

## Family and Medical Leave Act Policy Decision Checklist

### 1. Communication and Documentation

- How will you tell employees about FMLA and their right to take FMLA leave?
- How will you measure the 12-month period in the FMLA year?
- Will you use template forms from the Department of Labor or create your own?
- Will you require reasonable documentation of a qualifying family relationship?
- For military exigency leaves, will you require certification?
- Will documentation be required for military caregiver leave?
- Will you define a process to retroactively designate leave as FMLA leave?

### 2. Pay

- Will paid leave, including vacation, PTO, and sick time be substituted for unpaid time off?
- Will FMLA leave run concurrent with workers' compensation, short-term disability or long-term disability?

### 3. Medical Certification

- Will you require medical certification?
- If medical certification is required, will you provide a job description?
- If requested medical certification is incomplete or insufficient, and the employee does not provide the additional information within seven days, will you deny leave or contact the provider directly?
- Will you pursue second and third opinions when there is reason to doubt the validity of information received?

## Medical Certification (continued)

- When will recertification be required?
- Will you require a fitness for duty certification at the end of a leave as a condition for return to work?

## 4. Intermittent Leave and Schedule Changes

- Will you allow intermittent leave to care for or bond with a newborn, newly placed adopted or foster child?
- For employees requiring intermittent or reduced schedule leave, will you offer a temporary transfer to an alternative position that better accommodates recurring periods of leave?

## 5. Maintenance of Benefits

- If leave is unpaid, what is the process for employees to make premium payments?
- Will benefits other than health also be extended to employees on leave?
- Will you seek to recover premiums if the employee does not return to work, except for allowable reasons under the Act? What is that process?

## Communication and Documentation

Employers have numerous choices related to documentation but their policy decisions must be communicated up front and be applied equally.

### How will you tell employees about FMLA and their right to take FMLA leave?

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| <input type="checkbox"/> Employers are required to provide general notice about FMLA through multiple sources.   | <ul style="list-style-type: none"> <li>• Employers must display a general notice about FMLA in view for employees and applicants. This can be the Wage and Hour Division’s FMLA poster or another format that contains the same information.</li> <li>• Employers must also provide general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning benefits or leave rights.</li> <li>• If such written materials do not exist, the employer may distribute a copy of the general notice to each new employee upon hire.</li> <li>• Distribution may be accomplished electronically.</li> </ul>   |
| <input type="checkbox"/> When an employee requests FMLA leave or the employer acquires knowledge that leave may be for an FMLA purpose, the employer must notify the employee of eligibility to take leave.                                      | <ul style="list-style-type: none"> <li>• Notice must be provided within five days of the first time an employee takes leave for an FMLA-qualified reason in the employer’s designated 12-month leave year. *</li> <li>• The notice can be oral or in writing.</li> <li>• If the employer determines that an employee is ineligible for leave, the employer must give at least one reason for the decision to the employee.</li> <li>• Only one notice in the 12-month period is required, even if there is a new qualifying reason for an FMLA absence.</li> </ul> <p>* <b>Note:</b> While FMLA training for supervisors is not mandated, the FMLA requires supervisors to recognize FMLA-qualifying reasons for leave so they can initiate notice in a timely manner.</p> |
| <input type="checkbox"/> Each time an employee requests FMLA leave, an employer is required to provide an eligibility notice; the employer must also provide <i>written</i> notice of the employee’s rights and responsibilities under the FMLA. | <p>The notice must include:</p> <ul style="list-style-type: none"> <li>• A statement that the leave may be counted as FMLA leave</li> <li>• The employer’s designated 12-month period for counting FMLA leave entitlement</li> <li>• A statement of the employee’s right to job restoration and maintenance of benefits</li> <li>• If applicable, information that the employee is designated as a “key” employee and what that could mean</li> </ul>  |

- Specific employer policy requirements related to FMLA must also be included.
    - Any requirement for the employee to furnish a certification and the consequences for failing to do so
    - Information regarding the employee's right or the employer's requirement for substitution of paid leave and conditions relating to any substitution, and the employee's right to take unpaid leave if the conditions for paid leave are not met
    - Instructions for the employee's health benefits premium payments during leave (and potential employee liability if the employee fails to return to work after FMLA leave)
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### How will you measure the 12-month period?

