



## INFORMATION MEMO

# Family and Medical Leave Act

*Federal law requires covered employers to allow a certain amount of unpaid, job-protected leave to eligible employees for reasons relating to family and medical care. Find out if you are a covered employer, the eligible uses of the leave, and which employees are eligible. Links to a model FMLA leave policy. Learn basics of the related Minnesota Pregnancy and Parenting Leave law.*

### RELEVANT LINKS:

[29 U.S.C. §§ 2601 – 2654.](#)

[29 C.F.R. § 825.100 et seq.](#)

[DOL - FMLA.](#)

[DOL Side-by-Side Comparison of Current/Final FMLA Regulations.](#)

[29 C.F.R. § 825.104\(a\).](#)

See Section III A *General notice requirements.*

[29 U.S.C. § 2611\(2\)\(A\) & \(B\).](#)

## I. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) is a federal law that originally became effective on Aug. 5, 1993, requiring covered employers to provide up to 12 weeks of unpaid leave to eligible employees for reasons relating to family and medical care.

The law was later modified with 2009, 2013, and 2015 amendments clarifying certain key issues with respect to serious health conditions, light duty, substitution of paid leave, employer and employee notice obligations, as well as the medical certification process. Additionally, the amendments provided guidance on the law's changes for military family leave, and in 2015, the regulatory definition of spouse was amended so eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member regardless of where they live.

### A. Covered employers

All public employers, like cities, are covered without regard to the number of employees. However, employees still need to meet eligibility requirements. Thus, it is possible for a city with less than 50 employees to be covered under the FMLA and bound by the notice requirements reviewed under Section III A of this memo, but have no employees eligible to take this leave.

### B. Eligible employees

To be eligible, an employee must:

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

**RELEVANT LINKS:**

[29 C.F.R. § 825.110.](#)

[DOL Fact Sheet #28: The FMLA.](#)

[29 C.F.R. § 825.110.](#)

[29 C.F.R. § 825.105.](#)

[29 C.F.R. § 825.110\(d\).](#)

[29 U.S.C. § 2612\(a\).](#)

- Have worked for the city for at least 12 months. These 12 months do not need to be consecutive. As the Department of Labor (DOL) notes, the 12-month timeframe includes any time previously worked for the same employer (including seasonal work). If the employee has a break in service that lasted seven years or more, the time worked prior to the break will not count unless the break is due to service covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA), or there is a written agreement, including a collective bargaining agreement, outlining the employer’s intention to rehire the employee after the break in service.
- Have worked at least 1,250 hours during the 12 months preceding the start of the leave. Generally speaking, consistent with the Fair Labor Standards Act (FLSA), paid non-working time (such as paid leave and unpaid leave, including FMLA leave) does not count toward the calculation of the 1,250 hours. However, if a city chooses to indeed count paid, non-working time for any employee’s eligibility, then the city will need to be consistent and do so for all employees.
- Be employed at a worksite with 50 or more employees within 75 miles of that worksite (elected officials are not counted; paid on-call firefighters are generally included). Part-time employees and employees on leave with a reasonable expectation of returning to work are included in this 50-employee count.

Occasionally, a city may have an employee out on a medical leave of absence originally beginning as non-FMLA (perhaps because the employee had not worked the required minimum 12 months) but while that employee is out, the employee then becomes FMLA eligible. Once an employee becomes eligible for FMLA leave, FMLA protections will then be triggered from that point forward.

If a city has fewer than 50 employees but desires to provide similar FMLA benefits to employees, it can do so. However, if the city chooses to call these benefits “FMLA,” then the city will need to follow all the guidelines of the federal FMLA. Some jurisdictions find it more helpful when they are under 50 employees to offer “medical leave” instead, in order to afford the city more flexibility in setting up leave policy guidelines.

## **C. Eligible uses**

### **1. Reasons for FMLA leave**

Eligible employees can take up to 12 workweeks of unpaid leave during a 12-month period for:

**RELEVANT LINKS:**

[29 C.F.R. § 825.112\(a\)\(1\), \(2\).](#)

[29 U.S.C. §§ 2401-2405. DOL Fact Sheet #28F- Qualifying Reasons for Leave under the FMLA.](#)

[DOL Fact Sheet #28G: Certification of a Serious Health Condition under the FMLA.](#)

[See Section III B Notice of Eligibility Rights and Responsibilities Form.](#)

[29 C.F.R. § 825.112\(a\)\(3\).](#)

[29 C.F.R. § 825.124.](#)

[29 C.F.R. § 825.102. \*United States v. Windsor\*, 570 U.S. 12, 133 S. Ct. 2675, \(2013\). DOL Fact Sheet #28F- Qualifying Reasons for Leave under the FMLA.](#)

[29 C.F.R. § 825.113. 29 C.F.R. § 825.123. Americans with Disabilities Act. Minnesota Human Rights Act.](#)

- Parenting and bonding leave—leave for the care of and bonding with a newborn or placement of a son or daughter for adoption or foster care. An employee’s entitlement to FMLA for birth and bonding expires 12 months after birth or placement of the child and must be taken as a continuous block of leave unless the city agrees to allow intermittent leave. Birth mothers and fathers have the same right to take FMLA leave for the birth of a child. FMLA leave may be taken before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. An employer may not request a medical certification for leave to bond with a newborn child or a child placed for adoption or foster care. However, the city can require some sort of other documentation, such as a medical provider’s note confirming the pregnancy and due date, provided the city requests this consistently. Refer to the link to the left for suggestions on how to request this supporting documentation for bonding leave on Form WH-381.
- Providing care for a spouse, son, daughter, or parent with a serious health condition. According to the regulations, if an employee is needed to care for a family member, this care “encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care. The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member.”
- “Spouse,” as defined in the statute, means a husband or wife. This definition now includes an individual in a same-sex or common law marriage that was “entered into in a State that recognizes such marriages; or if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.”
- A serious health condition that makes the employee unable to perform the essential functions of his or her job. Cities will want to work closely with their city attorney when considering termination of an employee who is or may be “disabled,” since several laws, including the Americans with Disabilities Act and Minnesota Human Rights Act, may apply.

