

MEMORANDUM

PERSONNEL MANAGEMENT LIAISONS

Date: September 3, 1993  
Reference Code: 93-61

THIS MEMORANDUM SHOULD BE DISTRIBUTED TO:

Labor Relations Officers  
Personnel Officers

From: Department of Personnel Administration  
Office of the Director

Subject: Federal Family and Medical Leave Act

This memorandum provides an update and clarification regarding the Federal Family and Medical Leave Act (FMLA).

AB 1460

AB 1460, the legislation that changes the State's Family Rights Act to make it conform with FMLA has been amended to include an urgency statute. While this would make it effective upon signature by the Governor, the bill also contains a provision stating that it would not affect collective bargaining agreements until February 5, 1994. If the bill passes and is signed by the Governor, the Department of Personnel Administration will issue further direction concerning its impact on State employment.

Employees Currently on Leave

Excluded and Unit 14 employees, who are on a leave of absence effective August 5, 1993 and who meet the criteria for a FMLA leave, should have their leave designated as FMLA leave. If these employees have continued their health, dental, and vision coverage, departments should begin making the State contributions for these benefits (for up to 12 weeks), effective August 5, 1993. If the employee has not continued these benefits, he/she should be asked if he/she wishes to resume coverage, with the State paying its normal contribution for up to 12 weeks.

Determining the 12-Month Period

In our prior memorandum, we informed State Departments that they were permitted to select one of four methods for determining the 12-month period in which the 12 weeks of leave entitlement occurs. Several calls were received asking for clarification regarding the: 1) 12-month period measured forward from the date the first FMLA begins; and 2) the "rolling" 12-month period. Section 825.200 of the FMLA regulations define these periods as follows:

- 12-Month Period Measured Forward -- An employee is entitled to 12 weeks of leave during the year beginning on the first date FMLA is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period.



- Rolling 12-Month Period -- Each time an employee takes FMLA leave, the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months.

The following example illustrates the difference between these approaches:

- Assume that an employee takes three four-week family leaves beginning on February 1, 1994; June 1, 1994; and December 1, 1994.
- The employee then requests a 12-week family leave beginning on March 1, 1995.
- Under the "measured forward" approach, the employee would be entitled to the full 12 weeks of leave. This is because the February 1, 1994 leave began a 12-month eligibility period that ended on January 31, 1995. The March 1, 1995 leave would begin a new 12-month period, during which the employee could immediately take another 12 weeks of family leave.
- Under the "rolling period" method, the employee would be entitled to only four weeks of leave, beginning on March 1, 1995. This is because the eight weeks of leave taken during June 1994 and December 1994 would still be within the 12-month "look back" period, leaving only four more weeks of leave entitlement until the June 1994 leave began phasing off the books on June 1, 1995.

Employees who transfer to State departments that use a different method for determining the benefit period are entitled to receive FMLA benefits provided under the new department's method even though the employee may receive an additional FMLA entitlement. Likewise, an employee should not be penalized if the new employer's benefit period is different.

#### Miscellaneous Information

Attached for your information is additional information from the Department of Labor (DOL). This information can be used to meet DOL's noticing and posting requirements.

If you desire additional information regarding this memo, please contact Sydney Perry at (916) 445-9244 or CALNET 454-9244.



Wendell M. Coon, Chief  
Policy Development Office

Attachment

# U.S. Department of Labor Program Highlights



Fact Sheet No. ESA 93-24

## THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family and Medical Leave Act of 1993 (FMLA) was enacted on February 5, 1993.

The new law is effective on **August 5, 1993**, for most employers. If a collective bargaining agreement (CBA) is in effect on that date, the Act becomes effective on the expiration date of the CBA or February 5, 1994, whichever is earlier.

The U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division, administers and enforces FMLA for all private, state and local government employees, and some federal employees.

FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave each year for specified family and medical reasons. An eligible employee's right to FMLA leave begins on August 5, 1993; any leave taken before that date does not count as FMLA leave.

The law contains provisions on employer coverage; employee eligibility for the law's benefits; entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; notice and certification of the need for FMLA leave; and, protections for employees who request or take FMLA leave. The law also requires employers to keep certain records.