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- Employers may select one of four methods for establishing the 12-month period if the method is applied consistently and uniformly. If the employer fails to select a method, it must use the 12-month period method that is "most beneficial" to the employee.
    - The calendar year
    - Any fixed 12-month leave year, such as a fiscal year, a year required by state law or a year starting on the anniversary of the employee's hire date
    - The 12-month period measured forward from the date any employee's first FMLA leave begins
    - A rolling 12-month period measured backward from the date an employee uses any FMLA leave
  - Employer limits to choosing the 12-month methodology
    - Multi-state employers who have eligible employees in a state with family leave statutes that mandate a specific method for determining leave must comply with those rules within the respective state but may use a separate methodology for all other employees.
    - Employers who wish to change their method of measuring the 12-month period must provide at least 60 days' notice to of the intended change to affected employees and the transition may not negatively impact employees' retention of their leave entitlement.
    - The "single 12-month period" for military caregivers begins on the first day the employee takes leave and ends 12 months later, regardless of the employer-designated method of measurement.
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## Will you use template forms from the DOL or create your own?

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- Employers can use the Wage and Hour Division prototype forms available at [dol.gov/whd/fmla/forms](http://dol.gov/whd/fmla/forms)
    - WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition
    - WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition
    - WH-381 Notice of Eligibility and Rights & Responsibilities
    - WH-382 Designation Notice
    - WH-384 Certification of Qualifying Exigency for Military Family Leave
    - WH-385 Certification for Serious Injury or Illness of Covered Servicemember – for Military Family Leave
    - WH-385-V Certification for Serious Injury or Illness of a Veteran – for Military Caregiver Leave
  
  - Employers may create their own forms, provided the content reflects the DOL's model FMLA forms' content.
    - Employee Rights and Responsibilities Notice: Explains the FMLA provisions and procedures
    - Notice of Eligibility: Lets employees know whether they are eligible for FMLA leave
    - Certification forms: Documents whether a request is qualified
    - Designation Notice: Approves or denies FMLA leave requests or obtains additional information

**Note:** States with Family Medical Leave laws may provide or mandate their own forms.
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## Will you require reasonable documentation of a family relationship?

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- An employer may, but is not required to, request that an employee provide reasonable documentation of the qualifying family relationship.
    - The employee can provide a simple statement asserting that a family relationship exists.
    - The employee may provide documentation such as a birth certificate or court document.
    - The employee, not the employer, chooses the type of document to provide.
    - The employer is permitted to examine documentation, but the employee is entitled to the return of the official document submitted for this purpose.
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## For military exigency leaves, will you require certification?

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- Employees may take a qualifying exigency leave if the military member is on covered active duty, under a call to covered active duty status, or has been notified of an impending call or order to covered active duty.
  - Employers may request:
    - A copy of the military member's active duty orders (or other official documentation issued by the military) which indicates the military member is on covered active duty or call to covered active duty status.
    - Verification from the Department of Defense that the military member is on covered active duty. However, an employer may not request any additional information from the Department of Defense.
    - A statement or description of the appropriate facts regarding the qualifying exigency.
    - The approximate date on which the leave began (or will begin), and how long and how often leave will be needed.
    - The contact information for any meeting with a third party and a brief description of the purpose of the meeting.
- Form WH-384, Certification of Qualifying Exigency for Military Family Leave, may be used or employers may create their own version.

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**Note:** The FMLA specifies events that are covered as exigency leaves, but the employer and employee may agree to additional events, along with the timing and duration of the leave.

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## Will documentation be required for military caregiver leave?

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- An employer may require that a request for military caregiver leave be supported by a certification.
- The certification may be completed by the Department of Defense, Department of Veterans Affairs, TRICARE, or a private health care provider.
- An employer may request a second or third opinion of a covered veteran's serious injury or illness only when a certification is provided by a non-military-affiliated health care provider.
- Recertification is not permitted for such leaves.
- Employers may use Form WH-385, Certification for Serious Injury or Illness of a Covered Service Member; Form WH-385-V, Certification for Serious Illness or Injury of a Veteran for Military Caregiver Leave; or create their own version containing the same information.

## Will you define a process to retroactively designate leave as FMLA leave?

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- If the employer was unaware of the reason for a leave, it may retroactively designate the leave as FMLA leave while the leave is in progress or within two business days of the employee's return to work.
  - Where an employer fails to designate the leave as FMLA-qualifying and notify the employee of the designation, the employee is provided the full protections of the FMLA, but none of the absence preceding the notice can be counted against the employee's 12 week FMLA entitlement.
  - An employee and employer may agree to retroactively designate an absence as FMLA-protected.
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## Pay

Employees may choose to substitute paid time off for unpaid time off or employers may require that accrued paid leave run concurrent with FLMA leave.