## RELEVANT LINKS:

[29 C.F.R. § 825.126.](#)

[DOL Military Family Leave Provisions of the FMLA FAQ & A.](#)

[29 U.S.C. § 2612\(a\)\(3\) & \(4\).](#)

[29 U.S.C. § 2611 \(14\), \(15\) \(18\).](#)

[DOL Fact Sheet #28M \(a\): Military Caregiver Leave for a Current Servicemember under the FMLA.](#)

[DOL Fact Sheet #28F- Qualifying Reasons for Leave under the FMLA. 29 C.F.R. § 825.122\(c\) DOL Fact Sheet #28C. FMLA leave to care for a parent with a serious health condition on the basis of an “in loco parentis” relationship.](#)

[29 U.S.C. § 2612\(a\)\(1\). 29 U.S.C. § 2611 \(12\).](#)

[DOL Fact Sheet #28K: “Son or Daughter” 18 years of age or older under the FMLA.](#)

[DOL – Q&A concerning use of FMLA leave to care for a son or daughter age 18 or older.](#)

[29 C.F.R. 1630.2\(h\), \(i\), and \(j\), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act \(ADA\), 42 U.S.C. 12101 et seq., define these terms.” 29 C.F.R. § 825.122 \(2017\).](#)

[29 C.F.R. § 825.122\(g\), \(h\). US. Department of Labor: The Employees Guide to Military Family Leave under the Family and Medical Leave Act.](#)

- Qualified exigency and military caregiver leave -Any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or has been called to covered activity duty status.

Eligible employees may also take up to 26 workweeks of unpaid leave during a “single 12-month period” to care for a covered service member with a serious injury or illness, when the employee is the spouse, son, daughter, parent or “next of kin” of the service member. It is important to keep in mind that the “single 12-month period” for military caregiver leave is different from the 12-month period used for other FMLA reasons.

For FMLA purposes, “parent” is defined broadly as a biological, adoptive, step, or foster parent, or an individual who stood in loco parentis to an employee when the employee was a child. An employee’s parents-in-law are not included in the definition of “parent” for purposes of FMLA leave.

FMLA defines a “son or daughter” as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis.

The definition of “son or daughter” is limited to children under the age of 18 as well as children 18 years of age or older who are incapable of self-care because of a mental or physical disability. Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.” “Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

The FMLA military leave provisions have specific definitions of son or daughter that are unique to those requirements, generally including the covered service member’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered service member stood in loco parentis, and who is of any age.

**RELEVANT LINKS:**

[DOL Fact Sheet #28F- Qualifying Reasons for Leave under the FMLA.](#)

[WHD- Administrator's Interpretation No. 2010-3. 29 C.F.R. § 825.122\(d\)\(3\).](#)

[DOL- Fact Sheet #28B: FMLA leave for birth, bonding, or to care for a child with a serious health condition on the bases of an "in loco parentis" relationship.](#)

[29 C.F.R. § 825.122\(k\).](#)

[29 C.F.R. § 825.127. DOL Fact Sheet #28M\(a\): Military Caregiver Leave for a Current Servicemember under the FMLA.](#)

[29 C.F.R. § 825.127\(b\)\(1\).](#)

The FMLA regulations define “in loco parentis” as including those with day-to-day responsibilities to care for or financially support a child. Employees who have no biological or legal relationship with a child may, nonetheless, stand in loco parentis to the child and be entitled to FMLA leave.

Similarly, an employee may take leave to care for someone who, although having no legal or biological relationship to the employee when the employee was a child, stood in loco parentis to the employee when the employee was a child.

The city’s right to documentation of family relationship is the same for an employee who asserts an in loco parentis relationship as it is for a biological, adoptive, foster, or stepparent. This documentation may include a simple statement from the employee, a child’s birth certificate, a court document, etc. The employee is entitled to the return of any official documents submitted for this purpose. For an employee who stands in loco parentis to a child, such documentation may include, for example, the name of the child and a statement of the employee’s in loco parentis relationship to the child.

An employee asserting a right to FMLA leave for birth or to care for a child for whom he or she stands in loco parentis may be required by the city to provide notice of the need for leave and to submit medical certification of a serious health condition consistent with the FMLA regulations.

A “covered service member” means a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, or is in outpatient status or is on the temporary disability retired list for a serious injury or illness, or a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

Outpatient status”, with respect to a covered servicemember, means: the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients

**RELEVANT LINKS:**

[29 C.F.R. § 825.122\(e\).](#)

Next of kin of a covered service member means the nearest blood relative other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member's only next of kin.

[29 C.F.R. § 825.113.](#)

## **2. Serious health conditions**

Serious health conditions include:

[29 C.F.R. § 825.114.](#)

U.S. Dep't of Labor: [Opinion Letter FMLA2018-2-A](#), August 28, 2018

- **Hospital Care** -Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility. An August 2018, U.S. Department of Labor Opinion letter notes organ-donation surgery can qualify as a "serious health condition," even when the donor is in good health before the donation and chooses to donate the organ solely to improve someone else's health.

[29 C.F.R. § 825.115.](#)

- **Absence Plus Treatment**- A period of incapacity requiring absence of more than three consecutive calendar days from work, school, or regular daily activities that also involves continuing treatment by (or supervision of) a health care provider:
  - ✓ At least two visits to a health care provider to determine if a serious health condition exists and/or treatment or evaluations of the condition. (Treatment does not include routine physical examinations, eye examinations, etc; or
  - ✓ One visit to a health care provider and a regimen of continuing treatment. The first (or only) visit to the health care provider must occur within 7 days of the first day of incapacity. The second visit, if the provider decides is necessary, must occur within 30 days of first day of incapacity.

