

Family Medical and Leave Act (FMLA)

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

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Table of Contents

Family Medical and Leave Act (FMLA).....	3
National Defense Authorization Act of 2010.....	3
FMLA Regulations Effective January 1, 2009.....	4
FMLA Eligibility	4
Continuing Health Care Treatment.....	4
Serious Health Conditions	5
Employee Notice Requirements	5
Substitution of Paid Leave	6
Light Duty or Overtime.....	6
Employer Notice Obligations	6
Medical Certification Process	7
Leave Provisions for Military Families	7
Caring for Adult Children	8
FMLA and GINA	9
Social Media and Casual Conversations - GINA.....	9
Requests for Medical Leave	10
FMLA: Frequently Asked Questions	11

Family Medical and Leave Act (FMLA)

Reference Number:
MTAS-194

The Family and Medical Leave Act (FMLA), a federal law passed in 1993, requires employers to grant eligible employees job protected leave for their own serious health conditions, birth of a child, legal placement or adoption of children, or to care for an eligible seriously ill family member.

****For Information Regarding the Expanded Family Medical Leave under the Families First Coronavirus Response Act (FFCRA), please see MTAS-3010 'Expanded Family Medical Leave under FFCRA [1]****

On February 23, 2015, the U.S. Department of Labor's Wage and Hour Division announced a Final Rule to revise the definition of spouse under the Family and Medical Leave Act of 1993 (FMLA) in light of the United States Supreme Court's decision in *United States v. Windsor*, which found section 3 of the Defense of Marriage Act (DOMA) to be unconstitutional.

The Final Rule amends the definition of spouse so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member, regardless of where they live. More information is available at the Wage and Hour Division's FMLA Final Rule website [2].

National Defense Authorization Act of 2010

Reference Number:
MTAS-510

On October 28, 2009, President Obama signed the National Defense Authorization Act (NDAA) of 2010. While the general purpose of the law was to authorize funding for the defense of the United States and its interests abroad, this law contained several amendments to FMLA provisions.

Among other things, NDAA expanded the scope of FMLA for military families that includes:

- **Expanded Eligibility:** Qualifying exigency leave is expanded to include members of the regular Armed Forces who are deployed to a foreign country. Previously, qualifying exigency leave was only available for covered military members in the Reserves or Guard.
- **Veteran Leave:** Eligible employees will be able to elect military caregiver leave for those veterans who served in the regular Armed Forces or the Military Reserves within five years of the date the veterans undergo medical treatment, recuperation, or therapy. Previously, military caregiver leave was only available to care for current members of the Armed Forces, Guard, or Reserves.
- **Federal Expansion, Title II:** The legislation includes qualifying exigency leave for federal employees covered by Title II of the FMLA. Previously, federal employees covered by Title II did not have the right to take qualifying exigency leave.
- **Pre-existing Condition Expansion:** Military caregiver leave was expanded to cover aggravation of existing or pre-existing injuries incurred in the line of duty while on active duty. Previously, Department of Labor (DOL) regulations did not consider aggravation of existing injuries incurred in the line of duty while on active duty as a basis for taking military caregiver leave under the FMLA. Previously, the illness or injury had to rise to the level of a subsequent injury or illness to be considered as eligible for the FMLA.

In early 2008, President Bush first amended the FMLA law to provide two new family leave entitlements for military families.

The new law was expanded to provide:

- **Qualifying Exigency Leave:** Up to 12 weeks of FML leave for certain qualifying exigencies arising out of a covered military member's active duty status, or notification of an impending call or order to active duty status, in support of a contingency operation, and;
- **Covered Servicemember Leave (also called Military Caregiver Leave):** Up to 26 weeks of FML in a single 12-month period to care for a covered servicemember recovering from a serious injury or illness incurred in the line of duty on active duty. Eligible employees are entitled to a combined total of up to 26 weeks of all types of FML during the single 12-month period.

In November 2008, the DOL issued the final regulations, which not only addressed these new military entitlements, but also aimed at clarifying existing FMLA rules. After much discussion, the final regulations sought to enhance communication between employees, health care providers, and employers. While these new regulations do provide clarity, there are regular circumstances in which judgment is required. This was the first significant change to the FMLA in more than a decade.

FMLA Regulations Effective January 1, 2009

Reference Number:
MTAS-511

After a two-year period that involved nearly 20,000 comments, the DOL released a significant update to the Family and Medical Leave Act that took effect January 16, 2009.

The final update included clarifications to the military benefit enhancements that were released in early 2008 (NDAA) and specifies how to administer the changes that came about as a result of the amendment.

In addition, the rule re-organized the traditional FMLA regulations and clarified the statute's rights and obligations. The DOL also used this occasion to amend and create new forms that should be used for certification requirements regarding the use of FML and military family leave. Find the forms on the DOL website [3].