### Will paid leave, including vacation, PTO, and sick time be substituted for unpaid time off?

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- An eligible employee may choose, or an employer may require an employee to substitute accrued paid leave for FMLA leave.
    - The substitution of paid time off for unpaid FML is determined by the employer's applicable paid leave policy. Paid time cannot be substituted for reasons that would not be allowed for non-FMLA reasons.
    - Employers may not require, but may allow, an employee to substitute paid leave that is not yet available in accordance with policy.
    - Employees must be informed of the process for substituting paid leave in the Rights and Responsibilities Notice.
    - If an employer has a uniformly applied policy that requires submission of a doctor's note to receive sick pay, the employee may be required to submit documentation for pay, but not to validate the FMLA leave.
  - Unpaid leave under FMLA will not cause an employee who is exempt from the overtime requirement of the Fair Labor Standards Act to lose the FLSA exemption.
    - The employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee.
    - Employees who are paid using a fluctuating workweek method may be paid on an hourly basis for the duration of an intermittent FMLA leave. The hourly rate is determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken.
    - This special exception to the salary basis requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as FMLA leave.
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### Will FMLA leave run concurrent with workers' compensation, short-term disability, or long-term disability?

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- Leave taken under a disability leave plan or as a workers' compensation absence that also qualifies as FMLA leave due to the employee's own a serious health condition may be designated by the employer as FMLA leave.
  - Where state law permits, employers and employees can supplement paid leave with accrued paid leave to make up the difference in salary.
  - If an employee is not FMLA-eligible at the start of a leave but becomes eligible during the leave, any of the remaining leave period taken for a FMLA-qualifying reason becomes FMLA protected.
  - When a holiday falls during a week in which the employee is taking the full week as FMLA leave, the entire week is counted toward the employee's FMLA entitlement. If the employee is taking less than a full week, than the time is not counted as FMLA leave unless the employee was scheduled for and takes the holiday as FMLA leave.
  - Performing "light duty" work does not count against an employee's FMLA leave entitlement year.
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## Medical Certification

Building robust medical certification and recertification processes into an FMLA are the best tools an employer can have to comply with the Act and to curb potential fraud.

### Will you require medical certification?

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| <p><input type="checkbox"/> Employers are entitled to require medical certification for certain requests for leave.</p>                           | <p>Medical certification may be requested for:</p> <ul style="list-style-type: none"> <li>• The employee's own serious health condition</li> <li>• The serious health condition of the employee's parent, spouse, son or daughter</li> <li>• Military family leave</li> </ul> <p>Employers may not request medical certification for leave to bond with a healthy newborn child or a child placed for adoption or foster care.</p>  |
| <p><input type="checkbox"/> If an employer requires a medical certification, part of it must be completed by a specific health care provider.</p> | <ul style="list-style-type: none"> <li>• A doctor of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices</li> <li>• A podiatrist, dentist, clinical psychologist, optometrist, or chiropractor (with limitations) authorized to practice in the state and performing within the scope of his or her practice</li> <li>• A nurse practitioner, nurse-midwife, clinical social worker, or physician assistant authorized to practice in the state and performing within the scope of his or her practice</li> <li>• A Christian Science practitioner listed with the First Church of Christ, Scientist, in Boston, Massachusetts</li> <li>• Any health care provider from whom the employer or the employer's group health plan's benefits manager will accept a medical certification to substantiate a claim for benefits</li> </ul> |
| <p><input type="checkbox"/> Employers must allow employees at least 15 calendar days to obtain a required medical certification.</p>              | <ul style="list-style-type: none"> <li>• If an employee fails to provide a certification within 15 calendar days from receipt of the request for certification but made diligent, good faith efforts to do so and the delay was due to extenuating circumstances outside his or her control, the employer may not deny the leave for the period that the certification was late.</li> <li>• If the employee is substantially delayed in providing documentation and does not have sufficient reason, FMLA leave can be denied for the period following the 15-day window up until certification is supplied.</li> <li>• If the employee never produces the certification, the leave is not FMLA-protected leave.</li> </ul>   |
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## If medical certification is required, will you provide a job description?

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- The FMLA requires that the employee's health care provider certify that the medical condition for which the employee is seeking leave renders the employee unable to perform one or more of the employee's job functions.
    - If the employer fails to provide a list of the employee's essential functions or a job description, the medical provider can only identify limitations based upon the employee's own description of job functions.
    - An employer may provide a statement of the essential functions of the employee's position held at the time notice is given or leave commenced, whichever is earlier, for the employee's health care provider to review during the medical certification process.
    - When such statement is provided, a sufficient medical certification must specify which functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the position.
    - Job descriptions should be up to date, describe tasks with specificity (including both physical and mental requirements), and distinguish between essential and marginal job functions.
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## If the requested medical certification is incomplete or insufficient, and the employee does not provide the additional information within seven days, will you deny FMLA or contact the provider directly?

