

# COMPLIANCE OVERVIEW

Provided by Clarke & Company Benefits, LLC

## Employee Leaves of Absence – General Compliance Rules

Employees may need to take time off from work for various reasons, including for their own medical situations or family emergencies. Federal and state leave laws require employers to provide employees with leave in certain situations. In general, when employees request time off from work, employers should consider their obligations under:

- ✓ The federal Family and Medical Leave Act (FMLA), if applicable;
- ✓ The federal Uniformed Services Employment and Reemployment Rights Act (USERRA);
- ✓ The federal Americans with Disabilities Act (ADA), if applicable; and
- ✓ Any applicable state and local laws regarding employee leave, including laws regarding paid sick leave.

This Compliance Overview provides a high-level summary of the compliance rules that an employer should consider when evaluating an employee's leave request. To avoid noncompliance, an employer should familiarize itself with the leave laws it is covered under and establish policies and procedures for handling employee leave requests.

### LINKS AND RESOURCES

- [The Employer's Guide to the Family and Medical Leave Act](#), a Department of Labor (DOL) publication.
- Equal Employment Opportunity Commission (EEOC) [guidance](#) on employer-provided leave and the ADA.

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

## HIGHLIGHTS

### GENERAL RULES

- At the federal level, the FMLA, USERRA and the ADA require covered employers to provide leave in certain situations.
- Many states have their own laws regarding employee leave, including family and medical leave, school leave and organ donation leave.
- As a growing trend, states and localities are adopting paid sick leave laws.

### KEY COMPLIANCE STEPS

- Determine which leave laws apply to your organization.
- Review employee leave policies and practices for compliance with applicable laws.
- Train supervisors on leave policies.
- Administer employee leaves in a consistent and nondiscriminatory manner across your organization.



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## EMPLOYEE LEAVE LAWS

### Overview

In general, when employees request time off from work, employers should consider their obligations under federal, state and local leave laws. At the federal level, the three primary laws that employers may need to comply with when handling leave requests and creating leave policies are the FMLA, ADA and USERRA.

Employers should also be aware of the state and local laws that impact employee leaves. Most states have their own family and medical leave laws, and many states have other laws that allow employees to take leave in certain situations, such as leave for parents to attend school events.

Coordinating employee leaves under the various leave laws can be a challenge for employers. State leave laws often provide **greater protections** to employees than federal leave laws. Also, state and local laws tend to **change more frequently** than federal laws, which means that employers need to monitor legal developments to stay up-to-date.

*When employers are subject to multiple employee leave laws, they should make sure that their leave policies comply with the applicable law that provides the most protection for employees.*

Employers should make sure that their leave policies are consistent with applicable laws and are administered correctly. In some circumstances, more than one type of leave law may apply to an employee's request for time off. In these situations, the employer should generally comply with the leave rule that is **most favorable or generous to the employee**. Also, where possible, employers should consider running different types of employee leaves **concurrently** to minimize an employee's leave entitlement.

Employers should also be aware of the risk of legal claims for interference, retaliation and discrimination when managing employee leaves. To reduce their legal risk for these types of claims, employers should administer their leave policies in a consistent and nondiscriminatory manner throughout the organization.

### Compliance Tips

Administering employee leaves can be a complex and confusing process. Employers should consider the following compliance tips when managing employee leaves:

- ✓ **Determine which employee leave laws and policies may apply to an employee's leave request.** Employers may need to review an employee's situation carefully to determine their leave obligations. Employees are not always clear about why they need to take leave and may not

cooperate with the employer’s leave process. However, despite these obstacles, the employee may still have leave rights under the law.

- ✓ **Make sure that any managers or supervisors who are involved in the employee leave process receive training on the employer’s leave policies.** This will help ensure that employee leaves are administered in a manner that is consistent with applicable laws.
- ✓ **Administer the employer’s leave policies in a consistent and nondiscriminatory manner across the organization.** Maintaining this type of consistency can help protect an employer from claims of illegal leave administration, including claims of retaliation or discrimination.
- ✓ **If an employee’s leave is covered under more than one leave law or policy, determine if the leave periods can run concurrently in order to reduce the amount of time off.** For example, when an employee takes a workers’ compensation leave due to a workplace injury, an employer should consider counting this leave against the employee’s FMLA entitlement.
- ✓ **Remember the employer’s obligation to provide a reasonable accommodation under the ADA.** Although the ADA is not an employee leave law per se, it does require covered employers to provide employees with leave as a reasonable accommodation, unless doing so would cause an undue hardship for the employer.
- ✓ **Continue group health plan benefits during the leave,** if required to do so by the employee leave law or employer policy.

