Eligibility and Coverage

What is FMLA?
The Family and Medical Leave Act of 1993 (FMLA) provides covered employees with an entitlement up to 12 weeks of job-protected leave without pay (LWOP) during any 12 month period for certain family and medical needs. The United States government created FMLA to help employees balance their work and family responsibilities in accommodating the legitimate interests of American employers and promoting equal employment opportunities for employees.

Can an employee be denied FMLA leave?
FMLA leave is an entitlement to employees who qualify under all conditions of eligibility, notice, certification, usage purpose, and if the FMLA leave entitlement has not been exhausted within the 12 month period. By satisfying all eligible conditions, an employee may not be denied FMLA leave.

Who is eligible for FMLA?
To be entitled to FMLA leave, a federal employee (covered under 5 U.S.C. 6301(2)) must have completed at least 12 months of federal government service (not required to be consecutive and not required to be at the same agency).

The following employees are not covered:
- Public Health Service (PHS) Commissioned Corps Officers
- Employees with intermittent appointments
- Employees with temporary appointments of less than 13 months
- Individuals not appointed by the government, such as:
  - Intramural Research Training Award Fellows
  - Guest Researchers
  - Visiting Fellows
  - Special Volunteers

For whom can FMLA leave be used?
Family members under FMLA fall under a narrow definition. FMLA leave may be used for:
- Employee (self)
- Employee’s child(ren)
- Employee’s parent(s)
- Employee’s spouse (legal marriage regardless of sex or state of residency)
- “Next of kin” under military caregiver leave
What types of family and medical needs qualify under FMLA?
FMLA leave may be used for:

- the birth of a son or daughter of the employee and the care of such son or daughter
- the placement of a son or daughter with the employee for adoption or foster care
- the care of a spouse, son or daughter, or parent of the employee who has a serious health condition
- a serious health condition of the employee that makes the employee unable to perform the essential functions of his or her position
- a qualifying exigency arising out of the fact that the spouse, a son or daughter, or a parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces
- military caregiver leave

What is a serious health condition?
A serious health condition means an illness, injury, impairment, or physical or mental condition that involves:

- conditions that require inpatient care in a hospital, hospice, or residential medical care facility
- conditions that incapacitate an employee or employee’s family member for more than three consecutive days and require ongoing medical treatment
- chronic conditions that cause occasional periods when an employee or employee’s family member are incapacitated and require treatment by a health care provider
- pregnancy and childbirth

This definition includes conditions such as cancer, heart attacks, strokes, severe injuries, Alzheimer's disease, and/or terminal diseases. A serious health condition is not intended to cover short-term conditions for which treatment and recovery are very brief, such as common cold, influenza, earaches, upset stomach, headaches (other than migraines), and/or routine dental or orthodontia problems unless complications arise.

What is a qualifying exigency related to covered active duty in the Armed Forces?
Qualifying exigency leave under the FMLA helps employees manage family affairs when their family members are called to or on covered active duty. Leave may be used for the following categories, and specific terms can be found on Office of Personnel Management’s (OPM) fact sheet.

- short-notice deployment
- military events and related activities
- childcare and school activities
- care of service member’s parent
- financial and legal arrangements
- counseling
- rest and recuperation
- post-deployment activities
What is covered active duty for FMLA qualifying exigency?
Covered active duty or call to covered active duty status refers to:
- regular component of the Armed Forces - duty during the deployment of the service member with the Armed Forces to a foreign country under a call or order to active duty (or notification of an impending call or order to active duty)
- member of a reserve component of the Armed Forces - duty during the deployment of the service member with the Armed Forces to a foreign country under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to any of the following sections of U.S.C. Title 10, or any other provision of law during a war or during a national emergency declared by the President or Congress

What is military caregiver leave under FMLA?
Military caregiver leave allows eligible employees to take up to 26 weeks of leave in a single 12-month period to care for a family member (spouse, son or daughter, parent, next of kin) who is a covered service member/veteran with a serious injury or illness. Military caregiver leave is available to an eligible employee once per service member, per serious injury or illness.