**RELEVANT LINKS:**

[29 C.F.R. § 825.115.](#)

[29 C.F.R. § 825.115\(b\).](#)

[29 C.F.R. § 825.115\(c\).](#)

[29 C.F.R. § 825.115\(c\).](#)

[29 C.F.R. § 825.115\(d\).](#)

[29 C.F.R. § 825.115\(e\).](#)

- A regimen of continuing treatment includes, for example, a course of prescription medication (e.g. an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition.” A regimen of treatment does not include “the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.
- **Pregnancy** - Any period of incapacity because of pregnancy or prenatal care (even without treatment by a health care provider and even if the absence is less than three days, e.g., morning sickness).
- **Chronic Conditions Requiring Treatments** - Any period of incapacity because of chronic serious condition (even without treatment by a health care provider and even if the absence is less than three days, e.g., an asthma attack, diabetes, epilepsy, etc.).

A chronic condition is defined as a condition that:

- 1) Requires periodic visits (at least twice per year) for treatment by a health care provider or by a nurse or physician’s assistant under direct supervision of a health care provider;
- 2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- 3) May cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, etc.).

- **Permanent/Long-Term Conditions Requiring Supervision** - A period of incapacity that is permanent or long-term due to a condition for which treatment may or may not be effective (e.g., Alzheimer’s, a severe stroke, terminal diseases, etc.). The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.
- **Multiple Treatments** - Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider. The longer definition of “multiple treatment” includes treatment either for restorative surgery after an accident or other injury/illness, or for “a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

## RELEVANT LINKS:

[DOL- FMLA Questions and Answers "Does workers' compensation leave count against an employee's FMLA leave entitlement?"](#)

[20 U.S.C. § 2611\(18\).](#)

[29 C.F.R. § 825.200\(b\) \(1\) – \(4\).](#)

[DOL- Fact Sheet #28H: 12-month period under the FMLA.](#)

Occasionally, organizations question whether time off for workers' compensation injury or illness qualifies for FMLA. As the DOL website reads, FMLA and workers' compensation leave can indeed 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. Thus, as a best practices tip, whenever an employee is injured on the job and needs time off to recover, the city will want to determine whether the employee is also eligible for leave under the FMLA, and if so, designate the workers' compensation leave as FMLA as well.

### **3. Serious injury or illness of a service member**

Serious injury or illness of a service member includes:

- An injury or illness incurred by a member of the Armed Forces while in the line of duty.
- A serious injury or illness that existed before the beginning of the member's active duty and was aggravated while in the line of duty which may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.

### **4. Defining the 12-month tracking period**

When drafting an FMLA policy, a city has three alternatives for measuring leaves within a 12-month period:

- A calendar year, fiscal year (for example, Oct. 1 through Sept. 30), a year starting on an employee's anniversary date (for example, Sept. 22 through Sept. 21), or other fixed 12-month leave year. The calendar year and fixed leave methods can permit an employee to use another 12 weeks at the start of a new 12-month period, known as "leave stacking," regardless of how much FMLA the employee has used in the preceding 12 months.
- A 12-month period measured forward from the date an employee's first FMLA leave begins.
- A "rolling" 12-month period measured backward from the start date of the employee's last FMLA leave. This means that if an employee meets all of the other FMLA requirements and requests a day of FMLA leave on July 1, the employee will be eligible for leave so long as the employee took less than 12 weeks of FMLA leave during the preceding 12-month period.

While the measuring forward and backward options can avoid "leave stacking," they can also be more cumbersome to administer than fixed leave methods.

**RELEVANT LINKS:**

[DOL Fact Sheet #28M\(a\): Military Caregiver Leave for a Current Servicemember under the FMLA.](#)

[29 C.F.R. § 825.200\(e\).](#)

[DOL Fact Sheet #28H: 12-month period under the FMLA.](#)

[DOL Fact Sheet #28H: 12-month period under the FMLA.](#)

[29 U.S.C. § 2612\(b\)\(1\).](#)

[29 C.F.R. § 825.203.](#)

[DOL Fact Sheet #28- The FMLA.](#)

[29 C.F.R. § 825.202\(c\).](#)

[29 C.F.R. § 825.205\(a\).](#)

To reiterate, a separate 12-month period exists for the use of 26 weeks of FMLA to care for an injured or ill covered service member. This 12-month period begins on the first day the eligible employee takes FMLA to care for a covered service member and ends 12 months later regardless of the 12-month period established by the city for other FMLA reasons.

If an employer fails to select a method for measuring the 12-month period, then the method providing the most beneficial outcome to an employee for FMLA must be used.

In the event a city wishes to change the method of calculating the 12-month period used, the city must provide all employees with at least 60 days' notice of the intended change and ensure any affected employees retain the full benefit of their leave entitlement under whichever method affords the greatest benefit to them. Thus, when considering making a change to the 12-month calculation method, it is often easier to make such a change when no employees are currently out on FMLA.

## **5. Eligibility for intermittent or reduced schedule leave**

The FMLA permits employees to take leave on an intermittent basis or work a reduced schedule under certain circumstances for:

- Their own serious health condition.
- Providing care for their spouse, son, daughter, or parent with a serious health condition.
- Providing care for a covered service member with a serious health condition.
- A qualifying exigency.

Intermittent leave or a reduced work schedule means an employee may take leave in separate blocks of time or reduce the time he or she works each day or week for a single qualifying reason. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operations.

If, however, the FMLA is for the birth, adoption, or foster placement of a healthy child, the use of intermittent or reduced schedule leave requires the employer's approval.

When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. In other words, the city cannot charge an employee's FMLA for periods during which the employee is working.

**RELEVANT LINKS:**

[DOL Fact Sheet #28I: Calculation of Leave under the FMLA.](#)

[DOL Fact Sheet #28I: Calculation of Leave under the FMLA.](#)

[29 C.F.R. § 825.205\(b\)-\(c\).](#)

[DOL Fact Sheet #28I: Calculation of Leave under the FMLA.](#)

[29 C.F.R. § 825.204\(a\) and \(c\).](#)  
[Dep't of Labor: VIII Transfer to an Alternative Position.](#)

When 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 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. For example, an employee who normally works 30 hours a week, but works only 20 hours in a week because of FMLA, would use one-third of a week of FMLA.

