

Compliance Overview

Highlights

This Compliance Overview provides key guidance for employers on substitution of paid leave under the FMLA, including:

- FMLA background;
- General rules on substitution of paid leave;
- Non-FMLA leave;
- Disability leave plans;
- Workers' compensation; and
- Interaction with the federal FLSA, including exempt employees, fluctuating workweeks and limitations.



Navigating FMLA Rules on Substitution of Paid Leave

The federal Family and Medical Leave Act (FMLA) provides eligible employees of covered employers with job-protected leave for qualifying family and medical reasons. The FMLA only requires unpaid leave. However, the law permits an employee to elect, or an employer to require an employee, to use accrued paid vacation, sick or family leave for some or all of the FMLA period.

The rules surrounding the substitution of paid leave are complex. Employers must comply with these rules in order to help ensure employees are afforded their FMLA rights and avoid costly lawsuits. This Compliance Overview provides key guidance for employers on the substitution of paid leave under the FMLA.

This document provides general rules for private-sector employers; additional rules may apply. Also, some states have their own family and medical leave laws. Employers should check all applicable laws, including federal, state and local laws, and follow the provisions that provide the greatest benefit to employees.

Links and Resources

- [Family and Medical Leave Act Employer Guide](#), a publication of the U.S. Department of Labor, Wage and Hour Division (WHD)
- [FMLA Frequently Asked Questions](#) from the WHD
- [FMLA regulations](#)

Provided by **Connor & Gallagher OneSource**

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FMLA Background

Coverage

The FMLA generally applies to (among other entities) private sector employers with **50 or more employees**. To be eligible for FMLA leave, an employee working for a covered employer generally must:

- ✓ Have worked **1,250 hours** during the 12 months before the start of leave;
- ✓ Work at a location where the employer has 50 or more employees **within 75 miles**; and
- ✓ Have worked for the employer for **12 months**.

Amount and Reasons for Leave

A covered employer must grant an eligible employee up to a total of **12 workweeks** of unpaid, job-protected leave in a 12-month period for one or more of the following reasons:

- ✓ For the **birth** of a son or daughter and to bond with the newborn child;
- ✓ For the **placement** of a child with the employee for adoption or foster care and to bond with that child;
- ✓ To **care for an immediate family member** (spouse, child or parent, but not a parent-in-law) with a serious health condition;
- ✓ To take medical leave when the **employee is unable to work** because of a serious health condition; or
- ✓ For **qualifying exigencies** because the employee's spouse, son, daughter or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves or Regular Armed Forces.

The FMLA also allows eligible employees to take up to **26 workweeks** of unpaid, job-protected leave in a single 12-month period to **care for a covered service member** with a serious injury or illness. (The two types of leave noted above that are related to military service—qualifying exigency leave and military caregiver leave—are referred to as **military family leave**.)

Substitution of Paid Leave

General Rules

FMLA leave is generally unpaid; however, under the circumstances described below, eligible employees **may choose to substitute accrued paid leave for FMLA leave**. If an employee does not choose to substitute accrued paid leave, the employer **may require** the employee to do so.

Definition: "Substitute" means that paid leave provided by an employer, and accrued under its established policies, will run **concurrently** with unpaid FMLA leave. Thus, an employee receives pay under the employer's applicable paid leave policy during otherwise unpaid FMLA leave.

For the purpose of substituting accrued paid leave, an employee must have both **earned** the leave and **be able to use** that leave during the FMLA leave period. An employer may not require an employee to substitute leave that is **not yet available** to use under the employer's leave plan. However, an employer may **voluntarily advance** paid leave to an employee, and an employee may **voluntarily accept** such leave during an FMLA absence.

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An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's **normal leave policy**. For example, an employer is **not** obligated to allow an employee to substitute paid sick leave for unpaid FMLA leave to care for a child with a serious health condition if the employer's normal sick leave rules allow such leave only for the employee's illness.

When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer **must inform** the employee (in a Rights and Responsibilities Notice) that they must satisfy any procedural requirements of the paid leave policy **only in connection with the receipt of such payment**. If an employee does not comply with the additional requirements in an employer's policy, the employee is **not** entitled to substitute accrued paid leave, but they **remain entitled to take unpaid FMLA leave**. Employers may **not** discriminate against employees on FMLA leave in the administration of their paid leave policies.

Key Point: If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA under the rules above, the employee **will remain entitled to all paid leave** earned or accrued under the employer's plan.

When paid leave is used for an FMLA-covered reason, the leave is FMLA-protected.

Doctor's Notes

When an employer has a uniformly applied policy to require a doctor's note for each absence for **all employees** using paid leave (non-FMLA and FMLA leave), an employee using paid sick leave concurrently with unpaid FMLA leave **must also provide a doctor's note** for each absence in order to receive the paid sick leave. However, if the employee does not provide a doctor's note, they **would still be entitled to take unpaid FMLA leave**.

Non-FMLA Leave

If an employee uses paid leave under circumstances that do **not** qualify as FMLA leave, the leave will **not** count against the employee's FMLA entitlement. For example, paid sick leave used for a medical condition that is not a serious health condition or serious injury or illness does not count against the employee's FMLA entitlement.