### Employer Coverage

FMLA applies to all:

- public agencies, including state, local and federal employers, local education agencies (schools) and
- private-sector employers who employed 50 or more employees in 20 or more workweeks in the

current or preceding calendar year and who are engaged in commerce or in any industry or activity affecting commerce — including joint employers and successors of covered employers.

### Employee Eligibility

To be eligible for FMLA benefits, an employee must:

- (1) work for a covered employer;
- (2) have worked for the employer for a total of at least 12 months;
- (3) have worked at least 1,250 hours over the previous 12 months; and
- (4) work at a location where at least 50 employees are employed by the employer within 75 miles.

Most federal and certain congressional employees are also covered by the law and are subject to the jurisdiction of the U.S. Office of Personnel Management and the Congress.

### Leave Entitlement

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- for the birth or placement of a child for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or

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- to take medical leave when the employee is unable to work because of a serious health condition.

Spouses employed by the same employer are jointly entitled to a combined total of 12 workweeks of family leave for the birth or placement of a child for adoption or foster care, and to care for a parent (but not a parent-in-law) who has a serious health condition.

Leave for birth or placement for adoption or foster care must conclude within 12 months of the birth or placement.

Under some circumstances, employees may take FMLA leave intermittently — which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.

- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

Also, subject to certain conditions, employees or employers may choose to use accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave. The employer is responsible for designating if an employee's use of paid leave counts as FMLA leave, based on information from the employee. In no case can use of paid leave be credited as FMLA leave after the leave has ended.

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical-care facility;

- any period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or

- continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days, and for prenatal care.

"Health care provider" means:

- doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices; or

- podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice, and performing within the scope of their practice, under state law; or,

- nurse practitioners and nurse-midwives authorized to practice, and performing within the scope of their practice, as defined under state law; or

- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

#### Maintenance Of Health Benefits

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.

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In some instances, the employer may recover premiums it paid to maintain health coverage an employee who fails to return to work from FMLA leave.

### **Job Restoration**

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an equivalent job with equivalent pay, benefits, and other employment terms and conditions.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave.

Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly-paid "key" employees after using FMLA leave during which health coverage was maintained. In order to do so, the employer must:

notify the employee of his/her status as a "key" employee in response to the employee's notice of intent to take FMLA leave;

- notify the employee as soon as the employer decides it will deny job restoration and explain the reasons for this decision;

- offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and

- make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.

A "key" employee is a salaried "eligible" employee who is among the highest paid ten

percent of employees within 75 miles of the work site.

### **Notice And Certification**

Employees seeking to use FMLA leave may be required to provide:

- 30-day advance notice of the need to take FMLA leave when the need is foreseeable;

- medical certifications supporting the need for leave due to a serious health condition affecting the employee or an immediate family member;

- second or third medical opinions and periodic recertifications (at the employer's expense); and

- periodic reports during FMLA leave regarding the employee's status and intent to return to work.

When leave is needed to care for an immediate family member or the employee's own illness, and is for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt the employer's operation.

Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense.

Also, covered employers must inform employees of their rights and responsibilities under FMLA, including giving specific information when an employee gives notice of FMLA leave on what is required of the employee and what might happen in certain circumstances, such as if the employee fails to return to work after FMLA leave.

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## **Unlawful Acts**

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

## **Enforcement**

FMLA is enforced, including investigation of complaints, by the U.S. Labor Department's Employment Standards Administration, Wage and Hour Division. If violations cannot be satisfactorily resolved, the Department may bring action in court to compel compliance. An eligible employee may also bring a private civil action against an employer for violations.

## **Other Provisions**

Special rules apply to employees of local education agencies. Generally, these rules provide for FMLA leave to be taken in blocks of time when intermittent leave is needed or the leave is required near the end of a school term.

Salaried executive, administrative, and professional employees of covered employers who meet the Fair Labor Standards Act (FLSA) criteria for exemption from minimum wage and overtime under Regulations, 29 CFR Part 541, do not lose their FLSA-exempt status by using any unpaid FMLA leave. This special exception to the "salary basis" requirements for FLSA's exemption extends only to "eligible" employees' use of leave required by FMLA.

