



LEGAL HOTLINE FOR TEXANS

815 Brazos, Suite 1100, Austin, Texas 78701

(800) 622-2520 or (512) 477-3950

Pension Counseling (888) 343-4414

FMLA

THIS PUBLICATION IS NOT A SUBSTITUTE FOR THE ADVICE OF AN ATTORNEY.

The pamphlets of the Legal Hotline for Texans are general in nature and should not be relied on as advice for your particular circumstances. For advice that is specific to your particular circumstances, you should consult a lawyer.

The Legal Hotline for Texans (LHT) is a telephone hotline providing free legal advice and consultation and other free legal services to Texans Age 60 and Older or Eligible for Medicare; Crime Victims Age 60 and Older and their Family Members and Authorized Claimants; and Pension and Retirement Plan Employees, Participants and Beneficiaries.

Eligible Clients can consult with an attorney of the Legal Hotline for Texans free of charge by calling one of the phone numbers listed above. If clients would like to consult with an attorney in their communities, or if ongoing representation by an attorney is needed, the Legal Hotline for Texans may be able to make a referral.

Depending on individual circumstances and local availability, such a referral may be to an organization providing free attorneys to low income persons, or may be to an attorney on the Legal Hotline for Texans' reduced-fee panel, or may be to a statewide or local lawyer referral service.

The Legal Hotline for Texans is a project of the Texas Legal Services Center with support from the Texas Department of Aging and Disability Services (DADS), the U.S. Centers for Medicare and Medicaid Services (CMS), the U.S. Administration on Aging (AoA), and the Texas Equal Access to Justice Foundation through the Texas Basic Civil Legal Services Program (BCLS) and the Texas Crime Victims Civil Legal Services Program (CVCLS).

© Copyright 2005, Texas Legal Services Center
All rights reserved.

The Family and Medical Leave Act of 1993

If you are trying to deal with a serious family medical problem you may be entitled to take time off from work, without penalty. If, for example, you need to take care of a newborn child, a family member with a serious health condition, or if you have a serious health condition you will need to know about the Family and Medical Leave Act (“FMLA”), which is a federal law that took effect in 1993 to help people better manage the demands of work and family by allowing them to take unpaid leave from work. In fact, if you are eligible, you can take up to 12 weeks of unpaid leave per year.

But you must meet several requirements to be eligible. To be an “eligible” employee several things must be true. First, you have to work for an employer that is covered by the Act. Fortunately, most employers are covered because the Act applies to all public agencies (whether federal, state, or local), and to all private employers that have at least 50 employees.

If your employer is covered by the Act, then to be eligible for the FMLA leave you, as an employee, must meet several requirements. First, you need to have worked for your employer for at least 12 months. You’re also required to have worked at least 1,250 hours during the last 12 months. So, for example, if you worked 40 hours per week, for the same employer, for the last 12 months, and the employer employs 100 people, then you qualify for FMLA leave. And, in some cases, you can take the leave intermittently. You might, for example, take blocks of time, or reduce your normal weekly schedule.

If your employer is covered, and you are eligible, then you are guaranteed the opportunity to take the FMLA leave, but only for certain events. First, you can take FMLA leave for the birth and care of your newborn child; you can also take leave to take care of placement issues related to an adoption or foster care situation. And if you are unable to work because of a serious health condition, or if an immediate family member has a serious health condition, then you can utilize FMLA leave.

But what is a “serious health condition”? The Act defines it as:

- (1) An illness, injury, impairment, or physical or mental condition that involves either a period of incapacity or treatment with inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential medical-care facility; and any period of incapacity or subsequent treatment in connection with such inpatient care; or
- (2) Continuing treatment by a health care provider that includes a period of incapacity due to:
 - a. A health condition (including treatment or recovery) lasting more than three consecutive days, that also includes treatment two or more times by a health care provider or one such treatment that involves a continuing regimen of treatments; or
 - b. Pregnancy or prenatal care; or
 - c. A chronic serious health condition that continues over an extended period of time, requires periodic visits to a health care provider, and may involve occasional episodes of incapacity (e.g. asthma, or diabetes); or

- d. A permanent or long-term condition for which treatment is not particularly effective (e.g. Alzheimer's, stroke, cancer); or
- e. Any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (e.g. chemotherapy or radiation treatments for cancer).