## FEDERAL LEAVE LAWS

Leave Law	Covered Employers	Description	Health Plan Coverage
<b>FMLA</b>	Employers with 50 or more employees	Provides eligible employees with unpaid, job-protected leave for specified family and medical reasons.	For an employee on FMLA leave, group health plan coverage must be maintained on the same terms as if the employee continued to work.
<b>ADA</b>	Employers with 15 or more employees	Employees with disabilities must have access to leave on the same basis as all other similarly situated employees. In certain situations, leave may be considered a reasonable accommodation under the ADA.	An employer must generally treat employees on leave under the ADA the same as similarly situated individuals. Thus, if the employer maintains coverage for employees on leave for reasons other than disability, it must treat employees on disability leave in the same manner.

## USERRA

All employers

Provides protections to individuals who are absent from employment due to military service.

Employees who leave their jobs for military service have the right to continue group health plan coverage for up to 24 months.

### **Family and Medical Leave – FMLA**

The FMLA provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons. Private-sector employers are covered by the FMLA if they have **50 or more employees** during 20 or more calendar workweeks in the current or previous calendar year.

Under the FMLA, eligible employees may take up to 12 workweeks of unpaid FMLA leave in a 12-month period for one or more of the following reasons:

- ✓ The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care, and to bond with the newborn or newly placed child;
- ✓ To care for a spouse, son, daughter or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
- ✓ For a serious health condition that makes the employee unable to perform the essential function of his or her job, including incapacity due to pregnancy and for prenatal medical care; and
- ✓ For any qualifying exigency arising out of the fact that a spouse, son, daughter or parent is a military member on covered active duty or has been notified of an impending call or order to covered active duty.

**Compliance Tip:** When an employee indicates that he or she needs to take time off for a family or medical reason, consider whether the leave is covered by the FMLA. Employers should also check whether an employee's workers' compensation leave is covered by the FMLA, and run the leaves concurrently, if possible.

In addition, eligible employees may take up to 26 workweeks of FMLA leave during a single 12-month period to care for a covered service member with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the service member.

### **Substitution of Paid Leave**

An eligible employee may choose, or an employer may require the employee, to **substitute accrued paid leave** (such as paid sick, vacation or other leave) for unpaid FMLA leave. Substitute means that the accrued paid leave will run concurrently with the unpaid FMLA leave. When paid leave is used for an FMLA-covered reason, the leave is still FMLA-protected.

However, if an employee's FMLA leave is not unpaid (for example, because the employee is receiving disability benefits or workers' compensation benefits), an employer cannot require an employee to substitute available paid leave. Employers and employees may agree, where state law permits, to have

paid leave supplement the other program's benefits, such as in the case where a plan only replaces a portion of the employee's salary.

Also, if an employee's FMLA leave is running concurrently with a state family and medical leave law, the employer should review the state law's rules, if any, on the substitution of paid leave as state law may be more restrictive to the employer than the FMLA.

## *Health Plan Benefits*

While an employee is on FMLA leave, the employer must maintain the employee's coverage under any group health plan on the same terms as if the employee continued to work. An employee, while on leave, is required to pay the employer his or her portion of the group health benefit premiums. The FMLA provides multiple options for the [collection of premiums](#) for an employee on FMLA leave.

An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave.

## *Job Restoration*

When an employee returns from FMLA leave, he or she must be restored to the same job that the employee held when the leave began or to an "equivalent job." The employee is not guaranteed the actual job he or she held prior to the leave. An "equivalent job" means a job that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location).

## ***Disability Discrimination – ADA***

The ADA prohibits employment discrimination on the basis of disability and requires that covered employers provide reasonable accommodations to employees with disabilities. Employers are covered by the ADA if they have **15 or more employees**.

## *Leave Requests*

The ADA is not necessarily a "leave law." However, according to the Equal Employment Opportunity Commission (EEOC), employees with disabilities must have access to leave on the same basis as all other similarly situated employees. Also, in certain situations, leave may be considered a reasonable accommodation under the ADA.

**Compliance Tip:** An employee's request for indefinite leave—meaning that an employee cannot say whether or when he or she will be able to return to work at all—does not have to be approved as a reasonable accommodation under the ADA because it imposes an undue hardship on the employer.

When an employee requests leave, or additional leave, for a medical condition, the employer must treat the request as one for a reasonable accommodation under the ADA. However, if the request for leave can be addressed by an employer's leave program, the FMLA (or a similar state or local law) or the workers' compensation program, the employer may provide leave under those programs. But, if the leave cannot be granted under any other program, or leave under these programs has been exhausted,

then an employer should engage in an "interactive process" with the employee—a process designed to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship.