FMLA Eligibility

Reference Number:
MTAS-512

On February 23, 2015, the US Department of Labor's Wage and Hour Division announced a final rule to revise the definition of 'spouse' under the Family Medical Leave Act of 1993. The final rule amends the definition of spouse so that eligible employees in legal same-sex marriages will be able to take leave under protection of the FMLA to care for their spouse or family member, regardless of state of residence, effective March 27, 2015.

With the addition of the change to include same sex marriages as covered spouses, Family Medical Leave (FML) eligibility continues to entail:

- Employees must be employed by or with a covered employer for a total of 12 months. These months do not have to be consecutive. Time the employee is employed by a temporary agency does count toward this 12-month period.
- Employees are required to have actively worked at least 1,250 hours over the previous 12 months before becoming eligible for FML and;
- Employees must work for a covered employer where at least 50 employees are employed by the employer (within a 75-mile radius). However, notification requirements apply to all governmental agencies regardless of size.

Break-in-Service

Under the law, if an employee has a break in employment that lasts seven years or less, the employee's service prior to the service must be counted when determining if the employee has been employed for at least 12 months.

Breaks in service of more than seven years need not be counted unless the break in service was caused by:

- The fulfillment of National Guard or Reserve military duties
- A written agreement including collective bargaining agreement
- The employer's agreement to re-hire the employee after the break

Continuing Health Care Treatment

Reference Number:
MTAS-855

The regulations that came about in 2009 provided more definitive requirements for health care provider visits and the proper administration of the FMLA for an employee or eligible family member's serious health condition.

An employee or eligible dependent may have a serious health condition if he or she is incapacitated for more than three consecutive days *and* undergoes continuing treatment from a health care provider two or more times within a 30-day period. *In order for continuing treatment to exist, the employee must have a visit with a health care provider within seven days of the onset of the incapacity and have a second visit within 30 days of the incapacity.* Prior to these changes, FMLA regulations simply provided that a serious health condition involved more than three consecutive, full days of incapacity.

In addition, the final rule clarifies that in the case of an employee taking more than three consecutive calendar days of incapacity (days off) plus two visits to a health care provider, the two visits *must occur within 30 days of the period of incapacity.* This may also include treatment by a health care provider on one occasion followed by and resulting in a regimen of continuing treatment under the provider's supervision. The final rule states that periodic visits to a health care provider for chronic serious health conditions require *at least two visits to a health care provider per year.* 29 C.F.R. § 825.115(c)(1).

Serious Health Conditions

Reference Number:
MTAS-1501

The final rules which became effective January 16, 2009, do not change the fundamental definition of what constitutes a serious health condition.

Section 101(11) of FMLA defines a Serious Health Condition as “an illness, injury, impairment, or physical or mental condition that involves:

- (A) inpatient care in a hospital, hospice, or residential medical care facility; or
- (B) continuing treatment by a health care provider.” (defined above)

Examples of Serious Health Conditions

The definition of Serious Health Condition continues to be heavily debated. It is intended to cover illnesses and injuries that require an employee be absent from work more than a few days or on a recurring basis. Serious Health Conditions under FMLA are not intended to cover short and minor illnesses such as seasonal allergies, colds, stomach bugs, single asthma attacks, and viruses. However, complications that result in serious health that the medical certification is used to qualify each situation separately. It is certainly possible for one diagnosis to affect one person drastically differently from another. conditions (i.e., hospitalizations or advancement to pneumonia, etc.) would certainly qualify as a serious health condition. It is important to note that the medical certification is used to qualify each situation separately. It is certainly possible for one diagnosis to affect one person drastically differently from another.

Some common examples could be: terminal illness, critical injury, most cancers, emphysema, appendicitis, severe respiratory conditions (such as chronic asthma), heart attacks, heart conditions requiring bypass or valve operations, back conditions requiring surgery or extensive therapy, strokes, spinal injuries, severe arthritis, pneumonia, severe nervous disorders, any serious injury caused by an accident on or off the job, childbirth, kidney disease, injuries caused by serious accidents, Alzheimer's, and multiple conditions that if not treated would likely result in someone being incapacitated for more than three days.

Some additional examples are: depression, routine pregnancy and prenatal care, complications related to pregnancy including severe morning sickness, migraines, substance abuse treatment administered by a health care provider, emotional distress following a miscarriage, and mental health conditions.

Conditions that generally do not normally meet criteria (unless serious complications arise): Common cold, flu, virus, earaches, upset stomach, minor ulcers, non-migraine headaches, routine dental work or orthodontic procedures, absence due to substance abuse (note: active treatment is generally covered), and stress etc.

Note: Each individual FMLA request needs to be judged independently along with careful review of health care provider notes. You should also pay attention to new case law, as the courts may deem that certain ailments are in fact serious health conditions under FMLA. Additionally, just because a condition does not qualify under FMLA does not mean that it may not qualify under ADA.

