on an expected birth, placement for adoption or foster care, or planned medical treatment, an



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employee must give at least 30 days' notice. If 30 days' notice is not possible, an employee is required to provide notice "as soon as practicable" (that is to say, both possible and practical). The regulations clarify that it should be practicable for an employee to provide notice of the need for foreseeable leave either the same day or the next business day after the employee learns of the need for leave. But, the determination of when an employee could practicably provide notice will always be based on the particular facts and circumstances. When the need for FMLA leave arises suddenly, and the absence is unplanned, the employer may require the employee to follow customary call-in procedures.

Q15: *What information must an employee give when providing notice of the need for FMLA leave?*

- A. When an employee seeks leave for the first time for an FMLA-qualifying reason, the employee does not need to specifically assert his or her rights under the FMLA, or even mention the FMLA. The employee must, however, provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

Depending on the situation, "sufficient information" may include that the employee has been to the doctor multiple times for a condition that incapacitated the employee for more than 3 days in a row; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; that a spouse, parent, or child is on active duty in a foreign country and that the requested leave is needed because of this deployment; that a medical condition renders a spouse, parent, or child unable to perform daily activities; or that a family member is a covered service member with a serious injury or illness. The employee must also provide the anticipated duration of the absence, if known.

Where an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must either specifically state the qualifying reason for leave or the need for FMLA leave.

Q16: *What information may an employer request regarding an employee's medical condition?*

- A. Employers may request a complete and sufficient medical certification that documents the basis for an employee's request, the period for which leave is being requested, and the anticipated return to work date.

Employers must comply with the Genetic Information Nondiscrimination Act (GINA), and, therefore, may not request 'genetic information,' including family



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medical history. An exception applies that allows employers to request the medical facts of a family member's condition when an employee is asking for FMLA leave to care for that family member.

Q17: How soon after an employee requests leave must an employer request medical certification of a serious health condition?

- A. In most cases, an employer should request medical certification at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave begins. An employer may request certification at a later date if it has reason to question the appropriateness or duration of the leave.

Q18: How long does an employee have to return the completed medical certification?

- A: An employee has 15 calendar days from the date of request to return the completed medical certification.

Q19: What happens if an employer determines that the medical certification is incomplete?

- A. An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The employer must state in writing what additional information is necessary to make the certification complete and sufficient. An employee is then entitled to at least seven (7) calendar days to cure the deficiency, unless seven days is not practicable under the particular circumstances despite the employee's diligent good faith efforts.

Q20: May an employer contact an employee's healthcare provider to discuss the employee's serious health condition?

- A. Employers may contact an employee's healthcare provider for authentication or clarification of the medical certification without the need of receiving permission from the employee. An employer may confirm with the healthcare provider that the information on the certification was completed or authorized by the provider who signed, and may request clarification of the handwriting or meaning of a response. Employers may not directly ask healthcare providers for information beyond that contained on the certification form, unless they seek written authorization from the employee.

Employer contact may be made only by a healthcare provider, a Human Resources professional, a leave administrator, or a management official. **In no**



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case may the employee's direct supervisor contact the employee's healthcare provider.

Q21: *May employers require employees to execute a medical release as part of the medical certification process?*

- A. No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the healthcare provider to provide a complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.

Q22: *How often may an employer ask for medical certifications for an on-going serious health condition?*

- A. An employer can ask an employee, who is on leave, for recertification every 30 days unless the employee has previously submitted medical certification that the condition will last for more than 30 days. If an employee's condition has been certified to last more than 30 days, the employer may not request a recertification until that specified period has passed, unless the period is longer than six months (in the case of intermittent leave). An employer may always request recertification every six months in connection with an absence by the employee. An employer may also request recertification before 30 days have passed if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly, or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

Q23: *May employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?*

- A. Yes. An employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for their own serious health condition to submit a certification from the employee's healthcare provider that the employee is able to resume work. An employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the employer has appropriately notified the employee in the initial designation notice that this information will be required and has provided a list of essential functions.