An employer may convert the FMLA usage into hours so long as it fairly reflects the employee's actual workweek. For example, an employee whose regular work schedule is 40 hours per week and who qualifies for a reduced leave schedule of 30 hours per week would only use 10 hours of FMLA each week from his/her 480 hours of qualified FMLA for the 12-month period) (40 hours x 12 weeks = 480 FMLA hours).

When an employee's schedule varies so much the employer is unable to determine how many hours the employee would have worked during the week the employee takes FMLA, 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.

If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA.

When a holiday falls during a week in which an employee is taking the full week of FMLA, the entire week is counted as FMLA leave. However, when a holiday falls during a week when an employee is taking less than the full week of FMLA, the holiday is not counted as FMLA, unless the employee was scheduled and expected to work on the holiday and used FMLA for that day.

Employees must give 30 days' notice for intermittent FMLA leave that is foreseeable, or as much notice as practicable if it's not possible to give 30 days' notice. If the need for intermittent FMLA leave is unforeseeable, the employee must give notice as soon as practicable.

An employer may require those employees using an intermittent or reduced leave schedule to transfer temporarily to an alternative position that (1) has equivalent pay and benefits, and (2) better accommodates recurring periods of leave than the regular employment position of the employee.

**RELEVANT LINKS:**

[29 U.S.C. § 2612\(d\)\(2\)\(A\).](#)  
[29 C.F.R. § 825.207\(a\), \(b\) and \(c\).](#)

[DOL Fact Sheet #28I: Calculation of Leave under the FMLA.](#)

[29 C.F.R. § 825.207.](#)

[29 C.F.R. § 825.214.](#)

[29 U.S.C. § 2614\(a\)\(1\).](#)

[29 C.F.R. § 825.215.](#)

## **6. Employees wishing not to count an absence as FMLA time**

From time to time, a city may have an employee who expresses that he or she does not wish to have a qualified FMLA absence counted as actual FMLA hours. FMLA for qualified employees is a right, and employees do not have the authority to refuse to have the city count their qualified leave as FMLA time.

As long as the employee provides at least verbal notice sufficient to make the city aware of an FMLA-qualifying reason for the requested leave, the leave may be (and as a consistent and best practices approach, should be) designated as FMLA.

### **D. Substitution of paid leave**

Federal law states an FMLA leave may be unpaid. However, employers can require the employee (or employees may choose) to use accrued paid leave, such as sick, vacation, or PTO leave, to cover some or all of the FMLA taken. Use of accrued sick leave is limited by the city's policy governing the use of sick leave.

If paid leave is substituted for unpaid FMLA leave, the leave used will nevertheless be counted against the employee's FMLA leave entitlement. However, employers may not count the use of paid leave that does not qualify as FMLA (e.g., isolated sick days used for a medical condition that is not a serious health condition or serious injury or illness) to reduce the employee's annual FMLA entitlement, so recordkeeping is important when counting FMLA hours used.

## **II. Employee protections under the act**

The law provides for periods of unpaid leave, as previously addressed in this memo, to eligible employees for reasons relating to family and medical care, but contains other important protections as well. These protections include job restoration and continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

### **A. Job restoration**

When an employee returns from FMLA leave, the city must "restore" the employee to his or her original job or an "equivalent" job. An "equivalent" job means the job is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions.

**RELEVANT LINKS:**

[DOL Fact Sheet #28A; Employee Protections under the FMLA.](#)

[DOL – Reinstatement Limitations.](#)

[29 C.F.R. § 825.216.](#)

[DOL – Key Employees and Their Rights.](#)

[29 C.F.R. § 825.217.](#)

[29 C.F.R. § 825.219.](#)

[29 C.F.R. § 825.218.](#)

[29 U.S.C. § 2614\(c\)\(1\).](#)

[29 C.F.R. § 825.209.](#)

[29 C.F.R. § 825.210.](#)

An employee is entitled to any unconditional pay increases that occurred while he or she was on FMLA such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted only if employees taking the same type of leave for non-FMLA reasons receive the increases.

Under certain circumstances, an employer may deny job restoration to “key employees.” A key employee is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee’s worksite.

If an employer desires to implement the “key employee” provision for an eligible employee, it is important to work with legal counsel in analyzing the issue and drafting the required written notification to the employee. Generally, an employer is not required to restore a key employee to his or her position upon returning from FMLA if three conditions are met:

- (1) Written notice is provided to the employee at the time the employee gives notice of the need for FMLA (or when FMLA commences, if earlier) identifying he or she qualifies as a key employee.
- (2) The written notice also explains the basis for the employer’s finding that it cannot reinstate the employee to his or her old position because “substantial and grievous economic injury” to the employer’s operations would result. As the regulations note, a precise test is not established for the level of hardship or injury the employer must sustain. However, minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute “substantial and grievous economic injury.”
- (3) If the employee has already begun FMLA when the determination that grievous economic injury upon reinstatement will result, the employer must provide the employee with a reasonable time in which to return to work, taking into account the circumstances such as the length of the leave and the urgency of the need for the employee to return. The employer must serve this notice to the employee either in person or by certified mail.

Even if an employee on leave does not return to work in the time provided in the notice, the employee continues to be entitled to maintenance of health benefits for the duration of the FMLA, and the employer may not recover its cost of health benefit premiums.

**B. Maintenance of health benefits**

The city must keep the employee on FMLA on the city’s group health insurance coverage, including family coverage, and continue to pay the city’s share of the coverage as if the employee were still at work. The employee continues to be responsible for his or her share of the premium.

## RELEVANT LINKS:

[29 C.F.R. § 825.215.](#)

[DOL Fact Sheet #28A; Employee Protections under the FMLA.](#)

[26 C.F.R. § 54.4980B-10.](#)

[DOL- COBRA and Coordination with Other Federal Benefits Laws \(see page 15\).](#)

[29 C.F.R. § 825.212.](#)

[DOL Employee Payment of Group Health Benefit Premiums.](#)

[U.S. Dep't of Labor: FMLA2006-3-A.](#)

If paid leave is substituted for FMLA, the employee's share of group health plan premiums must be paid by the method normally used during paid leave, typically as a payroll deduction.