Burden of Proof

Employees who take FML for their own serious health condition are held to a somewhat higher standard than when they take leave to help an immediate family member with such a condition. As a result, documenting that an employee's own illness qualifies for FML usually requires furnishing the employer with more detailed medical information than when proving that a child, spouse or parent has a serious illness. For this reason documentation and a completed health care provider's statement are very important. In the event that more information is needed to determine FMLA eligibility, the human resource professional or FMLA administrator should seek immediate clarification from the employee's healthcare provider. **Note:** An employee's direct supervisor may not contact the health care provider for additional information.

Employee Notice Requirements

Reference Number:
MTAS-856

Employees, absent unusual circumstances, are required to follow an employer's policy relating to proper call-in procedures for reporting FML absence(s). Employers may require employees seeking FML to call a "designated number or a specific individual to request leave." 29 C.F.R. § 825.303(c). Under old regulations, an employer could not delay or deny FML if an employee failed to follow protocol.

It is specified that once FML has been granted for an employee's health condition, the employee must thereafter “specifically reference either the qualifying reason or the need for FML. Calling in “sick” without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act.” 29 C.F.R. § 825.303(b).

For unforeseeable absences, it should be “practicable” for employees to request leave “either the same day or the next business day.” 29 C.F.R. § 825.302(b).

- Foreseeable Leave – Employees must provide employers with at least 30 days advance notice before FML is to begin if the need for leave is foreseeable. When the employee becomes aware of the need for leave and it is less than 30 days out, the employee needs to notify the employer as soon as “practicable,” such as the same day the employee becomes aware or the next day.
- Unforeseeable Leave – Employees must provide notice as soon as practicable and within the time prescribed by the employer’s usual and customary notice requirements. This means following the procedure such as calling in or using a specified number, if requested, by the employer.

Employees on Intermittent Leave

Remember, if you have employees on intermittent FML, it is imperative that they follow your city’s call in procedures for every absence (scheduled or unscheduled) and specify if each leave request will be FMLA related or not FMLA related. Without this information on every absence you will be unable to properly track FML time used.

Substitution of Paid Leave

Reference Number:
MTAS-1502

Employers’ policies determine if employees will be paid or unpaid and they can require that employees use any and all paid time off **concurrently** with FML.

Under the regulations, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted. An employee using paid leave concurrently with FML must follow the same rules of the employer’s policy that apply to other employees. The statute provides that employees may choose to take annual, personal, sick leave concurrently with FMLA. Employers can require their employees to take paid leave concurrently with FML. If a city does not choose to do this, its employees will then be able to “stack” time, which can result in an undue burden on the employer. (Example: An employee takes five weeks off for surgery and uses all of his available sick leave. The employer does not start FMLA protection until the employee runs out of sick leave, which means the employee will get five weeks sick leave and then the employer will start 12 weeks of FML when the employee is out of sick leave.)

Light Duty or Overtime

Reference Number:
MTAS-1503

Light Duty

Time spent in light duty positions cannot be used against an employee’s FML entitlement.

The law now states that employees who accept light duty work need not exhaust their FML by agreeing to perform light duty. Whether light duty is presented as an option or as a mandatory provision, it may not be counted toward an employee’s FMLA benefit. 29 C.F.R. § 825.207(e).

Overtime

Many employees are regularly required to work overtime in their positions. However, when they go out on FML they are unable to do so.

The hours that the employee would have been required/mandated to work as overtime may be counted against the employee’s FMLA entitlement (i.e., counted as intermittent or reduced schedule leave, as applicable). However, if that overtime is voluntary, those hours may **not** be counted against an employee’s leave entitlement.

Employer Notice Obligations

Reference Number:
MTAS-857

The most recent rules combine several of the old notices into one section of the regulations and remove some inconsistencies that existed in regard to time periods. Employers are required to provide employees with the General Notice about FMLA (this could be via a poster and a handbook, an eligibility notification, a rights and responsibilities notice, or a designation notice). Employers are given additional time to provide the notices, which is now five days.

- **General Notice:** The employer should generate the General Notice to all employees. This can be done via a handbook or other written means. Consider how new hires and employees on leave of absence will be notified. Employers may also opt to post this information online via the intranet or Internet. The regulations specify the distribution of this notice to new hires via handbooks if such manuals exist.

