

**Family Medical Leave Act 1993  
New Mexico State Personnel Office**

**FREQUENTLY ASKED QUESTIONS**

1. *Which employees are eligible for Family Medical Leave Act (FMLA) qualifying leave?*

An "eligible employee" is a State employee who:

- a) Has been employed by the State for at least 12 months (does not have to be consecutive), and
- b) Has worked and been compensated for at least 1,250 actual work hours during the 12-month period immediately preceding the leave (this does not include vacation, sick leave, other paid leave, or compensatory time - this does include overtime worked).
- c) Pursuant to USERRA, an employee returning from fulfilling their National Guard or Reserve military obligation shall be credited with the hours of service that would have been performed.

2. *Are only classified service career status employees eligible for FMLA qualifying leave?*

No, non-career status employees are eligible if they meet the requirements stated under question one above. If employees are not in insurance eligible status, they are only eligible for unpaid time off and not the insurance benefits.

3. *Under what circumstances are employees eligible to take FMLA qualifying leave?*

- a) For birth of the employee's child, and to care for the newborn child;
- b) For placement with the employee of a child for adoption or foster care;
- c) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and
- d) For a serious health condition that makes the employee unable to perform the functions of the employee's job.
- e) For a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.
- f) To care for a covered service member who became ill or was injured as a result of active duty service.

4. *How much time may an employee take as FMLA qualifying leave?*

Eligible employees may take up to 12 work weeks of leave during a forward-rolling 12-month period starting with employee's first FMLA usage. An eligible employee's time is not phrased in terms of a particular number of days or hours of leave, but rather as 12 work weeks of leave with the following exceptions:

**Family Medical Leave Act 1993**  
**New Mexico State Personnel Office**

**Exceptions:**

If the leave is to care for a covered service member who became ill or was injured as a result of active duty or call to active duty service, refer to question No. 5. If a husband and wife both work for the State, refer to Question Nos. 6 and 7. If the leave is taken for the birth of a child or the placement of a child for adoption or foster care, refer to Question No. 9.

5. *How much time may an employee take as FMLA qualifying leave to care for a covered service member who became ill or is injured as a result of active duty or call to active duty service?*

Eligible employees may take up to 26 weeks within a single 12-month period. The 12-month period begins on the date the employee first takes FMLA leave to care for the covered service member and ends 12 months after that date.

6. *If both husband and wife are State employees, are they both eligible for twelve weeks of FMLA qualifying leave during the fiscal year?*

FMLA imposes the 12 weeks maximum combined leave on spouses who work for the same employer, which is the classified service under the Executive Branch of the State of New Mexico, not the individual employing agency. A husband and wife may take only a combined total of 12 weeks of FMLA qualifying leave under the following situations:

- a) For the birth of a son or daughter and to care for the newborn child;
- b) For placement of a child with the employee for adoption or foster care;
- c) To care for the employee's parent (not parent-in-law) who has a serious health condition.

7. *If both husband and wife are State employees, are they both eligible for 26 weeks of FMLA qualifying leave to care for a covered service member who becomes ill or is injured as a result of active duty or active duty service?*

A husband and wife can take only a combined total of 26 weeks of FMLA qualifying leave during a single 12-month period.

8. *If an employee uses the maximum of 12 weeks of FMLA qualifying leave, are they allowed to utilize another 12-weeks of FMLA the following the eligible 12-month rolling calendar period for the same condition?*

Yes, provided the employee still meets all the eligibility criteria (including 1,250 actual work hours in the previous year preceding the request).

**Family Medical Leave Act 1993**  
**New Mexico State Personnel Office**

9. *If FMLA qualifying leave is taken for the birth of a child, or for placement of a child for adoption or foster care, must the leave be completed within a specific period of time?*

Although it is possible that an employee could qualify for two separate FMLA qualifying leaves for the birth or placement of a child (under the condition explained in Question No. 5 above), all FMLA qualifying leaves must be completed within 12 months of the birth or placement of a child. The 12-month period begins on the date of birth or placement.