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Additionally, an employer may require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if the condition for which leave is being taken creates a reasonable safety concern regarding the employee's ability to perform his or her duties.

Typically, an employer should not require fitness-for-duty certification before allowing an employee to return to work following childbirth. An exception applies if an employee returns to work before the date of medical release on a previously documented healthcare provider certification.

Q24: What happens if an employee does not submit a requested certification?

- A. If an employee fails to timely submit complete and sufficient certification to support the use of FMLA leave (absent diligent, good faith efforts to do so), FMLA protection for the leave may be delayed or denied. If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.

Q25: Does Workers' Compensation leave count against an employee's FMLA leave entitlement?

- A. It can. FMLA leave and Workers' Compensation leave can run together, provided the on-the-job accident/illness qualifies as a serious health condition under the FMLA.

Q26: How do holidays affect FMLA leave?

- A. If a holiday falls within a full week of Family and Medical Leave, then it counts toward the Family and Medical Leave entitlement as if it were a workday. If a holiday falls within a week during which an employee used Family and Medical Leave for only part of the week, then the holiday does not count toward the Family and Medical Leave entitlement.

Q27: Can we require employees to return to work before they have exhausted their FMLA leave?

- A. Eligible employees who have properly requested and certified the need for FMLA leave are entitled to be absent for the period during which they have a qualifying reason for the absence up to a maximum of 12 workweeks in a 12-month period (or 26 workweeks for Military Caregiver FMLA leave). If an employee is using FMLA leave during an absence covered by Workers' Compensation, an employer may offer a light duty assignment in accordance with the state's Return-to-Work program. If the employee declines, and the absence continues



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to qualify as a FMLA-covered serious health condition, the employer cannot require the employee to return to accept the light duty. The employee's Workers' Compensation wage loss benefits may, however, be jeopardized.

Q28: Are there any restrictions on how an employee spends his or her time while on designated FMLA leave?

- A. State Personnel Board Rule 16 – *Absence from Work* provides that employees must have written authorization from the agency before accepting other employment or engaging in self-employment while on an authorized leave of absence. Otherwise, the employer may not restrict an employee's activities. The protections of FMLA will not, however, cover situations where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.

Q29: Can an employer deny an employee's request for FMLA leave?

- A. If an individual is an "eligible" employee with a qualifying reason and has met FMLA's notice and certification requirements (and has not exhausted FMLA leave entitlement for the year), the employer may **not** deny the FMLA leave.

Q30: Can an employer fire someone for taking FMLA leave?

- A. Generally, no. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under the FMLA. Employers cannot use the taking of FMLA leave as a negative factor in employment decisions. An employee may be disciplined, however, for fraudulently taking FMLA leave.

Q31: Are there other circumstances in which an employer can or should deny FMLA leave or reinstatement?

- A. Yes. A "key employee" (i.e., a salaried employee among the highest-paid 10% of the employer's total workforce) may be denied reinstatement if the employer determines that reinstatement would cause substantial and grievous economic injury to its operations, and the employee was given the proper notice and failed to return to work by the timeframe identified in such notice.

Employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave.

Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to reinstatement.



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Employees who are unable to return to work and have exhausted their 12 workweeks of FMLA leave in the designated “12 month period” (or 26 workweeks of Military Caregiver FMLA leave) no longer have the FMLA protections of leave or job restoration. Under certain circumstances, employers who advise employees experiencing a serious health condition that they will require a medical certificate of fitness-for-duty to return to work, may deny reinstatement to an employee who fails to provide the certification, or may delay reinstatement until the certification is submitted.

Q32: *What happens when an employee exhausts FMLA leave but is still not fit to return to regular duty?*

- A. A situation may arise where an employee has exhausted the 12 weeks of FMLA leave but is not medically cleared to return to work. Employers should interact with the employee to determine whether the employee’s medical condition rises to the level of a disability as defined by the Americans with Disabilities Act, as amended, (ADAAA) and if so, if there is a reasonable accommodation available. Such reasonable accommodation may include, but is not limited to, additional time off or working part-time.