- **Eligibility Notice:** When an employee requests FML, or when an employee is out of work due to an illness or injury that may qualify under the FMLA, *the employer must notify the employee of the employee's eligibility to take FML within five business days*, absent extenuating circumstances. If the employer determines the employee is ineligible, the notice must state at least one reason why he is ineligible for FML. If FML is approved, all FML absences for the same qualifying reason are considered a single leave and will not change during the designated FML 12-month period.
- **Rights and Responsibilities Notice:** Employers must provide a written rights and responsibilities notice *each time an eligibility notice is required and any time the information changes thereafter*, which includes the expectations, obligations and consequences (i.e., failure to pay premiums will result in termination of coverage). This notice can be mailed in tandem with other notices such as the medical certification form.

Medical Certification Process

Reference Number:
MTAS-858

Content and Clarification

- Employer representatives responsible for contacting the employee's health care providers *must be an HR professional, leave administrator, health care provider, or management official*. They cannot be the employee's direct supervisor.
- Employers should ask for information required by the certification form *only*.
- *Once the employer has received a complete and sufficient certification, the employer may not request additional information from the health care provider*. However, the employer may use a human resources professional, a leave administrator, another health care provider, or a management official to contact the health care provider to *authenticate or to clarify the certification*. For example, the employer's appropriate representative could ask the health care provider if the information contained on the form was completed or authorized by him or her, or ask questions to clarify the handwriting on the form or the meaning of a response. Under no circumstances may the employee's direct supervisor contact the employee's health care provider. Excerpted from Fact Sheet #28G, U.S. DOL: <http://www.dol.gov/whd/regs/compliance/whdfs28g.pdf> [4]
- The final rule allows the health care provider to give a diagnosis of the patient's health condition as part of the certification, but does not require this.
- The DOL may have separate forms available and required for applicable/eligible family members. Refer to those forms as necessary.

Medical Certification and Timing

- Employers may request a new medical certification each leave year for health conditions that last more than one year.
- Employers may request a re-certification of an on-going condition every six months in conjunction with an absence. (Except when a minimum duration of incapacity has been specified in the certification, in which case re-certification generally may not be required until that duration has passed). Previously, under the law, an employer could require re-certification no more than every 30 days.
- Employers now have five (versus two) days after the employee provides notice to request that an employee furnish a medical certification. (NOTE: There are now two separate medical certification forms – one for the employee's own serious health issues and one for the employee's family member. To find updated forms and other valuable information, including FMLA posters, visit <http://www.dol.gov/whd/fmla/index.htm> [5].

Fitness for Duty Certification

Restrictions still apply for those employers requesting fitness for duty certificates for employees on intermittent FML. Under the legislation, employers are able to request a fitness for duty certificate once every 30 days "if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave."

Waiver of Rights

Under updated rules, employees may elect to voluntarily settle their FMLA claims without the interference of court or DOL. Prospective waivers of FMLA are prohibited. Employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA.

Leave Provisions for Military Families

Reference Number:
MTAS-859

Military Caregiver Leave

The National Defense Authorization Act (NDAA) provided a new leave entitlement of up to 26 weeks to care for a covered service member with a serious injury or illness. An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member, who is recovering from a serious illness or injury sustained in the line of duty, is entitled to up to 26 weeks of leave in a single 12-month period to care for the service member.

Definition of Covered Service Member

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

Qualified Exigency Leave (QE)

The NDAA provides a new reason for leave under FMLA to allow families of National Guard, regular Armed Forces, Reserve personnel, and eligible veterans to take FMLA job-protected leave to manage their responsibilities called qualifying exigencies.

- An eligible employee may be entitled to up to 12 weeks of leave due to a “qualifying exigency” arising from the fact that the spouse, son, daughter, or parent of the employee is in the line of duty on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation.
- Qualifying Exigency Leave was recently clarified by NDAA of 2010 to apply to *veterans who served in the regular Armed Forces or the Reserves* within five years of the date the veterans undergo medical treatment, recuperation or therapy. Previously, military caregiver leave was only available to care for current members of the Armed Forces, Guard or Reserves.

Qualified Exigency: As defined by DOL Fact Sheet 28A

Qualifying exigencies include:

- Issues arising from a covered military member’s short notice deployment (i.e., deployment on seven or less days of notice) for a period of seven days from the date of notification;
- Military events and related activities, such as official ceremonies, programs, or events sponsored by the military or family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member;
- Certain childcare and related activities arising from the active duty or call to active duty status of a covered military member, such as arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate need basis, enrolling or transferring a child in a new school or day care facility, and attending certain meetings at a school or a day care facility if they are necessary due to circumstances arising from the active duty or call to active duty of the covered military member;
- Making or updating financial and legal arrangements to address a covered military member’s absence;
- Attending counseling provided by someone other than a health care provider for oneself, the covered military member, or the child of the covered military member, the need for which arises from the active duty or call to active duty status of the covered military member;
- Taking up to **five** days of leave to spend time with a covered military member who is on short-term temporary, rest and recuperation leave during deployment;
- Attending to certain post-deployment activities, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member’s active duty status, and addressing issues arising from the death of a covered military member;
- Any other event that the employee and employer agree is a qualifying exigency.