10. *Does FMLA leave have to be taken all at once, or can it be taken intermittently?*

FMLA qualifying leave taken for the employee's own serious health condition, for the serious health condition of the employee's spouse, son, daughter, or parent, or to care for a covered service member with a serious injury or illness may be taken intermittently or on a reduced schedule if "medically necessary" and if that medical need can best be accommodated by an intermittent schedule or for medical appointments.

If the need for intermittent leave or a reduced schedule is documented by the employee's or family member's health care provider as "medically necessary," such leave shall be granted.

Intermittent leave for the birth/placement of a child may be granted at the discretion of the Department Secretary or Agency Head. The Department Secretary or Agency Head's agreement is not necessary if the mother has a serious health condition in connection with the birth or if the newborn child has a serious health condition.

Leave due to a qualifying exigency may be taken on an intermittent or reduced schedule basis.

11. *Is an employee required to use paid sick leave for certain FMLA qualifying leaves?*

FMLA allows an employer to require the use of paid leave for certain qualifying events and the FMLA does not require an employer to expand the use of paid leave. The State of New Mexico allows the employee to utilize all forms of accrued leave or approved unpaid time for FMLA.

12. *Are there circumstances under which an employee may request to receive paid vacation or compensatory time in conjunction with FMLA?*

An employee may request and receive paid vacation or compensatory time. Granting of vacation or compensatory time is not subject to any other employer requirements such as seniority or staffing needs. However, the employee must make a reasonable effort to schedule foreseeable qualifying leave so as not to unduly disrupt the employer's operation.

**Family Medical Leave Act 1993**  
**New Mexico State Personnel Office**

If the employee is unable to provide sufficient documentation to determine FMLA eligibility, the employee shall be placed on unpaid leave until such documentation is made available to the employer.

13. *How do you determine the amount of FMLA qualifying leave used if an employee works a fixed part-time schedule or the employee's schedule varies from week to week?*

The amount of FMLA qualifying leave is determined on a pro-rata basis by comparing the requested schedule with the employee's normal schedule. Where the schedule varies from week-to-week to such an extent that the employer is unable to determine with any certainty the number of hours the employee would have worked, a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period is used to calculate the employee's leave entitlement.

14. *How can an agency determine if a request for leave is FMLA qualifying leave?*
- a) An employee requesting leave shall be asked the question, "Is the request for paid or unpaid time off for the purpose of an FMLA qualifying event (yes) (no)?" An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the Agency Director to determine whether it is qualifying under FMLA.
  - b) If an employee requests leave prior to completing a request-for-leave slip, a supervisor may ask the reason for the leave. The supervisor will ask for this information solely for the purpose of determining whether the leave is FMLA qualifying and/or if under the terms of the State's contracts or compensation plans an employee is eligible for paid or unpaid time off.
  - c) If the employee fails to explain the reason, leave may be denied.

15. *How can an employee determine if his or her request for time off qualifies under FMLA?*
- a) Notices explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act shall be posted in conspicuous places at the worksite.
  - b) An employee may ask his or her supervisor or contact the human resources office to ask questions concerning the employee's rights and responsibilities under the FMLA.

16. *Does an FMLA qualifying leave extend an employee's period of employment?*

Perhaps, depending upon the parameters of the employment situation. Please check with your agency's Human Resources contact to discuss the parameters of your situation.

**Family Medical Leave Act 1993**  
**New Mexico State Personnel Office**

17. *What are an employee's job protection rights upon return from an unpaid FMLA qualifying leave?*

An eligible employee shall be restored to the same position that the employee held when the FMLA qualifying leave began, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment such as same shift, equivalent hours, etc.

18. *How does FMLA qualifying leave coordinate with the Statewide Sick Leave Policy?*

FMLA prohibits an employer from discriminating against employees who use FMLA qualifying leave. Therefore, the FMLA qualifying leave cannot be referred to in any employment actions including but not limited to discipline and selection.