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- Before an employer can deny FMLA leave based on an incomplete or insufficient medical certification, the employer must:
    - Give the employee written notice of additional information needed
    - Allow the employee at least seven calendar days to correct deficiencies
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- If certification remains incomplete or insufficient after corrections were requested, the employer may choose between:
    - Denying the FMLA leave based on the incomplete or insufficient documentation, or
    - Contacting the provider directly (but only if the employee provides a signed, valid Health Insurance Portability and Accountability Act (HIPAA) authorization).

Although a HIPAA authorization is not required for authentication (that is, 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 authorized by the health care provider who signed the document), it's advisable to ask the employee to sign one before there is any contact with the health care provider.
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**Note:** The only individuals who may contact an employee's health care provider, with or without a HIPAA authorization, are (1) a health care provider hired by the employer, (2) a human resource professional, (3) a leave administrator, or (4) a management official (other than the supervisor).

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## Will you pursue second and third opinions when there is reason to doubt the validity of information received?

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- Employers may require employees to get a second or third medical opinion if they have reason to doubt the validity of certification supporting FMLA leave.
    - Second and third opinions are at the employer's expense.
    - Employers may unilaterally select a second opinion medical provider; a third opinion medical provider must be approved by both the employee and employer.
    - The provider chosen by the employer may not be employed or contracted on a regular basis by the employer (unless the employer is in an area with limited services).
    - Employees are provisionally entitled to FMLA benefits pending the receipt of a second or third medical opinion.
    - Employees are entitled to receive copies of the second and third medical opinions.
  
  - Employers may deny FMLA leave if employees do not comply with second and third opinion requests.
    - If the additional certifications do not support FMLA leave, the employer does not have to designate the leave as protected under FMLA.
    - If the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion to render a sufficient and complete second opinion, the employer can deny FMLA leave.
    - If the employee does not attempt in good faith to work with the employer to select a mutually agreeable third opinion provider, the employer can deny FMLA leave.
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## When will recertification be required?

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- Employers may use the recertification process to assure that FMLA leave is utilized within the parameters of the Act and remains medically necessary.
    - An employer may request recertification no more often than every 30 days and only when the employee is absent or requests to be absent during those 30 days.
    - If the medical certification indicates that the minimum duration of the serious health condition is more than 30 days, the employer must wait until the minimum duration expires or may minimally request recertification every six months.
    - Second and third opinions are not allowed on recertification.
  
  - Employers can request recertification in connection with an absence by the employee in less than 30 days only if:
    - The employee requests an extension of leave
    - The circumstances described by the previous certification have changed significantly
    - The employer receives information that casts doubt on the employee's stated reason for the absence or the continuing validity of the existing medical certification
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**Note:** Employers may provide records of the employee's absence patterns and ask the health care provider if the serious health condition and the need for leave is consistent with such a pattern.

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### Will you require a fitness for duty certification at the end of a leave as a condition for return to work?

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- If you require the employee to present a fitness-for-duty certification to return to work, you must provide notice of such requirement with the designation notice.
  - Return to work fitness-for-duty processes must be consistently applied to all leaves and not just FMLA leaves.
  - An employer may seek fitness-for-duty certification only regarding the particular health condition that caused the employee's need for FMLA leave.
  - 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.
  - The FMLA does not authorize Independent Medical Exams (IMEs) to investigate an employee's fitness for duty upon return to work.
  - 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 (that is, a reasonable belief of significant risk of harm to the employee or others) regarding the employee's ability to perform duties due to the serious health condition for which the employee took such leave, an employer is entitled to a fitness-for-duty certification for such absences up to once every 30 days.

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**Note:** Employees returning from an FMLA leave may request a reasonable accommodation under the American with Disabilities Act that would enable them to perform the essential functions of their position.

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## Intermittent Leave

Intermittent leave is one of the most difficult types of FMLA leave to manage. Careful consideration of options for such leaves may help reduce unplanned time off under the Act.

### Will you allow for intermittent leave to care for or bond with a newborn, newly placed adopted or foster child?

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- An eligible employee may use intermittent or reduced schedule leave to care for a healthy child born or placed with the family only if the employer agrees.
  - Employees are entitled to take solid blocks of time to be with a child during the 12-month period beginning on the date of birth or placement.
  - Employees are entitled to intermittent leave separate from bonding if the leave is for the care of a spouse, newborn, or newly placed child with a serious health condition.
  - If the employer approves intermittent leave or reduced schedules, the employer may temporarily transfer the employee to a position that better accommodates scheduling restrictions or the employer may alter an existing job.
- State laws may offer additional entitlements to intermittent family leave.
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### For employees requiring intermittent or reduced schedule leave, will you offer a temporary transfer to an alternative position that better accommodates recurring periods of leave?

