

Compliance Overview

Highlights

Employers should take the following steps to calculate the amount of leave available and the amount of leave used under the FMLA:

- Determine how much leave the employee needs;
- Determine how much leave the employee has available;
- Convert workweeks to hours;
- Count FMLA leave use;
- Consider overtime, holidays and concurrent leave; and
- Remember special rules and additional protections.



Steps to Calculate Leave Under the FMLA

The federal Family and Medical Leave Act (FMLA) provides eligible employees of covered employers with job-protected leave for qualifying family and medical reasons. It requires continuation of their group health benefits under the same conditions as if they had not taken leave. FMLA leave may be unpaid or used at the same time as employer-provided paid leave.

In order to help ensure employees are afforded their FMLA rights and avoid costly lawsuits, employers must properly calculate both the amount of leave employees have available and the amount of leave employees use. This Compliance Overview provides steps for employers to count the amount of leave available and the amount of leave used under the FMLA.

Employers should be aware that additional protections may apply. For example, some states have their own family and medical leave laws. Employers should be sure to check all applicable laws, including federal, state and local laws.

Links and Resources

- [Family and Medical Leave Act Employer Guide](#), a publication of the U.S. Department of Labor (DOL) Wage and Hour Division (WHD)
- [Fact Sheet #28I: Counting Leave Use Under the Family and Medical Leave Act](#), from the WHD
- [Fact Sheet #28H: 12-month Period Under the Family and Medical Leave Act](#), from the WHD

Provided by **Connor & Gallagher OneSource**

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Background

The FMLA applies to (among other entities) private-sector employers with 50 or more employees for at least 20 workweeks in the current or preceding calendar year (including joint employers and successors of covered employers). In order to be eligible to take leave under the FMLA, an employee generally must:

- ☒ Work for a covered employer;
- ☒ Have worked 1,250 hours during the 12 months prior to 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.

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 an employee for adoption or foster care, and to bond with that child;
- ☒ To care for an immediate family member 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 arising out of the fact that 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 servicemember with a serious injury or illness.

Step #1: Determine How Much Leave the Employee Needs

Employers should determine how much leave a requesting employee will need. Employers may be able to gather this information from the employee's leave notice or from their certification. Specifically, employees must provide **notice** of their need for FMLA leave. An employee's notice of a need for FMLA leave may be oral or written. The first time the employee requests leave for a qualifying reason, they are not required to specifically mention the FMLA. However, the employee is required to provide enough information for the employer to know that the leave may be covered by the FMLA. For foreseeable leave, the employee must also indicate **when and how much leave is needed**.

Additionally, in certain circumstances, an employer may require that an employee submit a **certification** to support the employee's need for FMLA leave. The certification is a document or form that is completed by the employee and, as appropriate, a healthcare provider. The certification will allow the employer to:

- ☒ Obtain information related to the FMLA leave request, including the **likely periods of absences**; and
- ☒ Verify that an employee, or the employee's ill family member, has a serious health condition (or, in the case of military family leave, that facts exist to support the employee's request for such leave).

Circumstances When an Employer May Require a Certification

An employer may require a certification when an employee requests leave for:

- ☒ The employee's own serious health condition (an employer may also, in certain circumstances, require a fitness-for-duty certification at the conclusion of the employee's leave as a condition to returning the employee to the job);

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- ☑ The serious health condition of the employee's parent, spouse, son or daughter; and
- ☑ Military family leave.

Key Points: Employers may **not** request a certification for leave to bond with a healthy newborn child or a child placed for adoption or foster care. However, employers may request documentation to confirm the family relationship.

Step #2: Determine How Much Leave the Employee Has Available

Next, employers should determine how much leave the requesting employee has available. Eligible employees may use up to 12 workweeks of FMLA leave in a 12-month period (up to 26 workweeks of leave in a single 12-month period for military caregiver leave). An employee's **actual workweek** is the basis for determining their FMLA leave entitlement. Employees do not accrue FMLA leave at any particular hourly rate.

Eligible employees may use up to 12 workweeks of FMLA leave in a defined 12-month period or "leave year" for the birth or placement of a child, care of a family member with a serious health condition, their own serious health condition and qualifying exigencies related to a family member's foreign deployment. The 12-month period may be based on:

- ☑ The calendar year;
- ☑ Any fixed 12-month period, such as a year starting on the employee's anniversary date, a fiscal year or a 12-month period required by state law;
- ☑ A 12-month period measured forward from the first date an employee takes FMLA leave; or
- ☑ A rolling 12-month period measured backward from the date an employee takes FMLA leave.

When an employee's need for FMLA leave extends beyond the 12-month leave year, the additional time the employee requests may be available in the next leave year.

Step #3: Convert Workweeks to Hours

Employees' entitlement to FMLA leave **may be converted from workweeks to an hourly equivalent** for ease of tracking. This conversion must be based on the employee's total normally scheduled hours.

Example #1: If an employee is regularly scheduled to work 50 hours per week, they are entitled to 600 hours of FMLA leave in a 12-month period.

Where an employee takes FMLA leave for less than a full workweek, the amount of FMLA leave used is determined as a **proportion** of the employee's actual workweek. The amount of FMLA leave taken is divided by the number of hours the employee would have worked if the employee had not taken leave of any kind (including FMLA leave) to determine the proportion of the FMLA workweek used.

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Example #2: An employee who normally works 30 hours a week but works only 20 hours in a week because of FMLA leave would use one-third of a week of FMLA leave.