On Sept. 20, 2017, the U.S. Court of Appeals for the Seventh Circuit (with jurisdiction over Illinois, Indiana and Wisconsin) [ruled](#) that a multi-month leave of absence is not a reasonable accommodation under the ADA. The court held that the ADA does not require employers to grant long-term leave for disabilities. This ruling conflicts with the EEOC's guidance on leave as a reasonable accommodation, and with other federal court decisions holding that multi-month leave periods were reasonable accommodations under the ADA. Employers should remain cautious and evaluate leave requests from employees on a case-by-case basis to determine whether granting the leave will enable the employee to return to work and perform essential job functions.

An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an [undue hardship](#) for the employer. That is the case even when:

- ✓ The employer does not offer leave as an employee benefit;
- ✓ The employee is not eligible for leave under the employer's policy; or
- ✓ The employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers' compensation program, or the FMLA or similar state or local laws).

Reasonable accommodation does not require an employer to provide paid leave beyond what it provides as part of its paid leave policy. Also, as is the case with all other requests for accommodation, an employer can deny requests for leave when it can show that providing the accommodation would impose an **undue hardship** on its operations or finances.

**Example:** An employer's leave policy does not cover employees who work fewer than 30 hours per week. An employee who works 25 hours per week and who has not worked enough hours to be eligible for leave under the FMLA requests one day of leave each week for the next three months for treatment of a disability. The employer must provide unpaid leave as a reasonable accommodation unless it can show that providing the unpaid leave would cause undue hardship.

## *Health Plan Benefits*

The ADA does not specifically require the maintenance of group health plan benefits during a disabled employee's leave. However, an employer must generally treat employees on leave under the ADA the same as similarly situated individuals. That is, if the employer maintains coverage for employees on leave for reasons other than disability, it must treat employees on disability leave in the same manner.

## Return to Work

If leave is granted under the ADA, an employee with a disability is entitled to return to work to the same position he or she had unless the employer demonstrates that holding the position would impose an “undue hardship.” If an employer can demonstrate that holding the position is an undue hardship, the employee must be reassigned to a vacant equivalent position. If no vacant equivalent position is available, the employer must then consider reinstatement to a vacant lesser position. If the employer has no option but to reinstate the employee to a vacant lesser position, the employer is not required to provide the employee with the equal pay and benefits that the employee may have had in their original position.

Finally, if there is no vacant lesser position available, the employer does not have to reinstate the employee. In this situation, the employer **must be prepared to prove** that no other reinstatement options (reinstatement to original position, vacant equivalent position or vacant lesser position) were available without imposing an undue hardship on the employer.

If...	Then...
There is undue hardship to keep a position open during ADA leave.	Can the employee be reinstated to a vacant equivalent position?
No vacant equivalent position is available.	Can the employee be reinstated to a vacant lesser position?
No vacant lesser position is available.	Employee does not have to be reinstated.

## Military Leave – USERRA

USERRA provides protections to individuals who are absent from employment due to military service. USERRA applies to all employers, regardless of size. Under USERRA, employers must:

- ✓ Re-employ individuals who are absent from employment by reason of service in the uniformed services;
- ✓ Restore seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services; and
- ✓ Provide any additional seniority, rights and benefits that the person would have attained if the person had remained continuously employed.

Also, if an employer has a formal leave policy that provides additional rights or continuation of benefits to employees who are absent from work, an employer must apply those policies to individuals absent from work due to their service in the uniformed services.

## Health Plan Benefits

An employer must allow individuals absent due to uniformed services to elect to **continue health insurance coverage** for themselves and their dependents. Health insurance coverage must be continued for 24 months beginning on the date when the absence began or, if earlier, the day after the date the employee fails to apply for return to work following completion of their service.

Individuals who are absent from work for less than 31 days may not be required to pay more for coverage than the amount charged to employees that are actively at work. Employers may charge all other individuals no more than 102 percent of the full premium under the plan.

If benefits are cancelled because the employee did not elect to continue coverage or failed to pay premiums, the employer must restore to the employee benefits that are equivalent to those the employee would have had if leave had not been taken, including family or dependent coverage. The employee cannot be required to serve a new pre-existing condition waiting period, wait for open enrollment or pass a medical examination to obtain reinstatement of coverage.

## Re-employment Rights

To be eligible for re-employment, an individual generally must not have:

- ✓ Accumulated more than five years of uniformed service-related absences from a position of employment with this employer (with some exceptions); and
- ✓ Been released from service under dishonorable or other punitive conditions.