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- When such leave is foreseeable based on planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position for which the employee is qualified and which better suits the employee's reduced hours.
  - Transfers are not permissible as a response to unplanned intermittent use of FMLA leave.
  - Alternative jobs must be with equivalent pay and benefits, even if the transfer position would otherwise be compensated at a lower level than the employee's own job.
  - Modifying a current position is an employer option.
  - Transfers may not be used to discourage an employee from exercising the employee's rights under FMLA. Some examples are moving a day worker to an overnight shift against the employee's will, or transferring the employee to an alternate job site a significant distance away.
  - When the employee's need for reduced or intermittent scheduling is no longer needed, the employee must be reinstated to the same or equivalent former position.
- Transfer to an alternative position may require compliance with collective bargaining agreements, state and federal law, including the Americans with Disabilities Act.
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## Maintenance of Benefits

Maintenance of benefits during a FMLA leave is one of the primary entitlements under the Act. Employers should proceed with caution when making any changes to employee coverage during a qualified leave.

### If FMLA leave is unpaid, what is the process for employees to make premium payments?

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- The employer must provide the employee with advance written notice of the terms and conditions under which premium payments must be made.
  - If an employee's premium payment is more than 30 days late, an employer may drop the employee's health insurance coverage unless the employer has a policy of allowing a longer grace period.
  - In order to drop insurance coverage for an employee whose premium payment is late, an employer must provide written notice to the employee that the payment has not been received, and that the insurance coverage will end at a specified date at least 15 days after the date of the written notice unless payment is received by that date. This notice must be mailed to the employee at least 15 days before coverage is to cease.
  - The employer may drop the employee from coverage retroactively if the employer has established policies regarding other forms of unpaid leave that allow the employer to cease coverage retroactively to the date the unpaid premium payment was due, provided the 15-day notice was given.
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### Will benefits other than health benefits be extended to employees on leave?

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- An employee's entitlement to benefits other than group health benefits during a period of FMLA leave is determined by the employer's established policy for providing such benefits when the employee is on other forms of leave.
  - "Group health plan" means a plan that provides health coverage and is contributed to by the employer. Individual policies purchased by employees are not considered "group health plans" under the FMLA.
  - If an employer provides a new health plan or benefits or changes health plan or benefits while an employee is on FMLA leave, the employee is entitled to the new or changed plan or benefits to the same extent as if the employee were not on leave.
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Some employers find it necessary to continue payments to maintain other benefits during the period of FMLA leave to restore employees to equivalent benefits upon return from FMLA leave. In that case, the employer may recover the employee's share of those payments when the employee returns from leave.

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### Will you seek to recover premiums if the employee does not return to work, except for allowable reasons under the Act? What is that process?

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- The employer may recover its share of health plan premiums unless the reason the employee does not return is due to 1) circumstances beyond the employee's control, or 2) the continuation, recurrence, or onset of a serious health condition of the employee, the employee's family member, or a serious injury or illness of a covered service member, that would otherwise entitle the employee to leave under FMLA.
    - An employee who returns to work for at least 30 calendar days is considered to have "returned" to work for the purposes of the FMLA. Furthermore, an employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after returning to work, is considered to have returned to work.
    - The employer may require supporting medical certification to validate the continuation, reoccurrence, or onset of the serious health condition. If the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work is due to a reason other than circumstances beyond the employee's control, the employer may recover all of the health benefit premiums it paid during the period of unpaid FMLA leave.
    - When paid leave is substituted for FMLA leave, the employer may not recover its share of health insurance or other non-health benefit premiums for the period covered by paid leave.
    - Recovery of health insurance premiums does not apply to paid leave provided under a plan covering temporary disabilities, including workers' compensation.

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  - The employer may recover the costs of health coverage through deduction from any sums due to the employee subject to applicable federal or state wage payment or other laws.
    - Alternatively, the employer may initiate legal action against the employee to recover such costs.
    - If the employer elects to maintain voluntary benefits during the leave, at the conclusion of leave the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums, regardless of whether the employee returns to work.
    - The amount that self-insured employers may recover is limited to only the employer's share of allowable "premiums" as would be calculated under COBRA, excluding the two percent fee for administrative costs.
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