The “next of kin” of a covered service member/veteran is the nearest blood relative, other than the veteran’s spouse, parent, son, or daughter, in the following order of priority:
1. a blood relative who has been designated in writing by the service member as the next of kin for FMLA purposes
2. blood relative who has been granted legal custody of the service member
3. brothers and sisters
4. grandparents
5. aunts and uncles
6. first cousins

A veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness is a covered veteran if he or she:
- was a member of the Armed Forces (including a member of the National Guard or Reserves)
- was discharged or released under conditions other than dishonorable
- was discharged within the five-year period before the eligible employee first takes FMLA military caregiver leave to care for him or her

A serious injury or illness is one that is incurred by a service member while on active duty that may cause the service member to be medically unfit to perform the duties of his or her office, grade, rank, or rating. A serious injury or illness also includes injuries or illnesses that existed before the service member’s active duty and that were aggravated by service while on active duty.

For what other purposes can an employee use FMLA leave?
In 1997 President Clinton issued a memorandum to expand family and medical leave policies under FMLA and allows for federal employees 24 hours of leave without pay during any 12-month period to fulfill certain family obligations:
• School and Early Childhood Educational Activities - to allow employees to participate in school activities directly related to the educational advancement of a child. This would include parent-teacher conferences or meetings with child-care providers, interviewing for a new school or child-care facility, or participating in volunteer activities supporting the child’s educational advancement. In this memorandum, “school” refers to an elementary school, secondary school, Head Start program, or a child-care facility.
• Routine Family Medical Purposes - to allow parents to accompany children to routine medical or dental appointments, such as annual checkups or vaccinations when no additional sick leave is available to employees.
• Elderly Relatives’ Health or Care Needs - to allow employees to accompany an elderly relative to routine medical or dental appointments or other professional services related to the care of the elderly relative, such as making arrangements for housing, meals, phones, banking services, and other similar activities.

Can employees be removed from their position by using FMLA leave?
Upon return from FMLA leave, an employee must be restored to his or her original job, or to an "equivalent" job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions. While on an intermittent/reduced schedule for FMLA, the employer may transfer the employee temporarily to an alternative position with equivalent pay and benefits that accommodates recurring periods of leave better than the employee’s regular job. An employee may also request a temporary alternative position subject to approval by employer while on an intermittent/reduced schedule.

Will an employee lose his/her benefits coverage while on FMLA leave?
An employee who takes FMLA leave is entitled to maintain health benefits coverage. An employee on unpaid FMLA leave may pay the employee share of the premiums on a current basis or pay upon return to work. Being in a leave without pay (or unpaid FMLA leave) status affects various employee entitlements, including the accrual of annual and sick leave. For example, when a full-time employee with an 80-hour biweekly tour of duty accumulates a total of 80 hours of nonpay status (either in one pay period, or over the course of several pay periods), the employee will not earn annual and sick leave in the pay period. Further details on the effects of extended leave without pay on federal benefits and programs can be found on this NIH Benefits and Payroll Liaison Branch fact sheet.

Can a leave approving official/supervisor mandate an employee to take FMLA leave?
A federal employee is responsible for requesting leave or other time off from work; therefore, the employee is responsible for invoking his/her entitlement to FMLA leave. Under 5 CFR 630.1203(h), an agency may not subtract leave from the 12-week FMLA leave entitlement unless the agency has obtained confirmation from the employee of his or her intent to invoke entitlement to FMLA leave (e.g., giving notice). However, an employee may be required to invoke FMLA to secure leave approving official’s approval of LWOP, advanced annual leave, advanced sick leave, or hours from Voluntary Leave Transfer Program and/or Leave Bank Program – all leave categories/programs that are not employee entitlements.
Duration, Request, and Timekeeping

**How long is FMLA leave and when does it begin?**

The length of allowed FMLA leave depends on the conditions (and certification) for leave purposes and is based upon a 12 month timeframe. While up to 12 or 26 weeks of FMLA leave may be available within a 12 month period depending on purpose, the actual duration granted is dependent on details described within the certification and may not exceed the maximum length of time. The 12 month period is not based on a set calendar or fiscal year; rather, the 12 month period begins upon the date an employee first uses FMLA leave. After the expiration of that 12 month period, an employee may be eligible use FMLA again.

For FMLA leave related to childbirth or placement for adoption or foster care, the 12 month period only begins on that actual date of childbirth or legal date of adoption or foster care. FMLA leave may begin prior to the actual date of childbirth, adoption, or foster care. FMLA leave to care for a newborn child or for a newly placed child must conclude within 12 months after the birth or placement.

There is no carryover of allowable/unused FMLA leave from a previous 12 month period to a new 12 month period. FMLA leave begins the first instance its usage is recorded (e.g., first record of FMLA leave in the Integrated Time and Attendance System [ITAS]).