The FMLA does not affect any other federal or state law which prohibits discrimination, nor supersede any state or local law which provides greater family or medical leave protection. Nor does it affect an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan. The FMLA also encourages employers to provide more generous leave rights.

## **Further Information**

For more information, please contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, Employment Standards Administration.

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# Family and Medical Leave Act of 1993



## FMLA Summary

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division  
February 1993

The Family and Medical Leave Act of 1993 (FMLA) becomes effective on August 5, 1993, though special rules apply where a collective bargaining agreement is in effect. The Secretary of Labor must prescribe regulations implementing the Act in early June.

The FMLA requires private sector employers of 50 or more employees, and public agencies to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are "eligible" if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles. Similar provisions also apply to federal and congressional employees.

## Reasons for Taking Leave...

An employer must grant unpaid leave to an eligible employee for one or more of the following reasons:

- ▶ for the care of the employee's child (birth, or placement for adoption or foster care);
- ▶ for the care of the employee's spouse, son or daughter, or parent, who has a serious health condition; or,
- ▶ for a serious health condition that makes the employee unable to perform their job.

At the employee's or employer's option, certain kinds of paid leave may be substituted for unpaid leave.

## Advance Notice and Medical Certification...

The employee may be required to provide advance leave notice and medical certification.

- ▶ The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- ▶ An employer may require medical certification to support a request for leave because of a serious health condition.
- ▶ An employer may also require medical certification if the employee is unable to return from leave because of a serious health condition.

## Intermittent or Reduced Leave...

- ▶ An employee may take intermittent leave or may work a reduced leave schedule to reduce the usual number of hours per day or work week.
- ▶ Intermittent or reduced leave schedules are subject to employer approval unless medically necessary.

## Job and Benefits Protection...

- ▶ Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms. Employers may deny restoration to certain highly compensated employees, but only if necessary to avoid substantial and grievous economic injury to the employer's operation.
- ▶ The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.
- ▶ The use of unpaid FMLA leave cannot affect the exempt status of bona fide executive, administrative and professional employees under the Fair Labor Standards Act.

more...



## Medical Insurance Coverage...

- ▶ For the duration of FMLA leave, the employer must maintain the employee's medical insurance coverage under any "group health plan," under the conditions coverage would have been provided if the employee had continued working.
- ▶ In some cases, the employer may recover premiums paid for maintaining an employee's health coverage if the employee fails to return to work from FMLA leave.

## Unlawful Acts by Employers...

FMLA makes it unlawful for any employer to:

- ▶ interfere with, restrain, or deny the exercise of any right provided under FMLA;
- ▶ discharge or discriminate against any person for opposing any practice made unlawful by FMLA; and,
- ▶ discharge or discriminate against any person because of involvement in any proceeding under or related to FMLA.

## Miscellaneous Provisions...

- ▶ Special rules apply to employees of local education agencies.
- ▶ Employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. Any employer who willfully violates this requirement may be subject to a fine of up to \$100 for each separate offense.
- ▶ A "Commission on Leave" will conduct a comprehensive study of existing and proposed policies relating to leave, and submit a report to Congress within two years.

## FMLA Does Not...

- ▶ affect any federal or state law prohibiting discrimination;
- ▶ supersede any state or local law which provides greater family or medical leave rights;
- ▶ diminish an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan, nor may the rights provided under FMLA be diminished by such agreement or plan; nor,
- ▶ discourage employers from adopting policies more generous than required by FMLA.

## Enforcement...

- ▶ The Secretary of Labor is authorized to investigate and attempt to resolve complaints of violations, and may bring an action against an employer in any federal or state court of law.
- ▶ FMLA's enforcement procedures parallel those of the federal Fair Labor Standards Act. The FMLA will be enforced by the department's Wage and Hour Division.
- ▶ An eligible employee may bring a civil action against an employer for violations.
- ▶ Employers who act in good faith and have reasonable grounds to believe their actions did not violate FMLA may have any damages reduced to actual damages at the discretion of a judge.

For more information, please contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, Employment Standards Administration.

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