In most cases, even employees whose schedules are subject to seasonal variations have an established schedule and verifiable work history that can be used to determine the days and hours they are expected to work. However, when an employee's schedule varies so much that the employer is unable to determine how many hours the employee would have worked during the week the employee takes FMLA leave, the employer may use a **weekly average** to calculate the employee's FMLA leave entitlement. The weekly average is determined by the hours scheduled over the 12 months prior to the beginning of the leave and includes any hours for which the employee took any type of leave.

Step #4: Count FMLA Leave Use

Employers should remember to count an employee's FMLA leave use. Employees may **not** be required to use more FMLA leave than is needed for a qualifying reason. Employees may use FMLA leave in whole weeks, single days, hours or, in some cases, less than an hour. Employees may use FMLA leave in the smallest unit of time made available by their employer for other types of leave, as long as that smallest unit of time is not greater than an hour.

Only the amount of leave an employee **actually takes** from work may be counted against an employee's FMLA leave entitlement. Likewise, time an employee is not scheduled to report for work may **not** be counted as FMLA leave. If employees are not expected to report for work for one or more weeks—for example, if they work at a school that closes two weeks for the winter holiday, or a plant that closes for a week for repairs—the days the employer's business activities have stopped do not count against the worker's FMLA leave.

Example #3: Ginger works Sunday through Thursday. She does not work on Fridays or Saturdays. Ginger receives treatment from a healthcare provider on Thursdays and Fridays for a serious health condition. She uses FMLA leave when she receives treatment on Thursdays, but does **not** need to take FMLA leave for the treatment she receives on Fridays, which is a nonworkday for Ginger.

Example #4: Jackson's father has a serious health condition. Jackson works offshore for two weeks and has two weeks off before he returns to work. Jackson helps his sister with his father's care when he is off work. He does **not** use FMLA leave when he is not scheduled to work.

Step #5: Consider Overtime, Holidays and Concurrent Leave

Employers may need to consider additional issues, such as overtime, holidays and concurrent leave.

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Overtime

Required overtime hours that an employee does not work because of an FMLA-qualifying reason **may be counted** as FMLA leave. **Voluntary** overtime hours that an employee does not work because of an FMLA-qualifying reason may **not** be counted as FMLA leave.

Holidays

Holidays are treated in the following manner for FMLA purposes:

If...	Then...
A holiday falls during a week in which an employee is taking FMLA for the whole week .	The entire week is counted as FMLA leave.
A holiday falls during a week when an employee is taking FMLA leave for less than the full week.	The holiday is not counted as FMLA leave unless the employee was scheduled and expected to work on the holiday and used FMLA leave for that day.

Example #5: Brennan uses 12 weeks of FMLA leave to bond with his newly placed foster child. His leave ends the week after Thanksgiving. Even though he would not have had to work on Thanksgiving Day, his week off that includes Thanksgiving Day **counts** as one whole workweek of FMLA leave.

Example #6: Mavis works Monday through Friday. One week, there is a holiday on Wednesday. Mavis works Monday and Friday and uses FMLA leave on Tuesday and Thursday. Mavis is also off on Wednesday, but because it is a holiday and she was not scheduled to work that day, the time off on Wednesday does **not** count against her total FMLA entitlement.

Example #7: Dario is scheduled to work on the President's Day holiday when he has an unexpected need for FMLA leave to care for his child with a serious health condition. Dario's time off from work on the holiday **counts** as FMLA leave.

When FMLA Leave Runs Concurrently With Other Types of Leave

FMLA leave is unpaid. However, an employee may request or an employer may require the employee to use accrued paid vacation leave, sick leave, personal time, etc., for some or all of the FMLA leave period. When an employee uses FMLA leave at the same time as another type of leave, such as paid sick leave or vacation leave, the employee's leave use counts as FMLA leave and **must be protected** under the FMLA.

Step #6: Remember Special Rules and Additional Protections

Special Rules

Employers should consider whether any special rules apply. For example, in a situation where it is **physically impossible** for an employee to begin or end work midway through a shift, the **entire period** the employee must be absent is designated as FMLA-protected leave and counts against the employee's FMLA leave entitlement. The period of the physical impossibility is limited to the period when the employer is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position after a period of FMLA leave due to the physical impossibility.

Key Points: This rule applies only to situations where it is truly physically impossible to return the employee to work after an FMLA-qualifying absence—for example, a railroad conductor whose FMLA leave prevents them from boarding the train before it leaves for its scheduled trip.

Other special rules may apply; for example, there are special rules applicable to airline flight crew employees.

Additional Protections

Additional protections may apply. For example, some **states** have their own family and medical leave laws. Nothing in the FMLA prevents employees from receiving protections under other laws. Workers have the right to benefit from all the laws that apply.

Also, the FMLA is a federal worker protection law. Employers are **prohibited from** interfering with, restraining or denying the exercise of or the attempt to exercise any FMLA right. Any violations of the FMLA or the FMLA regulations constitute interfering with, restraining or denying the exercise of rights provided by the FMLA.

Conclusion

FMLA compliance can be tricky, and even the most experienced employers may inadvertently make mistakes. Employers must be sure to properly calculate both the amount of leave available and the amount of leave used in order to help ensure employees are afforded their FMLA rights and avoid costly lawsuits. Following the steps outlined above can aid employers in counting the amount of leave available and the amount of leave used under the FMLA.