An employee on unpaid FMLA leave must make arrangements to pay the normal employee portion of the insurance premiums in order to maintain insurance coverage. The city may cancel coverage if the employee's premium payment is more than 30 days late and the city has given the employee written notice at least 15 days in advance advising that coverage is going to be canceled if the premium is not received.

Group health coverage that is provided under the FMLA during a family or medical leave is not COBRA continuation coverage, and taking FMLA leave is not a qualifying event under COBRA. When the employee returns from FMLA leave, the employee must be reinstated to the plan as if he or she never left it. With this consideration, some employers choose to recover premiums when the employee returns to work rather than canceling coverage for nonpayment of premiums.

If FMLA is unpaid, the city has a number of options for obtaining the employee's share of the premium:

- Payment would be due at the same time as it would be made if by payroll deduction.
- Payment would be due on the same schedule as payments are made under COBRA. No administrative charge (like a 2 percent admin fee, for example) may be added to the premium payment for administrative expenses.
- Payment would be prepaid pursuant to a cafeteria plan at the employee's option.
- The city's existing rules for payment by employees on leave without pay would be followed provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave.
- Another method voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

Some cities allow employees to decline participation in the city's group health plan, provided an employee can show proof of other medical coverage. When employees waive the city's group medical plan, the city may choose (but is not required) to provide a small stipend to the employee for waiving the city's group health coverage, referred to as "cash in lieu of" medical insurance.

**RELEVANT LINKS:**

[29 C.F.R. § 825.213.](#)

In those situations, it is often asked if the city is required to continue the cash in lieu contribution while an employee is on unpaid FMLA leave. The Department of Labor, in a 2006 FMLA Opinion Letter, indicated the city is not required to continue paying the cash in lieu so long as it does not pay cash in lieu to employees taking other types of leave. Specifically, the Department of Labor indicated an employer is not required to continue to make flex credit contributions to the extent the employee was using them to purchase non-health coverage or was taking them as cash, so long as such flex credit contributions were not made for employees taking other types of leave.

When an employee fails to return from FMLA for at least 30 calendar days, the city generally may request payment of its share of the health insurance premiums paid during the leave. Employers cannot recover premium costs when:

- There is a continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered service member, which would otherwise entitle the employee to leave under FMLA.
- An individual begins retirement within 30 days of taking FMLA.
- There are circumstances beyond the employee's control, such as the elimination of an employee's position during FMLA.
- When the above situation is present, the city may require medical certification of the employee's or the family member's serious health condition or the covered service member's serious injury or illness, and the employee will have up to 30 days to provide the employer with certification from the date the certification is requested. Should the employee fail to provide the certification, an employer can require the employee to pay 100 percent of the health premium costs paid by the employer.

[29 C.F.R. § 825.213.](#)

For reference, an employee who returns to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work

### **C. Other benefits**

[29 C.F.R. § 825.209\(h\).](#)

Other benefits, including cash payments chosen by the employee instead of group health insurance coverage, do not have to be maintained during periods of unpaid FMLA. Vacation, sick leave, or other types of paid leave or seniority do not have to accrue during unpaid FMLA if they would not accrue on other types of unpaid leave.

## RELEVANT LINKS:

[29 C.F.R. § 825.300.](#)

[DOL Fact Sheet #28D: Employer Notification Requirements under the FMLA.](#)

[DOL "Employee Rights and Responsibilities under the FMLA" Poster.](#)

See *Family and Medical Leave*, LMC Model Policy.

For other benefits, such as elected life insurance and/or long term disability (LTD) coverages, the employer and the employee may make arrangements to continue the types of benefits during periods of unpaid FMLA.

Since FMLA law requires employees to be restored to their former position with equivalent pay and benefits, it may be useful for the city to investigate, before an employee goes out on leave, with the city's life insurance and/or LTD carriers, for example, to determine the ease in restoring insurance benefits for an employee in the event of failure of payment while on unpaid FMLA.

Even if coverage remains available under the life and/or disability plans during the FMLA leave, the FMLA does not require the employer to continue to pay the cost of the benefit unless the employer would do so during other types of leave. So, the employer could make the coverage available during the FMLA leave but require the employee to pay the cost. However, if the employee fails to pay the premium the employer may need to step in and do so to ensure the coverage is available immediately upon the employee's return from the FMLA leave. Thus, if it is found to be especially burdensome, a city may want to consider maintaining non-health insurance benefits for employees during an unpaid FMLA.

Additional medical leave beyond FMLA may be considered a reasonable accommodation under applicable state and federal law.

### III. Employer Notice Requirements

#### A. General notice requirements

Covered employers who have employees who are eligible for FMLA must:

- Post a notice approved by the secretary of Labor explaining rights and responsibilities under FMLA. This poster must be displayed at all locations even if there are no employees eligible for FMLA at the location. Electronic posting also is permitted.
- Provide a general notice to each employee through an FMLA policy in an employee handbook or other written material, including union contracts. If there are no employee handbook materials, the city must give each employee a copy of the DOL's "*Employee Rights and Responsibilities Under the Family and Medical Leave Act*" at the time of a leave request as well as to each employee when he or she is hired.

## RELEVANT LINKS:

See Section III B *Notice of Eligibility Rights and Responsibilities Form*  
26 C.F.R. § 825.300(d).  
DOL Fact Sheet #28D:  
[Employer Notification Requirements under the FMLA.](#)

See Section III D  
*Designation Notice.*

[29 C.F.R. § 825.300\(d\).](#)

[29 C.F.R. § 825.301\(a\).](#)

DOL Fact Sheet #28D:  
[Employer Notification Requirements under the FMLA.](#)

[29 C.F.R. § 825.300\(b\), \(c\).](#)

[DOL FMLA Form- WH-381.](#)

- Provide a written Eligibility and Rights and Responsibilities notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations within five business days after receiving the employee’s notice of need for leave. The law lists specific items that must be included, so many employers find using the DOL’s FMLA Designation Form – WH-381 (see Section B of this memo) a helpful tool to accomplish this requirement.
- Provide notification that an employee leave is designated as FMLA leave. Within five business days of having enough information to determine whether the leave is FMLA-qualifying, an employer must notify an employee whether the leave is designated as FMLA and the corresponding amount of time that will count against his or her FMLA entitlement. However, if the city has sufficient information to designate the leave as FMLA immediately after receiving notice of the employee’s need for leave, the city may provide the employee with the designation notice at that time.