**Up to 12 weeks, depending on certification details**

FMLA provides up to 12 weeks of unpaid leave to eligible employees in a 12 month period for the following reasons:

- the birth of a son or daughter of the employee and the care of such son or daughter
- the placement of a son or daughter with the employee for adoption or foster care
- the care of a spouse, son or daughter, or parent of the employee who has a serious health condition
- a serious health condition of the employee that makes the employee unable to perform the essential functions of his or her position
- a qualifying exigency arising out of the fact that the spouse, or a son or daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces

**Up to 26 weeks (military caregiver leave), depending on certification details**

FMLA provides up to 26 weeks of leave to eligible employees during a single 12-month period to care for a seriously injured or ill service member/veteran under military caregiver leave. The single 12-month period for military caregiver leave begins on the first day the employee takes leave for this reason and ends 12 months later.

An eligible employee is limited to a combined total of 26 workweeks of leave for any FMLA-qualifying reasons during the single 12-month period. Up to 12 of the 26 weeks may be for an FMLA-qualifying reason other than military caregiver leave. For example, if an employee uses 10 weeks of FMLA leave for his or her own serious health condition during the single 12-month period, the employee has up to 16 weeks of FMLA leave left for military caregiver leave.
Military caregiver leave is available to an eligible employee once per service member, per serious injury or illness. However, an eligible employee may take an additional 26 weeks of leave in a different 12-month period to care for the same service member if he or she has another serious injury or illness. For example, if an eligible employee takes military caregiver leave to care for a current service member who sustained severe burns, the employee would be entitled to an additional 26 weeks of caregiver leave in a different 12-month period if the same service member is later diagnosed with a traumatic brain injury that was incurred in the same incident as the burns.

An eligible employee may also take military caregiver leave to care for more than one current service member or covered veteran with a serious injury or illness at the same time, but the employee is limited to a total of 26 weeks of military caregiver leave in any single 12-month period. Additionally, an eligible employee may be able to take military caregiver leave for the same family member with the same serious injury or illness both when the family member is a current service member and when the family member is a veteran.

Is FMLA leave granted as a continuous block or can there be intermittent usage?
FMLA allows employees to take leave on an intermittent basis or to work a reduced schedule. Certification will document any necessities for intermittent/reduced schedule usage (such as nature of employee’s serious health condition, caretaker requirements for a seriously ill family member, episodic treatments, care after childbirth, adoption, or foster care, etc.). 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 operation. If an employee uses intermittent/reduced schedule leave, the employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodates recurring periods of leave better than the employee’s regular job. If an employee is absent beyond the FMLA leave granted and recorded in the certification (whether in a continuous block or intermittent basis/reduced schedule), the employee’s supervisor should consult his/her servicing Employee/Labor Relations Specialist. See additional information for episodic requests for leave under intermittent usage of FMLA leave.

Do federal holidays count toward the entitled FMLA (12 weeks) leave time?
FMLA leave may be charged only on days on which an employee is scheduled to be in a duty status. Any holidays authorized under 5 U.S.C. 6103 or by Executive order and non-workdays established by Federal statute, Executive order, or administrative order that occur during the period in which the employee is on FMLA leave will not be counted toward the 12-week entitlement to family and medical leave.

When and how does an employee request FMLA leave?
When an eligible employee wishes to use FMLA leave (also known as invoking his/her entitlement to FMLA), the employee must notify his/her leave approving official of the intent to use FMLA. While written notice is preferred, oral communication is allowed. An employee must provide notice of his or her intent to take FMLA leave not less than 30 days before leave is to begin or, in emergencies, as soon as is practicable. If necessary, notice may be given by an employee’s personal representative. Employees must provide notice as soon as practicable for foreseeable leave due to a qualifying exigency.
Next, the employee must submit certification paperwork as requested by the agency. The leave approving official holds the responsibility for FMLA leave approval/disapproval. An employee and his/her leave approving official arrange the FMLA leave schedule while the employee and his/her administrative officer/timekeeper arrange the leave details for timekeeping purposes. An employee may not retroactively invoke his/her entitlement to FMLA (or retroactively substitute paid time off for leave without pay previously taken under the FMLA).

How does an employee record FMLA leave for timekeeping purposes?
An employee is responsible for submitting FMLA leave requests into our timekeeping system (such as Integrated Time and Attendance System) as early in advance as possible or in emergencies, as soon as is practicable. It is crucial to record FMLA leave as accurately and up-to-date as possible to protect both the employee and agency. FMLA leave must be recorded as FMLA-related for timekeeping to best account for duration and to document time under FMLA protections, e.g., job protection, benefits, confidentiality, etc.

