

CALIFORNIA EMPLOYMENT  
LAW CORNER *By Jessica A. Braverman, Esq.*

## Understanding the Federal Family Medical Leave Act (FMLA)

One of the most misunderstood leaves in employment appears to be the Federal Family Medical Leave Act or FMLA, as it is better known. Employers and Employees tend to confuse when this leave is triggered, who is covered and for what type of situation. Now starting in 2008, FMLA has been expanded to include a special Military Leave. Both Employers and Employees are struggling to comprehend it all.

### The Beginning of FMLA

The Federal Family Medical Leave Act came about in February 1993 during the Clinton administration as a response to women's concerns about keeping their job or losing benefits after the birth or arrival of a child. However, since its passage, FMLA has morphed and evolved into much broader applications. Today FMLA is taken by men and women because of a birth, adoption or to care for a spouse or child who has a serious health care condition, for the serious health condition of the employee, or for the military deployment of a spouse or child. It is estimated that over 35 million employees have taken FMLA leave since 1993.

### The Basics of FMLA

FMLA applies to employers with 50 or more employees within a 75 mile radius. That means if the employer has 25 employees in San Francisco and 25 employees in Los Angeles, that employer legally does not have to offer FMLA since the total of 50 employees is not within a 75 mile radius of each other. Assuming the Employer qualifies to offer FMLA or chooses to do so, the employee, to qualify to use this leave must have been at the job at least a year (12 full months) and have worked at least 1,250 hours during that 12 month period. The employee must give the employer 30 days notice (when practical) to take the FMLA leave and the employer may require employees to first use vacation or other leave before applying for FMLA. FMLA leave is unpaid leave for a total of 12 weeks per year. Where both the husband and the wife work at the same company, the employer may restrict the couple to a total of 12 weeks leave per year.

Employers may require the employee to show medical confirmation of an illness and also to show medical confirmation to return to work. Employers must hold the employee's job open during FMLA leave unless the employer can document that the granting of the FMLA

leave will cause such financial hardship that the employer would be financially devastated by holding the position open (and other minor exceptions).

### Frequent Questions and Answers from the Department of Labor Website

*Q: How is the 12-month period calculated under FMLA?*

Employers may select one of four options for determining the 12-month period: the calendar year; any fixed 12-month "leave year" such as a fiscal year, a year required by state law, or a year starting on the employee's "anniversary" date; the 12-month period measured forward from the date any employee's first FMLA leave begins; or a "rolling" 12-month period measured backward from the date an employee uses FMLA leave.

*Q: Does workers' compensation leave count against an employee's FMLA leave entitlement?*

It can. FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

*Q: Can the employer count leave taken due to pregnancy complications against the 12 weeks of FMLA leave for the birth and care of my child?*

Yes. An eligible employee is entitled to a total of 12 weeks 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-week FMLA leave entitlement.

*Q: Can the employer count time on maternity leave or pregnancy disability as FMLA leave?*

Yes. Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave so long as the employer properly notifies the employee in writing of the designation.

*Q: If an employer fails to tell employees that the leave is FMLA leave, can the employer count the time they have already been off against the 12 weeks of FMLA leave?*

In most situations, the employer cannot count leave as FMLA leave retroactively. Remember, the employee must be notified in writing that an absence is being designated as FMLA leave. If the employer was not aware of the reason for the leave, leave may be designated as FMLA leave retroactively only while the leave is in progress or within two business days of the employee's return to work.

*Q: Who is considered an immediate "family member" for purposes of taking FMLA leave?*

An employee's spouse, children (son or daughter), and



parents are immediate family members for purposes of FMLA. The term “parent” does not include a parent “in-law.” The terms son or daughter do not include individuals age 18 or over unless they are “incapable of self-care” because of mental or physical disability that limits one or more of the “major life activities” as those terms are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act.

*Q: May I take FMLA leave for visits to a physical therapist, if my doctor prescribes the therapy?*

Yes. FMLA permits you to take leave to receive “continuing treatment by a health care provider,” which can include recurring absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay or for treatment of severe arthritis.

*Q: Do the 12 months of service with the employer have to be continuous or consecutive?*

No. The 12 months do not have to be continuous or consecutive; all time worked for the employer is counted.

*Q: Do I have to give my employer my medical records for leave due to a serious health condition?*

No. You do not have to provide medical records. The employer may, however, request that, for any leave taken due to a serious health condition, you provide a medical certification confirming that a serious health condition exists.

*Q: Can my employer require me to return to work before I exhaust my leave?*

Subject to certain limitations, your employer may deny the continuation of FMLA leave due to a serious health condition if you fail to fulfill any obligations to provide supporting medical certification. The employer may not, however, require you to return to work early by offering you a light duty assignment. (For more information go to: <http://www.dol.gov/elaws/esa/fmla/faq.asp> or the department of labor website.)

**The 2008 addition to FMLA pertaining to Military issues:**

Starting in January 2008, President Bush signed a new law that extended FMLA to allow the use of up to 12 weeks of unpaid leave for any qualifying exigency arising from the fact that a spouse, son, daughter or parent of an employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces. As of May 2008, Congress has not created the definition of “qualify exigency” as required by this new law and thus employers and employees are grappling with the application of this new law.

Additionally, the new law also provides that an

employee who is the spouse, son, daughter, parent or next of kin of a covered service member shall also be entitled to a total of 26 workweeks of leave during a 12-month period to care for the service member. Employers may require medical certification in support of this request.

For more information about FMLA, contact Jessica@CAELTC.com or call the California Employment Law Training Center at (925) 827-4198, a San Ramon Chamber member. Also, if you are an employer or employee interested to learn more about the two new Military Leave Laws, hold the date of July 10, 2008 from noon to 1:30 PM open as the Contra Costa County Bar Association is working with Jessica Braverman, Esq. and the employment law section of the CCCBA on a possible seminar on this topic.



*This is a regular column being brought to you by California Employment Law Training Center, a member of the San Ramon Chamber of Commerce. This column is for informational purposes only and is not intended to provide legal advice. Each issue, Jessica will address employment law related topics and all members are encouraged to submit questions or topic ideas to Jessica directly at Jessica@CAELTC.com.*

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