Caring for Adult Children

Reference Number:
MTAS-860

Family Medical Leave to Care for Adult Children

Typically when we think of parents taking FML to care for children we assume the eligible children are under 18 or permanently disabled. However, with the expansion to the scope of ADA (Americans with Disabilities Act) by the ADA

Amendments Act, it is easier for an employee to take leave to care for an adult child who has a serious health condition and is incapable of self-care under ADA.

Under the FMLA, a parent can take family leave (FML) to care for his or her adult children who are not in the military and are not veterans if the children are “incapable” of self-care or have a disability defined by ADA. Generally this means the adult child must require direct assistance or supervision providing self-care in three or more activities of daily living such as grooming, hygiene, bathing, dressing, and eating. These could also include instrumental activities of daily living such as essential errands, cooking, cleaning, shopping, transporting, paying bills, using communication devices, and maintaining a residence. There are many different disabilities and conditions that could deem an adult child incapable of self-care. It could be a serious accident, surgery, illness, or more permanent conditions such as developmental disabilities, Down syndrome, brain damage, paralysis, etc.

Temporary conditions or illnesses such as pregnancy-related restrictions or routine surgeries would likely not result in someone being “incapable of self-care” as defined by the regulations.

FMLA and GINA

Reference Number:
MTAS-861

FMLA and GINA (Genetic Information NonDiscrimination Act)

GINA was signed into law by President Bush in May of 2008 and took effect November 21, 2009.

Title I addresses the use of genetic information in health insurance.

Title II addresses discrimination in employment based on genetic information.

GINA restricts employers and insurers from acquiring and using genetic information except in limited circumstances.

With respect to employment, GINA makes it illegal to discriminate against employees or applicants because of genetic information. GINA prohibits employers or employment agencies and labor organizations from requesting, requiring, or purchasing genetic information of employees and applicants (as well as their family members).

Specifically it:

- prohibits discrimination and harassment on the basis of genetic information;
- prohibits employers from obtaining genetic information except in narrow circumstances;
- requires employers to keep what they do get confidential; and
- prohibits employers from making any employment-related decisions based on genetic information.

The Link between GINA and FMLA

When asking for medical information in the course of administering FML (or ADA), there is a potential to obtain information that could be protected by GINA, including genetic information such as: results of genetic tests for cancer genes, hereditary diseases, and other disorders. Results of genetic information on family members can also fall under FMLA/ADA due to GINA. GINA protections include requests for genetic information by an employer about employees or their family members as well as genetic information regarding a fetus or embryo. It also includes the manifestation of a disease or disorder that may pertain to employees or their family members.

The EEOC issued regulations under GINA that define terms and provide guidance for employers administering the act’s provisions. They specifically reference certain issues under FMLA. <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/gina> [6]

Inadvertent Acquisition of Genetic Information

GINA, as originally written, makes the mere acquisition of genetic information on employees and their family members illegal. As a general matter, employers seem to understand this, but with the passage of GINA, employers were worried about facing GINA violations due to inadvertent acquisition of information (i.e., raising money for a family member’s condition, or knowledge of an employee or family member’s condition via social media or water cooler talk at the office). Employers questioned whether simply receiving the information (inadvertently) would be a violation of GINA. The EEOC offered clarifications [7] to these concerns.

Social Media and Casual Conversations - GINA

Reference Number:
MTAS-1504

Social Media

Final regulations make clear that the inadvertent acquisition exception applies in the workplace as well as incidents that take place online such as on Facebook or other social media avenues. They provide for a specific situation where a manager or supervisor inadvertently learns of a genetic condition of an employee or their family member via a social media

platform where the manager or supervisor has been given permission to access the profile (i.e., friends on Facebook).

An employer would not violate GINA if a supervisor and employee are friends on a social media site and the employee posts about money being raised for his father's Alzheimer's. However, this exception (employer protection) would not apply if the employer needed special permission to access a profile and the employer went around those privacy safeguards to get the information. If the employer sought out that information it could be a GINA violation. In this case the inadvertent exception would not apply.

As an HR best practice, it is not recommended to "friend" employees or applicants on social media sites. While it is not illegal, the implications can be complex and can potentially place your city at unnecessary exposure.

Casual Conversations

According to the EEOC this depends on the nature of the situation. If the employer inadvertently requests information about a genetic health issue in a casual conversation it may not violate GINA.

For instance, a supervisor may make general health inquiries such as "How are you?" "How do you feel today?" Those kinds of questions are acceptable and are generally not a GINA violation. But if the employer goes further by probing for information such as asking if other family members have the condition, or if the employee has been tested for a condition, then according to the regulations the employer has crossed the line and is likely to be in possession of protected genetic information acquired illegally. The outer limits of this water cooler exception will surely be tested in the courts. Be cautious!