The law lists specific items that must be included, so many employers find using the DOL’s FMLA Designation Form – WH-382 (linked under the “Designation Notice” section of this memo) a helpful tool to accomplish this requirement.

## B. Notice of Eligibility Rights and Responsibilities Form

After the city receives notice of a potentially FMLA-qualifying condition, a *Notice of Eligibility Rights and Responsibilities Form* should be completed within five business days (absent extenuating circumstances) of the employee notifying the city of the need for FMLA.

The DOL provides an optional form (linked to the left) as a useful tool to help employers meet the FMLA requirement to notify an employee of his or her eligibility to take FMLA leave.

Part A can be especially helpful documentation for situations where an employee requesting FMLA leave is ineligible for the leave (i.e., the employee has not satisfied the 1,250 hours work requirement, or the city has fewer than 50 employees at the site) because the form has appropriate lines the city can check indicating why the employee is not eligible for FMLA. Part B of the form provides employees with required information regarding their rights and responsibilities for taking FMLA leave.

## RELEVANT LINKS:

[29 C.F.R. § 825.301\(d\).](#)

[EEOC Q&A for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008.](#)

[EEOC Q&A for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008.](#)

[DOL Fact Sheet #28- The FMLA.](#)

[29 C.F.R. § 825.305\(b\).](#)  
[29 U.S.C. § 2614\(a\)\(4\).](#)

Additionally, Form WH-381 can be helpful for documenting leave to bond with a newborn child or a child placed for adoption or foster care.

Specifically, a city could check the box in Part B on page one of the form, indicating “other information is needed,” and note that documentation from the health care provider is needed to confirm the pregnancy and due date of the child, or in the case of adoption, a city could request similar information from the adoption or foster agency involved.

If a city fails to designate FMLA, the city may retroactively designate the leave as FMLA with appropriate notice to the employee, provided that the city’s failure to timely designate leave does not cause harm or injury to the employee.

Under the Genetic Information Nondiscrimination Act of 2008 (GINA) the Equal Employment Opportunity Commission (EEOC) suggested employers include the following “safe harbor” language to all lawful requests for medical information in the event that genetic information is inadvertently shared with an employer from an employee’s medical provider. The sample language is not included on existing model DOL FMLA forms, so some employers have elected to attach the GINA language to the forms as an additional page:

*The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law.*

*To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information.*

*“Genetic information,” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.*

### **C. Optional medical certification forms**

When an employee requests FMLA leave due to his or own serious health condition or a covered family member’s serious health condition, the employer may require certification in support of the leave from a health care provider. The City can also attach to the *Notice of Eligibility and Rights and Responsibilities* one of the appropriate certification forms listed below and provide at least 15 calendar days for the employee to return the completed form. Additional time may be appropriate in some circumstances.

**RELEVANT LINKS:**

[29 C.F.R. § 825.125.](#)

[29 C.F.R. § 825.118.](#)

[DOL FMLA Form – WH-380-E.](#)  
[29 C.F.R. § 825.306.](#)  
[DOL Fact Sheet #28G: Certification of a Serious Health Condition under the FMLA.](#)

[DOL FMLA Form – WH-380-F.](#)

[29 C.F.R. § 825.306.](#)

[DOL FMLA Form – WH-384.](#)

[29 C.F.R. § 825.309.](#)

[DOL-Employee’s Guide to Military Family Leave Under FMLA.](#)

“Health care providers” generally include: doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, chiropractors (within certain limitations), nurse practitioners, nurse-midwives, clinical social workers (within certain limitations), Christian Science practitioners listed with the First Church of Christ, Scientist in Boston as well as a few others listed in the law (see link to the left).

The DOL provides cities with additional optional model forms that can be customized, and many cities choose to routinely use these forms since employers generally cannot request information from employees beyond what is permitted under FMLA regulations and the DOL-model forms.

These forms are used by the city to determine whether an eligible employee is actually qualified for the specific FMLA leave. A link to the respective form and a brief description of each along with information on generally when a city would want to use it, is provided below.

### **1. Certification of Health Care Provider for Employee’s Serious Health Condition**

This form is commonly used when an FMLA-eligible employee provides the city with enough information to make the city aware of the employee’s need to take time off for his or her own medical condition that may qualify as a serious health condition under the regulations.

### **2. Certification of Health Care Provider for Family Member’s Serious Health Condition**

This form is commonly used when an FMLA-eligible employee provides the city with enough information to make the employer aware of the employee’s need to take time off for his or her covered family member’s medical condition that may qualify as a serious health condition under the regulations.

### **3. Certification for Qualifying Exigency for Military Family Leave**

This form is commonly used when an FMLA-eligible employee provides the city with enough information to make the city aware of the employee’s need to take time off to manage family affairs related to qualifying exigencies when an employee’s spouse, son, daughter, or parent is on covered active duty in the Armed Forces or has been notified of an impending call to covered active duty.

**RELEVANT LINKS:**

[DOL Form WH-385-V.](#)

[29 C.F.R. § 825.310.](#)

[DOL-Employee's Guide to Military Family Leave Under FMLA.](#)

[DOL Form – WH-382.](#)

[29 C.F.R. § 825.312.](#)

[29 C.F.R. § 825.312\(h\).](#)

[29 C.F.R. § 825.312\(e\).](#)

## **4. Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave**

This form is commonly used when an FMLA-eligible employee provides the city with enough information to make the city aware of the employee's need to take time off for a covered service member (the employee's spouse, son, daughter, parent, or next of kin who is a current member of the Armed Forces) suffering from an illness or injury incurred in the line of duty.