Q33: *What is the next step to take when an employee with a disability requests additional leave after exhausting Family and Medical Leave, but it has been determined that the agency cannot hold the position open any longer because of undue hardship?*

- A. Under the Americans with Disabilities Act, as amended, (ADAAA) a qualified employee with a disability is entitled to return to the same job unless the employer demonstrates that holding the job open would impose an undue hardship. When an eligible employee exhausts FMLA leave, the employee may request additional time to return to work under ADAAA even after the employer has communicated that it cannot hold the employee's job open any longer (i.e., undue hardship). In this situation, the employer must determine if it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave, without undue hardship to the employer. If an equivalent position is not available, the employer must look for a vacant position at a lower level, without undue hardship. Continued accommodation is not required if a vacant position is not available.



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Q34: How can an employer determine whether an employee is entitled to FMLA leave for a child for whom the employee stands in loco parentis?

- A. Employees may be found to be standing *in loco parentis* if they provide day-to-day care and/or financial support for a child. As a general rule, the more day-to-day responsibilities and/or financial support an employee provides for the child, the more likely he or she qualifies for FMLA leave to care for that child.

An employee who substitutes for or shares in the raising of a child with the child's biological or legal parent is entitled to leave for the child's birth, adoption, care, or military-related Family and Medical Leave. For example, a grandparent, family friend, or unmarried partner (including a same-sex partner) may fall into this category, so long as they provide day-to-day care and/or financial support for the child. The fact that the employee has no legal relationship to the child should not be considered when administering the FMLA. Also note that an employee may take leave to care for a person who once stood *in loco parentis* to the employee.

An employer may require an employee to provide reasonable documentation to support *in loco parentis* status. The Department of Labor has indicated that the burden on the employee to provide documentation is light – a simple statement asserting that such a family relationship exists will be enough. If you wish to require more stringent documentation we recommend you consult with your legal counsel before doing so.

Q35: Does it matter how many parents a child has under FMLA?

- A. There is nothing in the FMLA statute or regulations that restricts or limits the number of parents a child may have under FMLA. A common example is when a child's biological parents divorce and each parent remarries – in this situation the child would be the "son or daughter" of all four parents, the two biological parents and the two stepparents.

Q36: How does the FMLA treat Same-Sex Marriages?

- A. The same as other lawful marriages. Beginning June 26, 2015, state employees in lawful same-sex marriages, who are otherwise eligible for FMLA, have full FMLA rights for qualifying absences for their spouses.



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Q37: How does the FMLA treat Common-Law Marriages?

- A. Even though Georgia does not recognize common law marriages entered into on or after January 1, 1997, under the regulations, if an employee entered into a common law marriage in a jurisdiction which DOES recognize such marriages, Georgia employers are required to extend Family and Medical Leave for qualifying absences related to the common law spouse.

Q38: May an employee take FMLA leave to care for their adult child with a serious health condition?

- A. There are four requirements that must be met before an employee will be eligible to take FMLA leave to care for an adult child 18 years of age or older. The adult child must (1) have a disability as defined by the Americans with Disabilities Act, as amended, (ADAAA); (2) be incapable of self-care due to that disability; (3) have a serious health condition; and (4) be in need of care due to the serious health condition during the period of the requested leave. The ADAAA broadened the scope of “disability,” allowing for a number of conditions to meet the first prong of the adult child leave criteria. “Incapable of self-care” means that the adult child requires active assistance or supervision to perform three or more daily living activities, including but not limited to, caring appropriately for one’s grooming and hygiene, bathing, dressing, eating, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. Because serious health conditions can involve episodic impairment, it is important to seek information from the attending healthcare provider to determine the current effect of the condition and whether the adult child needs assistance during the period of requested leave.

The age of the adult child at onset of a disability or serious health condition is not relevant in determining whether the individual is an “adult child” for whose care the employee may take FMLA leave. Thus, an employee’s child need not have had the disability or serious health condition before reaching adulthood, rather, the adult child may develop a disability or serious health condition later in life.