Requests for Medical Leave

Reference Number:
MTAS-862

Requests for Medical Leave: FMLA/ADA/Worker's Compensation

GINA specifically prohibits an employer from asking about an employee's family genetic health information. There is an exception to this: when the employer is specifically asking for medical info for purposes of FMLA/ADA/Workers' Compensation certification it should be following certain steps in order to make sure it falls within the exceptions that are allowed under GINA.

If an employee is seeking leave to care for a family member then obviously the employer will have access to a family member's health information that may be protected under GINA (family history of medical information specifically). This is a limited exception and only applies to an employee's family member, which may include family history information. So in this case, under FMLA; an employer could legally receive information on a family member's medical history information. **Note:** This exception does not apply to the employee's request for his own serious health condition.

GINA makes clear that if a covered entity acquires genetic information in response to a lawful request for medical information, the acquisition of medical information will generally not be considered inadvertent unless the individual directs the employer in writing or verbally not to request genetic information. In other words, the employer needs to state up front that it does not want genetic information on health care certification forms. Otherwise a situation may be created where genetic information under GINA will likely be acquired.

Safe Harbor Language

Employers can include this with the request for information/health care certification forms. This is essentially a disclaimer on any medical information requests that explicitly state employers do not want protected genetic information under GINA.

The EEOC has provided sample safe harbor language as follows that you may choose to utilize in your communications:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Bottom line: When you are asking for medical information under FMLA make sure it falls under a GINA exception and does not violate the law. **Note:** The most recent forms produced for FMLA purposes by the DOL [3] have included compliant safe harbor language for applicable situations addressed by each.

Employer Checklist

- Update FMLA policies to include GINA regulations (include safe harbor language)
- Update FMLA policies to include changes as a result of ADA amendments
- Review your FMLA policies
- Review applicable benefit forms
- Consider changes to payroll system, databases, HRIS system, etc.

- Revise current policies to reflect changes
- Plan a communication strategy; consider newsletter articles, bulletin boards, handbooks, departmental memos, payroll stuffers, etc.
- Consider employees on leave (military, family leave, maternity, workers compensation and other types of leave)
- Consider placing information on company's website (intranet or internet)
- Allow employees to ask questions; often employees do not understand change.
- *All public employers subject to notice requirements*; even if no employees are currently eligible for FMLA.

<http://www.dol.gov/whd/fmla> [8]

FMLA: Frequently Asked Questions

Reference Number:
MTAS-1417

The following FAQ's are samples from the U.S. Dept of Labor, Wage and Hour Division's page 'FMLA Frequently Asked Questions.' Further questions can be found: <http://www.dol.gov/whd/fmla/fmla-faqs.htm> [9]

****For Expanded FMLA under the FFCRA as it relates to the COVID-19 pandemic of 2020, please follow this link:** <https://www.dol.gov/agencies/whd/fmla/pandemic> [10] **

Coverage

(Q) *What types of businesses/employers does the FMLA apply to?*

(A) The FMLA applies to all:

- public agencies, including local, State, and Federal employers, and local education agencies (schools); and
- private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year – including joint employers and successors of covered employers.

Eligibility

(Q) *Who can take FMLA leave?*

(A) In order to be eligible to take leave under the FMLA, an employee must:

- work for a covered employer;
- have worked 1,250 hours during the 12 months prior to the start of leave;
- **work at a location where the employer has 50 or more employees within 75 miles;** and
- have worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. In general, only employment within seven years is counted unless the break in service is (1) due to an employee's fulfillment of military obligations, or (2) governed by a collective bargaining agreement or other written agreement.

Hours of Service Requirement

(Q) *Does the time I take off for vacation, sick leave or PTO count toward the 1,250 hours?*

(A) The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.

Unpaid leave

(Q) *Is my employer required to pay me when I take FMLA leave?*

(A) The FMLA only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid vacation leave, paid sick or family leave for some or all of the FMLA leave period. An employee must follow the employer's normal leave rules in order to substitute paid leave. When paid leave is used for an FMLA-covered reason, the leave is FMLA-protected.

Qualifying conditions

(Q) *When can an eligible employee use FMLA leave?*

(A) A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12 month period for one or more of the following reasons:

- for the birth of a son or daughter, and to bond with the newborn child;
- for the placement with the employee of a child for adoption or foster care, and to bond with that child;

- to care for an immediate family member (spouse, child, or parent – but not a parent “in-law”) with a serious health condition;
- to take medical leave when the employee is unable to work because of a serious health condition; or
- for qualifying exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces.

The FMLA also allows eligible employees to take up to 26 workweeks of unpaid, job-protected leave in a “single 12-month period” to care for a covered servicemember with a serious injury or illness.