### **D. Designation Notice**

Once an employee has completed and submitted the appropriate certification form, this optional notice can be helpful to the city to approve the FMLA leave request, obtain additional information, or deny the FMLA request:

#### **1. If FMLA is approved for the employee's own serious health condition on the Designation Notice**

It can be helpful to require an employee returning from FMLA to present a fitness-for-duty certificate prior to returning to work.

A fitness-for-duty certification may be required only when the city has a uniformly applied policy requiring all similarly situated employees (i.e., same occupation, same serious health condition) to provide a fitness-for-duty certification from the employee's health care provider indicating that the employee is able to resume work. When requiring a fitness-for-duty certificate before an employee can return to work, the city must not only inform the employee of this requirement on the Designation Notice, but will also want to attach a copy of the employee's job description to indicate the employee's essential job functions. Generally, no second or third opinions on a fitness-for-duty certification may be required.

However, upon return to work from a serious health condition that is also a disability under the Americans with Disabilities Act, an employer may follow ADA procedures for requesting medical information and requiring medical exams (i.e., the request/exam is permissible if it is job-related and consistent with business necessity).

An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in section 825.300(d). If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA.

**RELEVANT LINKS:**

[29 C.F.R. § 825.312\(f\).](#)

For employees on intermittent FMLA, the regulations state an employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule. However, if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the serious health condition for which the employee took such leave, an employer is entitled to a fitness-for-duty certification for employees on intermittent leave up to once every 30 days.

In this instance, an employer needs to inform the employee at the same time it issues the Designation Notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Upon return to work from a serious health condition that is also a disability under the ADA, an employer may follow ADA procedures for requesting medical information and requiring medical exams (i.e., the request/exam is permissible if it is job-related and consistent with business necessity).

## **2. Incomplete or insufficient information**

[29 C.F.R. § 825.305\(c\).](#)

The regulations define an incomplete certification as a submitted form where one or more of the applicable entries have not been completed, and an insufficient certification as one where the information provided is vague, ambiguous, or non-responsive.

For situations where an employee provides incomplete or insufficient information, the city may find it helpful to indicate on the designation form that "additional information is needed to determine if your FMLA leave request can be approved," and indicate what information is needed. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency.

The bottom section of the Designation Notice can be used to document any of the following situations:

- The employee has already exhausted his or her FMLA leave entitlement within the defined 12-month period.
- The certification form does not support the employee's leave of absence or states the employee's medical condition does not meet the definition of a serious health condition.

**RELEVANT LINKS:**

[29 C.F.R. § 825.305\(c\).](#)

[29 C.F.R. § 825.307\(a\).](#)

[29 C.F.R. § 825.307\(f\).](#)

[29 C.F.R. § 825.307\(a\).](#)

### **3. Clarification and authentication of medical certifications**

If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the city may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the city has given the employee an opportunity and appropriate time to cure any deficiencies. To make such contact, the city cannot use in any circumstances the employee's direct supervisor, but instead must use a health care provider, a human resources professional, a leave administrator, or a management official.

The FMLA regulations specifically address obtaining medical certifications abroad. "In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request."

For this clarification and authentication purpose, authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.

Employers may not ask health care providers for additional information beyond that required by the certification form. Cities will want to obtain a release from the employee to gather HIPAA information from the employee's medical provider.

The regulations state it is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request.

If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear.

**RELEVANT LINKS:**

[29 C.F.R. § 825.313\(c\).](#)

Recertification of leave may be required if the employee requests an extension of the original length approved by the City or if the circumstances regarding the leave have changed. Recertification may also be required if there is a question as to the validity of the certification or if the employee is unable to return to work due to the serious health condition.

The general rules for recertification are as follows: “An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. . . . Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.”

[29 C.F.R. § 825.308\(a\)-\(c\).](#)

The following rules also apply, “30-day rule. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee unless:

- 1) The employee requests an extension of leave;
- 2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness complications); or
- 3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

[29 C.F.R. § 825.313\(c\).](#)

The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts

[29 C.F.R. § 825.307\(a\),\(d\).](#)  
[DOL- Medical Certification  
Second and Third Opinions.](#)

#### **4. Obtaining second or third opinions**

In likely very rare circumstances, employers can require an employee to obtain a second or third medical certification at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to FMLA benefits, including maintenance of group health benefits. It is important that cities consult with their city attorney prior to requesting a second or third medical certification.

**RELEVANT LINKS:**

[29 C.F.R. § 825.301.](#)  
[DOL Fact Sheet #28- The FMLA.](#)  
[DOL Fact Sheet #28E- Employee Notice Requirements under the FMLA.](#)

[DOL Fact Sheet #28- The FMLA.](#)  
[DOL Fact Sheet #28E- Employee Notice Requirements under the FMLA.](#)

[29 C.F.R. § 825.302\(e\).](#)  
[29 C.F.R. § 825.303.](#)

[29 C.F.R. § 825.304\(b\).](#)

## **E. Employee requirements**

### **1. Employees have the responsibility of providing notice of the need for FMLA leave to their employer**

When an employee is seeking leave, the employee is not required to specifically mention FMLA, but is required to mention enough information in the verbal or written request so the city can know the leave may be covered by the FMLA and when and how much leave the employee anticipates needing to take.

### **2. Amount of notice**

Employees must comply with their employer's usual and customary requirements for requesting leave and provide enough information for their employer to reasonably determine whether the FMLA may apply to the leave request.

In general, the employee must give the city at least 30 days' advance notice of the need to take FMLA leave when he or she knows about the need for the leave in advance and it is possible and practical to do so. The DOL provides the example if the employee is scheduled for surgery in two months, the need for leave is foreseeable and at least 30 days' advance notice is required.

If 30 days' advance notice is not possible because the situation has changed or the employee does not know exactly when leave will be required, the employee must provide notice of the need for leave as soon as possible and practical. When the employee has no reasonable excuse for not providing at least 30 days' advance notice, the city may delay the FMLA leave until 30 days after the date notice is provided.

When the employee could not have provided 30 days' advance notice, but has no reasonable excuse for not providing a shorter period of advance notice, the city may delay the FMLA leave by whatever amount of time the employee delayed in notifying the employer.