19. *Can employees choose whether or not they want to use FMLA qualifying leave?*

No. It is the employer's responsibility to designate leave as qualifying under FMLA. An employee may not choose whether leave shall be counted as FMLA qualifying leave.

20. *How can an employer verify an employee's need for leave because of a "serious health condition"?*

The agency's FMLA designation decision must be based only on information received from the employee or the employee's spokesperson.

An employer may also require an employee to obtain certification of a "serious health condition" from the employee's health care provider. The employer can pay for a second opinion if it doubts the validity of the original certification. If the second opinion conflicts with the first, the employer may pay for a third opinion. The provider of the third opinion must be jointly approved by the employer and employee. The third opinion will be final.

If a leave request is for the serious health condition of a family member, the employer can require the employee to provide certification from the family member's health care provider.

21. *Is an employee eligible to continue health insurance benefits during a FMLA qualifying leave?*

During an FMLA qualifying leave, the employee and dependent health and dental insurance coverage is maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the entire leave period.

Employees who receive the partial employer contribution must continue to pay their portion of the premium in order to retain this coverage. If the employee fails to make

**Family Medical Leave Act 1993**  
**New Mexico State Personnel Office**

their premium payments, they will lose the coverage and may not be covered for any claims which may have occurred while on FMLA qualifying leave.

22. *What other insurance coverage may an employee continue during a FMLA qualifying leave?*

An employee may continue all coverage which they had prior to going on the FMLA qualifying leave, by paying the full cost of the premium. This includes, but is not limited to, basic, optional, spouse, child life insurance and short term and long term disability insurance. If the employee takes leave due to a work-related disability, short-term disability may not be continued. It may be reinstated upon the employee's return to work.

23. *May an employee choose not to retain health and dental coverage while on FMLA qualifying leave?*

Yes, an employee may choose not to retain coverage. The coverage will be reinstated upon the employee's return to work.

24. *May an employee choose not to retain optional coverage while on a FMLA qualifying leave?*

Yes, however, they may have the coverage reinstated upon return to work, if the return to work is within the allotted 12 weeks of FMLA qualifying leave. If the leave goes beyond 12 weeks, the employee must reapply with evidence of good health. If an employee chooses not to retain optional coverage, they will not be covered for any claims that may have occurred while they were on leave.

25. *If an employee terminates employment during the FMLA qualifying leave, may the employer recoup the costs of the premiums paid?*

Yes, an employer may recover its share of health/dental insurance premiums paid during a period of unpaid FMLA qualifying leave from an employee if the employee fails to return to work for at least thirty (30) calendar days after the leave unless the employee does not return due to the continuation, recurrence or onset of the serious health condition, or due to other circumstances beyond the employee's control.

26. *What are an employee's Consolidated Omnibus Budget Reconciliation Act (COBRA) rights in relation to an FMLA qualifying leave?*

As it relates to FMLA qualifying leave, the COBRA qualifying event is termination of employment, or the end of the leave - whichever comes first. Once the COBRA qualifying event occurs, the employee may choose to "continue" health and dental by paying the entire cost of coverage - even though the employee did not pay their share of the premium during the FMLA qualifying leave.

**Family Medical Leave Act 1993**  
**New Mexico State Personnel Office**

27. *What can employees do if they believe that their rights under FMLA have been violated?*

The employee has the choice of:

- a) First consulting with their agency's Human Resources area,
- b) Filing, or having another person file on his or her behalf, a complaint with the Secretary of the United States Department of Labor, or
- c) Filing a private lawsuit pursuant to section 107 of FMLA.

28. *How are employees protected who request leave or otherwise assert FMLA rights?*

The FMLA prohibits an employer from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

29. *Do State laws providing family and medical leave still apply?*

Nothing in FMLA supersedes any provision of State law. However, if leave qualifies for FMLA and for leave under State law, the leave used counts against the employee's entitlement under both laws.

