Changes to the FMLA Administration Process

As of January 1, 2016, Milwaukee County is using a new vendor, FMLASource, to administer FMLA leaves for employees. FMLASource offers new resources and a user friendly process that will assist employees in applying for and using leaves. Among the new resources available to employees are a customer service call-in center to open new leaves and have questions answered, online access to check your eligibility for leave and also to claim and track leave time, downloadable forms from the FMLASource website, and access to smart phone apps to have your FMLA leave information at your fingertips. The FMLA process will now be monitored by the Department of Human Resources (HR), and the HR partner assigned to your department will be able to assist you with questions if you are unable to locate your issue below.

New Process Questions

Q. How do I request a FMLA leave under the new process?

A. Employees can go online to FMLASource.com or call 1-877-GO2FMLA (877-462-3652) to request a new leave. Once a leave has been requested, employees can check the status of that leave either online or by calling the customer service number. Employees are still required to advise their supervisor of the need for time off per your departmental work rules. Once a leave has been requested you will receive instructions for how to track time, declare bank time usage, and return to work information.

Q. Can I use my Short Term Disability (STD) policy concurrent with banked paid time during a FMLA leave?

A. No. This is not a Milwaukee County policy, but rather a federal regulation issued by the Department of Labor (DOL). As disability insurance typically provides an employee on leave with compensation, the federal regulations state that such leave is not "unpaid" leave and therefore, an employee cannot substitute accrued paid time for the time they are collecting disability. You will be able to use paid time if there is a qualifying period prior to the STD benefit compensation. These regulations are found under the DOL 29 CFR Section 825.207(d) and (e) for further reference.

Q. If I am off work for an approved workers' compensation claim, will my time off be counted as part of my annual FMLA entitlement?

A. Yes. If you meet the eligibility requirements for FMLA, the time you miss from work will run concurrently with your annual FMLA entitlement.

Q. Once I am approved for intermittent leave, when do I need to declare an absence as FMLA related?

A. Within 48 hours of the leave date or 48 hours. Remember, employees are still required to follow their departmental call-in procedures for intermittent leave.

Q. If my leave or a portion of my leave is denied and I would like to appeal this decision, what can I do?

A. Employees who would like to appeal a denial are required to file a written appeal within 30 days of the denial date and send this to fmla@milwaukeecountywi.gov. You will receive an appeal determination within 14 calendar days. Appeals sent after 30 days will not be considered.

Qualifying Reasons for FMLA Leave

Q. Can I still use FMLA leave during pregnancy or after the birth of a child?

A. Yes. An employee's ability to use FMLA leave during pregnancy or after the birth of a child has not changed. Under the regulations, a mother can use up to 12 weeks of FMLA leave for the birth of a child, for prenatal care and incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or child birth).

Q. What if both employees work for the County?

Where both spouses work for the County, they may, at the County's discretion, be limited to a combined total of 12 weeks of FMLA leave if they are seeking leave for (1) the birth and care of a child; or (2) for the placement of a child for adoption or foster care, and to care for the newly placed child or (3) a combined total of 26 weeks if leave is to care for a covered servicemember with a serious injury or illness.

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. What is the definition of a serious health condition under the regulations?

A. A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. The "continuing treatment" test for a serious health condition under the regulations may be met through (1) a period of incapacity of more than three consecutive, full calendar days plus treatment by a health care provider twice, or once with a continuing regimen of treatment, (2) any period of incapacity related to pregnancy or for prenatal care, (3) any period of incapacity or treatment for a chronic serious health condition, (4) a period of incapacity for permanent or long-term conditions for which treatment may not be effective, or (5) any period of incapacity to receive multiple treatments (including recovery from those treatments) for restorative surgery, or for a condition which would likely result in an incapacity of more than three consecutive, full calendar days absent medical treatment.

The regulations specify that if an employee asserts a serious health condition under the requirement of a "period of incapacity of more than three consecutive, full calendar days and any subsequent treatment or period of incapacity relating to the same condition," the employee's first treatment visit (or only visit, if coupled with a regimen of continuing treatment) must take place within seven days of the first day of incapacity. Additionally, if an employee asserts that the condition involves "treatment two or more times," the two visits to a health care provider must occur within 30 days of the first day of incapacity. Finally, the regulations define "periodic visits" for treatment of a chronic serious health condition as at least twice a year.

Eligibility for FMLA Leave

Q. I have 12 months of service with my employer, but they are not consecutive. Do I still qualify for FMLA?

A. You may. In order to be eligible to take leave under the FMLA, an employee must (1) work for a covered employer, (2) work 1,250 hours during the 12 months prior to the start of leave, (3) work at a location where 50 or more employees work at that location or within 75 miles of it, and (4) 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. The regulations clarify; however, that employment prior to a continuous break in service of seven years or more need not be 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.

Q. If I have to miss work due to National Guard or Reserve duty, will this affect my eligibility for FMLA leave?

A. No. The regulations make clear the protections for our men and women serving in the military by stating that a break in service due to an employee's fulfillment of military obligations must be taken into consideration when determining whether an employee has been employed for 12 months or has the required 1,250 hours of service.

Employee Notice Requirements

Q. How much notice must an employee give before taking FMLA leave?

A. When the need for leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give at least 30 days notice. If 30 days notice is not possible, an employee is required to provide notice "as soon as practicable." Employees must also provide notice as soon as practicable for foreseeable leave due to a qualifying exigency, regardless of how far in advance such leave is foreseeable (see FAQ for military family leave for additional information). The regulations clarify that it should be practicable for an employee to provide notice of the need for leave that is foreseeable either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must account for the individual facts and circumstances.
When the need for leave is unforeseeable, employees are required to provide notice as soon as practicable under the facts and circumstances of the particular case, which the regulations clarify will generally be within the time prescribed by the employer's usual and customary notice requirements applicable to the leave.

Q. What information must an employee give when providing notice of the need for FMLA leave?
A. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA. The employee must, however, provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

The regulations provide additional guidance for employees regarding what is "sufficient information." Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty and that the requested leave is for a qualifying exigency; if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence if known.

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.

Certification of Need for FMLA Leave

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. What if I do not want my employer to know about my medical condition?

A. If an employer requests it, an employee is required to provide a complete and sufficient medical certification in order to take FMLA-protected leave due to a serious health condition. An employee may choose not to submit medical certification as requested by the employer, but then the employee would be ineligible for FMLA-protected leave.

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.

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.

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.

Miscellaneous Questions

Q. My medical condition limits me to a 40 hour workweek but my employer has assigned me to work eight hours of overtime in a week. Can I take FMLA leave for the overtime?

A. Yes. Employees with proper medical certifications may use FMLA leave in lieu of working required overtime hours. The regulations clarify that the hours that an employee would have been required to work but for the taking of FMLA leave can be counted against the employee's FMLA entitlement. Employers must select employees for required overtime in a manner that does not discriminate against workers who need to use FMLA leave.

Q. Can I use my paid leave as FMLA leave?

A. Under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer's applicable paid leave policy. The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA. If the employee does not choose to substitute applicable accrued paid leave, the employer may require the employee to do so.