In the case of FMLA leave for a qualifying exigency, the employee must give notice of the need for such leave as soon as possible and practical regardless of how far in advance the leave is needed.

For planned medical treatment, the employee must consult with the city and try to schedule the appointment at a time that minimizes the disruption to the city. The employee should consult with the city prior to scheduling the treatment in order to arrange a schedule that best suits the needs of both the employee and city.

**RELEVANT LINKS:**

[DOL Fact Sheet #28E-  
Employee Notice  
Requirements under the  
FMLA.](#)

[29 C.F.R. § 825.313\(a\)-\(b\).](#)

[DOL Fact Sheet #28E-  
Employee Notice  
Requirements under the  
FMLA.](#)

[29 C.F.R. § 825.216\(e\).](#)

[Pharakhone v. Nissan N.  
Am., Inc., 324 F.3d 405 \(6th  
Cir. 2003\).](#)

Of course, any schedule of treatment is subject to the approval of the treating health care provider.

A city may require an employee to provide reasonable notice if the need for FMLA leave changes while the employee is out on FMLA leave. For example, the city may require the employee notify the employer if the employee’s doctor determines he or she can return to work earlier than expected or if his or her return to work will be delayed. The employer may also require the employee provide periodic updates on his or her status and intent to return to the job.

In the case of foreseeable leave, if the employee fails to submit the requested medical certification the “employer may deny FMLA coverage until the required certification is provided. . . . In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances.”

Once approved for a particular FMLA leave reason, if additional leave is needed for that reason, the employee must reference that reason or the need for FMLA leave. In all cases, the employer may ask additional questions and/or for a certification to determine if the leave is FMLA-qualifying. If the employee fails to provide the employer with enough information to determine whether the leave is FMLA-qualifying, the leave may not be protected.

### **3. Cities can choose to implement a policy prohibiting an employee from working a second job while on FMLA**

FMLA does not specifically prohibit an employee from working a second job unless the employer has a policy specifically addressing this activity.

FMLA regulations do allow a city to apply a policy restricting outside employment to employees who take FMLA leave, as long as the policy is applied uniformly and in place prior to an employee taking leave.

In *Pharakhone v. Nissan N. Am., Inc.*, 324 F.3d 405 (6th Cir. 2003), the court determined the employer did not fire its employee because he exercised his right to FMLA leave, but because he elected to work at his wife’s restaurant during leave for the birth of their child. The company had a documented policy prohibiting “unauthorized work for personal gain while on leave,” and his supervisor advised him that he was not permitted to work there during his leave.

## RELEVANT LINKS:

[29 U.S.C. § 2619.](#)  
[29 C.F.R. § 825.400.](#)

[DOL Fact Sheet #77B:  
Protection for Individuals  
under the FMLA.](#)

[29 C.F.R. § 825.400.](#)

[Minn. Stat. § 181.941.](#)

## IV. Violations

The statutory penalty for noncompliance with the FMLA's notice posting provision is "a civil monetary penalty not to exceed \$100 for each separate offense."

FMLA authorizes an award of damages, including lost wages and employment benefits as well as reinstatement and promotion. In addition, the employee will be entitled to reasonable attorney fees and may be able to recover certain "liquidated damages."

## V. Minnesota pregnancy and parental leave law

Minnesota employers with 21 or more employees must provide up to 12 weeks of unpaid leave to an employee who is a new biological or adoptive parent for parenting and pregnancy leave. The unpaid leave of absence must be granted to a biological or adoptive parent in conjunction with the birth or adoption of a child; or to a female employee for prenatal care or incapacity due to pregnancy, childbirth, or related health conditions.

The start of leave must begin within 12 months of the birth or adoption, which is increased from six weeks, and the length of the leave shall be determined by the employee, but must not exceed 12 weeks unless agreed to by the employer. An employer is allowed to require reasonable notice of the date the leave will begin and the estimated duration of the leave. To qualify, as of July 1, 2014, an employee must have been employed for at least 12 months prior to the leave request and must work an average number of hours equal to at least half the full-time equivalent for employees in that job class. The city may require an employee who plans to take pregnancy or parenting leave to give reasonable notice of the date the he or she will be taking leave and the estimated duration of the leave (not to exceed 12 weeks).

While on parenting leave, a city can require the employee to use other eligible paid leave (such as sick leave, vacation leave, disability leave), or leave required by FMLA, as long as the total does not exceed 12 weeks.

Prior to July 1, 2014, Minnesota employers were not allowed to reduce parental leave by accrued sick leave, which resulted in some situations where an employee was eligible to take more than 12 weeks when combining FMLA and the Minnesota Parenting Leave law. However, with the change in law, the total leave between FMLA and parenting or pregnancy leave is 12 weeks.

**RELEVANT LINKS:**

Dep't of Labor and Industry:  
[Labor Standards Frequently asked questions about the Women's Economic Security Act \(WESA\)](#). See II  
Pregnancy and parental leave, question 3 Is an employee entitled to use pregnancy and parental leave in addition to Family and Medical Leave Act (FMLA) leave?

800.925.1122  
651.281.1200  
[HRbenefits@lmc.org](mailto:HRbenefits@lmc.org)

With that said, there could be, in very limited circumstances, a situation where an employee could possibly receive 24 weeks of leave even in the case where FMLA and Minnesota Parenting Leave runs concurrently. An example of this limited circumstance could include, for example, an employee needing 12 weeks for knee surgery following returning to work from 12 weeks taken for the birth of his/her child within the organization's defined 12 month period. Thus, this limited circumstance would ONLY be if the leave for the knee surgery is taken BEFORE the parenting leave. If it's after and the organization runs FMLA and MN Parenting Leave concurrently, then there's no more FMLA or Parenting Leave available to the employee. Other possible cases where an employee may be eligible for more than 12 weeks of leave, would be if an employer does not run FMLA and MN Parenting leave concurrently, or if the employer has a calendar year it is possible to stack leaves (maternity leave October – December, the employee requalifies for FMLA on January 1 and then takes 12 weeks off).

**VI. Further assistance**

If you have any additional questions, please contact the League's Human Resources and Benefits Department.