30. *If an employee is on a non-medical leave of absence that also qualifies as an FMLA-protected leave, should that employee's leave accrual date be adjusted?*

No. Accrual dates shall not be adjusted for employees on FMLA-qualifying leave whether medical or not.

31. *Do employees earn sick and vacation accruals when they are on unpaid FMLA-qualifying leaves?*

No. Employees only earn sick and vacation accruals when they are in a paid status. In addition, an employee being paid less than eighty (80) hours in a pay period due to an FMLA-qualifying unpaid leave will have his/her sick/vacation accruals prorated.

32. *Are employees on FMLA-qualifying leave allowed to earn holiday pay during their leave?*

Yes. SPB Rule 1.7.4.17 NMAC allows for paid holiday pay except in instances where the employee is absent without leave on the workday prior or directly following a holiday.

33. *Does Workers' Compensation leave count against an employee's FMLA leave entitlement?*

It can. FMLA qualifying leave and Workers' Compensation leave may run concurrently, provided the reason for the absence is due to a qualifying serious illness or injury, and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

**Family Medical Leave Act 1993**  
**New Mexico State Personnel Office**

34. *Does Short-term and/or Long-term disability leave count against an employee's FMLA leave entitlement?*

It can. FMLA qualifying leave and short-term and/or long-term disability leave may run concurrently, provided the reason for the absence is due to a qualifying serious health condition and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

35. *Can an employer count missed overtime hours against the employee's FMLA entitlement?*

Yes, if an employee would normally be required to work overtime, but is unable to do so because of an FMLA-qualifying reason that limits his/her ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's entitlement (e.g., employee normally would be required to work 48 hours, but due to a serious health condition, can only work 40 hours. The employee would use eight hours of FMLA-protected leave).

Voluntary overtime hours that an employee does not work due to the FMLA reason may not be so counted. For more information, please contact your agency's human resources bureau.



**Family Medical Leave Act 1993  
New Mexico State Personnel Office**

**EMPLOYEE RIGHTS AND RESPONSIBILITIES  
UNDER THE FAMILY AND MEDICAL LEAVE ACT 1993**

**Basic Leave Entitlement**

*FMLA requires covered employers to provide up to 12 weeks of unpaid job-protected leave to eligible employees for the following reasons:*

- ~ For incapacity due to pregnancy, prenatal medical care or child birth;*
- ~ To care for the employee's child after birth, or placement for adoption or foster care;*
- ~ To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or*
- ~ For a serious health condition that makes the employee unable to perform the employee's job.*

**Military Family Leave Entitlements**

*Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.*

*FMLA also includes a special leave entitlement that permits eligible employees to take up 26 weeks of leave to care for a covered service member during a single 12-month period. A covered service member is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the service member medically unfit to perform his or her duties for which the service member is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.*

**Benefits and Protections**

*During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.*

*Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.*

**Eligibility Requirements**

*Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 actual work hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.*

**Definition of Serious Health Condition**

*A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the*

**Family Medical Leave Act 1993  
New Mexico State Personnel Office**

*functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.*

*Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than three consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.*

**Use of Leave**

*An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.*

**Substitution of Paid Leave for Unpaid Leave**

*Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.*

**Employee Responsibilities**

*Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.*

*Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave.*

*Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified.*

*Employees also may be required to provide a certification and periodic recertification supporting the need for leave.*

**Employer Responsibilities**

*Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.*

*Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.*

**Family Medical Leave Act 1993  
New Mexico State Personnel Office**

***Unlawful Acts by Employers***

*FMLA makes it unlawful for any employer to:*

- “ Interfere with, restrain, or deny the exercise of any right provided under FMLA;*
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.*

***Enforcement***

*An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer. FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.*

***FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice.***

***Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.***

**For additional information:**

1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627

**WWW.WAGEHOUR.DOL.GOV**