Integrated Time and Attendance System (ITAS) instructions:
1. After logging into ITAS, select “Request Leave” on upper left-hand column.
2. Click on the “Other Types” link for “Leave Type.”
3. After the leave types expand, scroll down to the FMLA leave categories and select the appropriate category whether it is annual leave, sick leave, or LWOP.
4. Submit the appropriate number of hours requested in the “Hours” column.
5. Select the dropdown box immediately to the right in the “Remark” column to select FMLA leave purpose, such as “Birth of a child/care of a newborn,” “Placement of a child for adoption or foster care,” “Serious health condition – employee,” etc.

ITAS screenshots can be found below and further questions on submitting FMLA leave requests in ITAS can be directed to the employee’s administrative officer/timekeeper.
How can an employee request episodic FMLA leave under intermittent schedule conditions (calling out)?

Employees whose approved FMLA leave under an intermittent schedule allows for episodic leave requests (e.g., condition manifests in an unscheduled manner and employees require leave) should make FMLA leave requests as soon as possible and explicitly notify their leave approving official that the leave is for FMLA when “calling out.” If the employee has been approved for FMLA leave under an intermittent schedule, has not exceeded the maximum length of time approved, and is within the 12 month period, the leave approving official must approve this particular episodic FMLA leave request and may not seek further certification or violate the confidentiality of the employee regarding this episodic FMLA leave request. It should be accurately recorded as “FMLA leave” in ITAS.

Documentation and Certification

What kind of documentation and paperwork is required?

An employee who wishes to use FMLA leave is required to complete certification connected to the purpose of the FMLA leave. Depending on the purpose, this may be certification regarding a qualifying exigency surrounding covered active duty or medical certification with information supplied by a health care provider that includes information such as approximate date condition start/end period, appropriate facts surrounding condition, estimated treatment dates, etc.

Employees must provide medical certification of a serious health condition no later than 15 calendar days after the date the agency requests the medical certification. If it is not practicable under the particular circumstances to provide the requested medical certification within 15 calendar days after the date requested by the agency despite the employee’s diligent, good faith efforts, the employee must provide the medical certification within a reasonable period of time under the circumstances involved, but no later than 30 calendar days after the date the medical certification was requested by the agency.

Certification documentation is created by the U.S. Department of Labor (DOL) and may be found below, specific to the FMLA purpose:

- WH-380E Certification of Health Care Provider for Employee’s Serious Health Condition
- WH-380F Certification of Health Care Provider for Family Member’s Serious Health Condition
- WH-384 Certification of Qualifying Exigency for Military Family Leave
- WH-385 Certification for Serious Injury or Illness of a Current Servicemember for Military Family Leave
- WH-385V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave

DOL forms may be unnecessary for requested FMLA leave related to the purpose of adoption and foster care. Alternatively, required documentation should include a signed statement by the employee describing requested FMLA leave for purposes of adoption or foster care; estimated leave duration/return date; and copy of birth certificate, attesting medical care facility, surrogacy, adoption, or foster care documentation.
**Are active duty orders required for FMLA leave taken for a qualifying exigency?**

The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status of a covered service member, an agency may require the employee to provide a copy of the covered service member’s active duty orders or other documentation issued by the military that indicates the covered service member is on covered active duty or call to covered active duty status, and the dates of the covered service member’s active duty service. This information need only be provided to the agency once. A copy of new active duty orders or other documentation issued by the military must be provided to the agency if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status of the same or a different covered service member.

**What happens with an employee’s FMLA documentation?**

An employee is not required to disclose the specific nature of a serious health condition or provide medical records to his/her leave approving official - only that FMLA leave is requested for a condition that satisfies FMLA requirements. As such, the employee may either submit medical certification directly to his/her leaving approving official or to Occupational Medical Service (OMS) to maintain confidentially. OMS can attest whether the employee qualifies for a FMLA-approved condition and nature of duration for leave granting purposes. While OMS may comment on the existence or nonexistence of a serious health condition that qualifies for FMLA leave, only the leave approving official may approve or disapprove the FMLA leave. An Employee/Labor Relations Specialist who services the employee’s Institute/Center can help the employee’s supervisor with navigating concerns/guidance for employees invoking FMLA.