Birth and bonding

(Q) Are there any restrictions on when an employee can take leave for the birth or adoption of a child?

(A) Leave to bond with a newborn child or for a newly placed adopted or foster child must conclude within 12 months after the birth or placement. The use of intermittent FMLA leave for these purposes is subject to the employer’s approval. If the newly born or newly placed child has a serious health condition, the employee has the right to take FMLA leave to care for the child intermittently, if medically necessary and such leave is not subject to the 12-month limitation.

(Q) When can a parent take leave for a newborn?

(A) Mothers and fathers have the same right to take FMLA leave to bond with a newborn child. A mother can also take FMLA leave for prenatal care, incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can also use FMLA leave to care for his spouse who is incapacitated due to pregnancy or child birth.

Intermittent/reduced leave schedule

(Q) Does an employee have to take leave all at once or can it be taken periodically or to reduce the employee’s schedule?

(A) When it is medically necessary, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee’s usual weekly or daily work schedule. 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.

Leave to care for or bond with a newborn child or for a newly placed adopted or foster child may only be taken intermittently with the employer’s approval and must conclude within 12 months after the birth or placement.

(Q) Can an employer change an employee’s job when the employee takes intermittent or reduced schedule leave?

(A) Employees needing intermittent/reduced schedule leave for foreseeable medical treatments must work with their employers to schedule the leave so as not to disrupt the employer’s operations, subject to the approval of the employee’s health care provider. In such cases, the employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodate recurring periods of leave better than the employee’s regular job.

Serious health condition

(Q) What is a serious health condition?

(A) The most common serious health conditions that qualify for FMLA leave are:

- conditions requiring an overnight stay in a hospital or other medical care facility;
- conditions that incapacitate you or your family member (for example, unable to work or attend school) for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication); chronic conditions that cause occasional periods when you or your family member are incapacitated and require treatment by a health care provider at least twice a year; and pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).

(Q) Can I continue to use FMLA for leave due to my chronic serious health condition?

(A) Under the regulations, employees continue to be able to use FMLA leave for any period of incapacity or treatment due to a chronic serious health condition. The regulations continue to define a chronic serious health condition as one that (1) requires “periodic visits” for treatment by a health care provider or nurse under the supervision of the health care provider, (2) continues over an extended period of time, and (3) may cause episodic rather than continuing periods of incapacity. The regulations clarify this definition by defining “periodic visits” as at least twice a year.

(Q) Can I take FMLA leave for reasons related to domestic violence issues?

(A) FMLA leave may be available to address certain health-related issues resulting from domestic violence. An eligible employee may take FMLA leave because of his or her own serious health condition or to care for a qualifying family member with a serious health condition that resulted from domestic violence. For example, an eligible employee may be able to take FMLA leave if he or she is hospitalized overnight or is receiving certain treatment for post-traumatic stress disorder that resulted from domestic violence.

Certification

(Q) Am I required to prove that I have a serious health condition?

(A) An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must allow the employee at least 15 calendar days to obtain the medical certification.

(Q) What happens if my employer says my medical certification is incomplete?

(A) An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The employer must state in writing what additional information is necessary to make the certification complete and sufficient and must allow the employee at least seven calendar days to cure the deficiency, unless seven days is not practicable under particular circumstances despite the employee's diligent good faith efforts.

(Q) Can my employer make me get a second opinion?

(A) An employer may require a second or third medical opinion (at the employer's expense) if he or she has reason to doubt the validity of the medical certification.

(Q) Do I have to give my employer my medical records for leave due to a serious health condition?

(A) No. An employee is not required to give the employer his or her medical records. The employer, however, does have a statutory right to request that an employee provide medical certification containing sufficient medical facts to establish that a serious health condition exists.

(Q) How soon after I request leave does my employer have to request a medical certification of a serious health condition?

(A) Under the regulations, an employer should request medical certification, in most cases, at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave begins. An employer may request certification at a later date if he or she has reason to question the appropriateness or duration of the leave.

(Q) May my employer contact my health care provider about my serious health condition?

(A) The regulations clarify that contact between an employer and an employee's health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. Under the regulations, employers may contact an employee's health care provider for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official. In order to address employee privacy concerns, the regulations makes clear that in no case may the employee's direct supervisor contact the employee's health care provider. In order for an employee's HIPAA-covered health care provider to provide an employer with individually-identifiable health information, the employee will need to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the employer. Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.

(Q) Must I sign a medical release as part of a medical certification?

(A) No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide a complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.

(Q) How often may my employer ask for medical certifications for an on-going serious health condition?