Disability Leave Plans

As a general matter, benefits under a disability leave plan may provide guaranteed **income** to employees who are unable to work due to serious illness or injury. Leave taken under a disability leave plan would be considered FMLA leave for a serious health condition and counted in the FMLA entitlement if it meets the criteria in the federal [regulations](#) (see §§ 825.112 through 825.115). In these cases, an employer **may designate** the leave as FMLA and count it against the employee's FMLA entitlement.

Key Point: Because leave under a disability benefit plan is **paid**, the provision for substitution of the employee's accrued paid leave is inapplicable, and **neither the employee nor the employer may require the substitution of paid leave**.

That said, employers and employees may agree, where state law permits, to have paid leave **supplement** disability plan benefits, such as in cases where a plan provides replacement income for only two-thirds of an employee's salary.

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Workers' Compensation

In general, state laws provide **workers' compensation benefits** to employees who are unable to work because of a **work-related** injury or illness. Under the FMLA, a serious health condition may result from injury to an employee **on or off** the job (and thus can include a workers' compensation injury). If an employer designates the leave as FMLA in accordance with the federal regulations, the leave **counts against** the employee's FMLA entitlement.

Key Point: Similar to leave under a disability benefit plan, because a workers' compensation absence is **paid**, the provision for substitution of the employee's accrued paid leave is inapplicable, and **neither the employee nor the employer may require the substitution of paid leave**.

That said, employers and employees may agree, where state law permits, to have paid leave **supplement** workers' compensation benefits, such as in cases where workers' compensation only provides replacement income for two-thirds of an employee's salary.

If a healthcare provider treating an employee for a workers' compensation injury certifies the employee is able to return to a light-duty job but is **unable** to return to the same or equivalent job, the employee **may decline** an employer's offer of a light-duty job. As a result, the employee may lose workers' compensation payments **but is entitled to remain on unpaid FMLA leave** until the employee's FMLA entitlement is exhausted. Beginning on the date workers' compensation benefits **cease**, the substitution provision becomes applicable, and **either the employee may elect or the employer may require** the use of accrued paid leave.

Interaction With the FLSA

Exempt Employees

If an employee is otherwise exempt from minimum wage and overtime requirements of the federal Fair Labor Standards Act (FLSA) and its [regulations](#) as a salaried executive, administrative, professional or computer employee, providing unpaid FMLA-qualifying leave **will not cause the employee to lose the FLSA exemption**. Thus, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer **may make salary deductions** for hours taken in a workweek as intermittent or reduced FMLA **without affecting the employee's exempt status**.

In addition, the fact that an employer provides FMLA leave (whether paid or unpaid) and maintains required FMLA records will **not** be relevant when determining whether an employee is exempt.

Fluctuating Workweeks

For an employee paid using the [fluctuating workweek method of payment for overtime](#), the employer—during the period in which intermittent or reduced schedule FMLA is scheduled to be taken—may compensate the employee on an **hourly basis** and pay **only for the hours the employee works** (including time and one-half their regular rate for overtime hours). The change to payment on an hourly basis would include the **entire period** during which the employee is taking intermittent leave, including weeks in which **no leave** is taken. The hourly rate is determined by dividing the employee's weekly salary by their normal or average schedule of hours worked during weeks in which FMLA is **not** being taken.

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Key Point: If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer **must do so uniformly, with respect to all employees** paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis.

If an employer does **not** elect to convert the employee's compensation to hourly pay, **no deduction may be taken** for FMLA absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating workweek basis.

Limitations

The exception above to the salary basis requirements or fluctuating workweek payment requirements applies **only to employees of covered employers who are eligible for FMLA and to leave that qualifies as FMLA**. Hourly or other deductions that are not in accordance with the regulations may **not** be taken (e.g., from the salary of an employee who works for an employer with fewer than 50 employees or where the employee has not worked long enough to be eligible for FMLA) **without potentially affecting the employee's eligibility for exemption**. Deductions that are not permitted by the regulations may also **not** be taken from such an employee's salary for:

- ☒ Leave that is **more generous** than that provided by the FMLA; or
- ☒ Leave that does **not qualify** as FMLA, such as deductions from an employee's pay for leave required under state law or under an employer's policy/practice for a reason not covered under the FMLA (e.g., to care for a grandparent or for a medical condition that is not a serious health condition or serious injury/illness).

Employers may comply with state law or their own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by **not taking hourly deductions from the employee's pay**, in accordance with FLSA requirements. Alternatively, employers **may take such deductions**, treating the employee as an **hourly employee and paying overtime premium pay** for hours worked over 40 in a workweek.

Conclusion

FMLA compliance can be tricky, particularly when it comes to the rules for substitution of paid leave. Employers must comply with complex rules in order to help ensure employees are afforded their FMLA rights and to avoid costly lawsuits. Following the guidance outlined in this Compliance Overview can aid employers in complying with the rules on substitution of paid leave under the FMLA.