The employee’s certification and paperwork for FMLA must be secured whenever not in use or under the direct control of authorized persons. It must be stored in metal filing cabinets which are locked when the records are not in use, or in a secured room. The paperwork will be safely stored and destroyed one year after the employee returns from FMLA leave.

**Does an employee have to recertify their medical certification?**

Your leave approving official may require subsequent medical recertification on a periodic basis, but not more than once every 30 calendar days, for leave taken for purposes relating to pregnancy, chronic conditions, or long-term conditions (under the definition of serious health condition). For leave taken for all other serious health conditions and including leave taken on an intermittent or reduced leave schedule, if the health care provider has specified on the medical certification a minimum duration of the period of incapacity, the agency may not request recertification until that period has passed. An agency may require subsequent medical recertification more frequently than every 30 calendar days, or more frequently than the minimum duration of the period of incapacity specified on the medical certification, if the employee requests that the original leave period be extended, the circumstances described in the original medical certification have changed significantly, or the agency receives information that casts doubt upon the continuing validity of the medical certification.
Can the employer verify certification for FMLA leave for qualifying exigencies?
If an employee submits a complete and sufficient certification to support his or her request for leave because of any qualifying exigency for covered active duty, the agency may not request additional information from the employee. However, the agency may verify the information described below and does not need the employee's permission to do so.

1. If the qualifying exigency involves meeting with a third party, the agency may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and verifying the information provided in the employee's statement regarding the meeting between the employee and the specified individual or entity. No additional information may be requested by the agency.

2. An agency may contact an appropriate unit of the Department of Defense to request verification that a covered service member is on covered active duty or call to covered active duty status. No additional information may be requested by the agency.

Substituting Paid Leave with Unpaid FMLA Leave
Can an employee substitute unpaid leave during FMLA with paid leave?
FMLA leave is not a paid leave category and defaults as leave without pay. An employee may elect to substitute his/her annual leave and/or sick leave, consistent with current laws and OPM’s regulations for using annual and sick leave, for unpaid leave under FMLA. The employee may also be eligible to use leave earned from the Voluntary Leave Transfer Program, Leave Bank Program, advanced annual leave, and/or advanced sick leave. An employee may not retroactively substitute paid time off for leave without pay previously taken under the FMLA.

How does FMLA work with Leave Transfer or Leave Bank program?
An employee who has a personal or family emergency and will go (or is projected to go) into a nonpay status for at least 24 hours (LWOP), may be eligible to apply for the Voluntary Leave Transfer Program (VLTP) and/or Leave Bank Program (LB). Please visit their respective program pages to determine eligibility and further questions can be directed to the employee’s respective Institute/Center Leave Transfer Program Coordinators or Leave Bank Contacts. While both programs are types of leave sharing programs among federal employees and may be utilized simultaneously, this comparison chart provides similarities and differences.

Employees who invoke FMLA, exhaust their sick and annual leave, and successfully submit applications may be eligible to use donated leave from either VLTP or LB or both programs to substitute FMLA LWOP. While invoking FMLA is not a requirement to apply for VLTP or LB, some leave approving officials require an employee to invoke FMLA before approving the use of VLTP or LB hours. Employees should discuss this potential requirement with their leave approving official. VLTP and LB are not employee entitlements.
References

Government Publishing Office

- eCFR Title 5, Chapter I Subchapter B, Part 630, Subpart I
- Federal Register, Vol 65, No 80. OPM final regulations on FMLA

Office of Personnel Management

- Fact Sheet: Effect of Extended Leave Without Pay (LWOP) (or Other Nonpay Status) on Federal Benefits and Programs
- Fact Sheet: Family and Medical Leave
- Fact Sheet: Family and Medical Leave Qualifying Exigency Leave
- FMLA Regulations
- Guide to Adoption and Foster Care Programs for Federal Employees
- Handbook on Leave and Workplace Flexibilities for Childbirth, Adoption, and Foster Care
- Memorandum: Expanded Family and Medical Leave Policies

National Institutes of Health

- NIH Policy Manual - Family Leave Policies and Programs
- NIH Impact of Non Pay Status
- NIH Leave Bank Program
- NIH Leave Guide: FMLA
- Overview of Federal Leave Categories
- Voluntary Leave Transfer Program

NOTES:

- FMLA consists of two titles: Title I covers private sector and state/local governments as administered by the Department of Labor while Title II covers most federal agencies as administered by the Office of Personnel Management. While much of the language is similar, federal employees fall under Title II and OPM guidance.
- Leave approving officials/supervisors should review any relevant collective bargaining agreements for bargaining unit employees.