The Act defines "treatment," and "regimen of continuing treatment." Treatment does not include dental exams, for example; and taking an aspirin everyday does not constitute a "regimen of treatment." Suffice it to say that, generally, things that a person can do without a visit to a health care provider probably will not fit within the rules. But, a "common cold" or the flu might fit. If the illness requires a "regimen of continuing treatment" and results in at least 3 days of incapacity, then the condition may constitute a serious condition and allow for FMLA leave.

The Act also defines what is meant by the term "immediate family member," which is defined to include a spouse, child (including adopted and foster children), or parent. Note that grandparents are not included.

Thus, to summarize: if you are regularly employed, by a medium or large employer, and you are trying to deal with a serious health matter in your family, but you don't have usable sick leave or vacation time you can use, then you may be able to take advantage of FMLA unpaid leave – without penalty to your work position.

Once you decide you want (or need) to seek FMLA leave you have to give your employer notice. In fact, you must give 30-day advance notice when doing so is practicable (and foreseeable). If the FMLA leave was foreseeable, and 30-days notice was not given, then the employer can delay your leave.

The law also provides that your employer can require you to give medical certification to support the need for the leave request. The employer can also require a second or third medical opinion, if the employer pays for them, and for follow-up recertifications. Finally, an employer can require you to provide updates on your condition and status (i.e. when you intend to return to work), and if you are going to seek intermittent FMLA leave (i.e. schedule adjustments), you must try to schedule treatments to disrupt your work as little as possible.

Your employer is required to maintain your health insurance benefits and cannot change the terms of that coverage. So, for example, if your employer pays 100% of your coverage costs, and 50% of your family's coverage costs, then the employer must maintain that coverage at that cost while you are out on FMLA leave.

When you return to work, you must get your job back. That means you must be restored to your original job (or to an equivalent job with equivalent pay), and benefits, unless doing so would cause "substantial economic injury" to your employers operations. Under certain limited circumstances, an employer may refuse to reinstate certain highly paid "key" employees (a "key" employee is one that has a salary among the highest ten percent of employees). The employer must notify the employee that he or she is considered a "key" employee, notify the employee as

soon as the decision is made to not reinstate the person (and explain the reasons), offer the employee a reasonable chance to return to work, and make a final determination on the reinstatement issue by the end of the leave period.

One frequent area of concern and confusion relates to the fact that an eligible employee can take up to 12 weeks of FMLA leave during a 12-month period, but how is the 12-month period calculated?

Employers can choose one of several options, and it their choice. The employer might just use the calendar year, in which case you would be entitled to up to 12 weeks FMLA leave every calendar year. Or the employer might use their “fiscal” year. For example, many companies have “fiscal” years that run from September 1 of one calendar year thru August 31of the next calendar year (September 1, 2002 thru August 31, 2003, for example). Or the employer can choose to start the 12-month period from the date the FMLA leave begins, or use a “rolling” 12-month period that measures backward from the date the leave began.

But irrespective of how the employer chooses to count the 12-month period, the employer cannot require you to return to work early (i.e. before the condition resolves itself or the 12-weeks runs), not even to a “light-duty” assignment, but if you fail to provide required follow-up documentation and certifications, your employer can deny further leave.

Another area of concern relates to vacation pay, and other forms of paid leave, because an employer can require that you use all your accrued paid leave first, or that paid leave be counted as FMLA leave. But, the employer is required to notify you, within two business days, of how the employer will treat the FMLA leave. It is your employer’s responsibility to designate the leave. Note again that the leave guaranteed by the Act is unpaid leave. There is no requirement for paid leave.

Finally, it is unlawful for any employer to interfere with, restrain, or deny an employee any right provided for by the Family and Medial Leave Act. It is also unlawful for an employer to discharge or discriminate against any person for opposing any practice, or involvement in any proceeding, related to the FMLA. If you believe your employer has violated the law you should file a complaint with the United States Department of Labor, Wage and Hour Division. The Department of Labor has authority to bring an action in court to compel compliance, and you have the authority to initiate private civil action as well.