(A) The regulations allow recertification no more often than every 30 days in connection with an absence by the employee unless the condition will last for more than 30 days. For conditions that are certified as having a minimum duration of more than 30 days, the employer must wait to request a recertification until the specified period has passed, except that in all cases the employer may request recertification every six months in connection with an absence by the employee. The regulations also allow an employer to request recertification in less than 30 days if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly, or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

Additionally, employers may request a new medical certification each leave year for medical conditions that last longer than one year. Such new medical certifications are subject to second and third opinions

(Q) Can employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?

(A) Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for such conditions to submit a certification from the employee's own health care provider that the employee is able to resume work. Under the regulations, an employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the employer has appropriately notified

the employee that this information will be required and has provided a list of essential functions. Additionally, an employer may require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the condition for which leave was taken.

(Q) What happens if I do not submit a requested medical or fitness-for-duty certification?

(A) If an employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the employee never provides a medical certification, then the leave is not FMLA leave.

If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.

Employee notice

(Q) What and when do I need to tell my employer if I plan to take FMLA leave?

(A) Employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. If leave is foreseeable less than 30 days in advance, the employee must provide notice as soon as practicable – generally, either the same or next business day. When the need for leave is not foreseeable, the employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Absent unusual circumstances, employees must comply with the employer's usual and customary notice and procedural requirements for requesting leave.

Employees must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that the employee is incapacitated due to pregnancy, has been hospitalized overnight, is unable to perform the functions of the job, and/or that the employee or employee's qualifying family member is under the continuing care of a health care provider.

When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. When an employee seeks leave, however, due to a FMLA-qualifying reason for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for the leave or the need for FMLA leave.

(Q) Is an employee required to follow an employer's normal call-in procedures when taking FMLA leave?

(A) Yes. Under the regulations, an employee must comply with an employer's call-in procedures unless unusual circumstances prevent the employee from doing so (in which case the employee must provide notice as soon as he or she can practicably do so). The regulations make clear that, if the employee fails to provide timely notice, he or she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer's rules provide.

Employer notice

(Q) Are employers required to tell their employees of the existence of FMLA and the employee's right to take FMLA leave?

(A) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints of violations of the FMLA with the Wage and Hour Division. An employer that willfully violates this posting requirement may be subject to a civil money penalty of up to \$110 for each separate offense.

Additionally, employers must include this general notice in employee handbooks or other written guidance to employees concerning benefits, or, if no such materials exist, must distribute a copy of the notice to each new employee upon hiring.

When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA purpose, the employer must notify the employee of his or her eligibility to take leave, and inform the employee of his or her rights and responsibilities under the FMLA. When the employer has enough information to determine that leave is being taken for a FMLA-qualifying reason, the employer must notify the employee that the leave is designated and will be counted as FMLA leave.

(Q) How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?

(A) Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

(Q) Does an employer have to provide employees with information regarding their specific rights and responsibilities under the FMLA?

(A) At the same time an employer provides an employee notice of the employee's eligibility to take FMLA leave, the employer must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, the employer must inform the employee whether the employee will be required to

provide certification of the FMLA-qualifying reason for leave and the employee's right to substitute paid leave (including any conditions related to such substitution, and the employee's entitlement to unpaid FMLA leave if those conditions are not met). If the information included in the notice of rights and responsibilities changes, the employer must inform the employee of such changes within five business days of receipt of the employee's first notice of the need for FMLA leave subsequent to any change. Employers are expected to responsively answer questions from employees concerning their rights and responsibilities.

(Q) How soon after an employee provides notice of the need for leave must an employer notify an employee that the leave will be designated and counted as FMLA leave?

(A) Under the regulations, an employer must notify an employee whether leave will be designated as FMLA leave within five business days of learning that the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances. The designation notice must also state whether paid leave will be substituted for unpaid FMLA leave and whether the employer will require the employee to provide a fitness-for-duty certification to return to work (unless a handbook or other written document clearly provides that such certification will be required in specific circumstances, in which case the employer may provide oral notice of this requirement). Additionally, if the amount of leave needed is known, an employer must inform an employee of the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (e.g., where the leave will be unscheduled), an employer must provide this information upon request by the employee, but no more often than every 30 days and only if leave was taken during that period.

Links:

- [1] <https://www.mtas.tennessee.edu/reference/expanded-family-medical-leave-fmla-under-ffcra>
- [2] <http://www.dol.gov/whd/fmla/spouse/index.htm>
- [3] <https://www.dol.gov/whd/fmla/forms.htm>
- [4] <http://www.dol.gov/whd/regs/compliance/whdfs28g.pdf>
- [5] <http://www.dol.gov/whd/fmla/index.htm>
- [6] <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/gina>
- [7] <http://www.eeoc.gov/laws/regulations/gina-background.cfm>
- [8] <http://www.dol.gov/whd/fmla>
- [9] <http://www.dol.gov/whd/fmla/fmla-faqs.htm>
- [10] <https://www.dol.gov/agencies/whd/fmla/pandemic>

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