An employee generally must provide the employer with **advance notice of service obligations**, when reasonable. In addition, the employee must report to work or submit an application for re-employment to the employer within the following time frames:

Action	Length of Service	Time Allowed
Report to Work	Less than 31 days	By the beginning of the first regularly scheduled work period after the end of the calendar day of duty, plus time required to return home safely and an eight-hour rest period
	31 to 180 days	No later than 14 days after completion of uniformed service
Make Application for Re-employment	31 to 180 days	No later than 14 days after completion of uniformed service
	More than 180 days	No later than 90 days after completion of uniformed service

Certain exceptions apply to the requirement to report to work or to submit an application for re-employment, including circumstances where an individual is injured while performing uniformed services.

Employees who return from uniformed service must be re-employed according to the following schedule of priority:

- ✓ If the employee's service was for **less than 91 days**, the employee should be placed in the position that would have been held had employment not been interrupted. If the employee does not qualify for such a position, the employee should be placed in the position held before beginning his or her tour of duty.
- ✓ If the employee's service was for **more than 90 days**, the employee should be placed in a position of similar seniority, status and pay.

## STATE LEAVE LAWS

Many states have enacted their own laws to provide different, or additional, leave rights for employees than those provided under federal law. Most states have their own family and medical leave laws, and many states provide leave rights for other reasons, such as bereavement leave or civic duty leave.

Depending on an employer's size and location, it may be covered under the FMLA and state family and medical leave laws. If both the FMLA and state law apply to the same situation, the employer must follow the law that gives the employee greater rights.

**Compliance Tip:** To help determine if the FMLA and a state leave law apply to a family or medical leave, employers should consider each law's definition of "family member." In some cases, state laws include more individuals (for example, parents-in-law or domestic partners) under this definition than the FMLA does. Employers may not designate an employee's leave as FMLA if the reason for leave is not FMLA-qualifying.

Where an employee's leave is covered by the FMLA in addition to a state leave law, the employer must determine whether the state law permits (or prohibits) the leave to run concurrently with the federal FMLA. Many state leave laws include specific language regarding its interaction with the federal FMLA. When an employer appropriately runs FMLA concurrently with other types of leave (including employer-provided leave, if applicable), it will be able to limit the amount of time off an employee is entitled to in any 12-month period.

An employee's request for family or medical leave may not be covered by the FMLA, but may be subject to a state leave law. For example, a state's leave law may cover small employers that are not subject to the federal FMLA or it may provide leave rights in situations not covered by federal law, such as leave to care for a domestic partners or leave to attend school events.

Common types of state leave rights include the following:

<b>School activity leave</b>	Leave for parents to attend or otherwise be involved with activities at their child's school or day care facility
<b>Bereavement leave</b>	Leave following the loss of a family member

<b>Leave for assault victims</b>	Leave for employees who are victims of domestic violence, sexual assault or stalking (or employees with family members who are victims of this violence) to seek medical care, obtain counseling or seek legal assistance
<b>Family and medical leave</b>	Leave for certain family and medical reasons, such as caring for a family member with a serious health condition.
<b>Military (and military family) leave</b>	Re-employment rights for military members and leave rights for employees who are family members of deployed military members.
<b>Civic duty leave</b>	Leave for time to vote, to serve on a jury, to respond to a subpoena or to participate in judicial proceedings related to a crime.
<b>Blood or organ donation leave</b>	Leave for donating blood or organs

Because each state has its own set of leave laws, employers should stay up-to-date on the employee leave laws that are applicable to their organizations. Also, if an employee suffers a workplace injury, his or her absence from work may be covered by a state **workers' compensation program**. If permitted under state law, workers' compensation leave may run concurrently with FMLA leave.

Whether an employee is entitled to continue his or her **health plan coverage** during a state-mandated leave depends on the terms of the applicable state leave law. If the state leave law does not address health plan coverage requirements, an employer should review the terms of its health plan documents to determine the eligibility rules that apply to the coverage.

## Current Trend

***Paid Sick Leave*** – Currently, there are no federal legal requirements for paid sick leave. However, many employers have paid time off policies that offer a least a few days of sick leave each year. Also, a growing number of states and localities are enacting **paid sick leave laws** (including, for example, California, Oregon, New York City and the District of Columbia).

Covered employers in states and localities with paid sick leave laws should review their leave policies to make sure they comply with the legal requirements for providing this type of leave—such as eligibility, accrual of leave and carryover requirements.