

A survivor of domestic or sexual violence may have serious health conditions that require medical attention. These conditions may be either physical or psychological. Sometimes family and medical leave laws allow you to take time off to treat these conditions. You may also be able to take time off to care for a family member with a serious health condition. This guide provides basic information regarding your right to take time off from work when you or a family member has a serious health condition. Some states also have laws that specifically provide time off to victims of domestic violence, sexual assault, or stalking to address injuries, go to court, find safe housing, or receive counseling. Legal Momentum's state-law guide "Time Off From Work" (available at <http://www.legalmomentum.org/issues/vio/timeoff.pdf>) provides information on these laws.

1. What rights do family and medical leave laws provide to survivors of domestic violence, sexual assault and stalking?

A federal law allows certain employees to take unpaid time off from work to treat a *serious health condition* or to take care of a family member with a serious health condition. The law is called the **Family and Medical Leave Act (FMLA)**. Physical or mental conditions related to domestic violence, sexual assault and stalking may count as *serious health conditions* under the FMLA. Many states have similar family and medical leave laws. It is important to check whether your state has its own family and medical leave law. If it does, find out how it is different from the federal FMLA.

If you qualify for time off under the FMLA you can take up to 12 weeks off from work to treat your health condition (or take care of your family member) without being fired. When you return to work you have a right to be given the same benefits, pay and working conditions as you had before you took the time. If you usually receive health insurance benefits from your employer, you also have a right to receive those benefits while you are on leave.

The FMLA also makes it illegal for your employer to interfere with your right to take time off. Your employer may not harass you, deny a valid request for time off, or refuse to hire or promote you because you have taken or will take family and medical leave. It is also illegal for your employer to punish you for asking for family and medical leave, or for complaining that they are not following the rules of the FMLA.

2. Can I apply for time off under the federal Family and Medical Leave Act?

It depends. Only certain employees have a right to take time off under the FMLA. You must meet all of the following conditions to be eligible for time off under the FMLA:

- you must have worked for your employer at least 12 months (even on a part-time or temporary basis);

- you must have worked at least 1,250 hours (an average of 25 hours per week) during the 12 months before the leave;
- your employer must have at least 50 employees within 75-miles of your worksite; and
- you (or your family member) must have a *serious health condition* for which you are receiving *continuing treatment* from a *health care provider*.

Sometimes your employer may offer more generous options for taking time off in a personnel policy or a union contract. Some state family and medical leave laws also offer more generous options sometimes. Make sure you look into all your options.

3. What do the terms serious health condition, continuing treatment, health care provider, and family member mean in the FMLA?

“Serious health condition”

To qualify for time off under the FMLA you must show that you or your family member has a *serious health condition*. According to the FMLA, a *serious health condition* is an illness, injury, or mental condition that requires either an overnight stay in a hospital or “continuing treatment” by a health care provider. Generally, common colds, the flu, earaches, upset stomachs, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, cosmetic surgery and periodontal diseases are not “serious health conditions.”

“Continuing treatment”

Under the FMLA, *continuing treatment* generally means a condition that causes incapacity (an inability to work or perform other regular daily activities) for more than three days and requires two or more doctor visits or a single doctor visit with a regimen of continuing treatment and supervision (e.g., regular physical therapy). These visits and treatments can be related to injury, chronic illness, restorative surgery, pregnancy or prenatal care. *Continuing treatment* does not include regular physical, eye, or dental exams. Chronic health conditions, such as asthma, diabetes, or epilepsy, that may cause episodes of incapacity (rather than continuous incapacity) or conditions for which treatment may not be effective, such as terminal cancer or Alzheimer’s, may also qualify.

“Health care provider”

Generally you (or your family member) must be receiving treatment from a *health care provider* to qualify for time off. Under FMLA *health care providers* include:

- licensed medical doctors;
- clinical psychologists;
- optometrists;
- licensed nurse practitioners and nurse-midwives;
- clinical social workers; and
- chiropractors (sometimes, depending on the treatment they provide).

Your employer’s health care plan may accept a letter from your doctor (or your family member’s doctor) as proof that you (or your family member) have a serious health condition and are covered by benefits. If this is the case, the doctor probably counts as a health care provider under the FMLA.

“Family member”

You may take time off to care for your parent, child or spouse with a serious health condition. Parent means a biological parent or an individual who cared for you as a parent when you were a child. Parents-in-law are not included. Spouse means a husband or wife as recognized by the state in which you live. Child means a biological, adopted or foster child, a legal ward, or a child for whom you act as a parent even if you have not formally adopted the child. A child must be either under the age of 18 or, if older than 18, not able to take care of him or herself because of a mental or physical disability.

4. Does my employer have to tell me about my family and medical leave rights?

Yes. All employers who are required to give employees time off under the FMLA must post a notice explaining the rights and responsibilities of all employees and employers under the FMLA. The employer also must provide written information about FMLA to employees who wish to take time off under FMLA. If the employer has a handbook, it generally must address FMLA. Also, if your employer is going to count specific time off as FMLA leave, your employer must give you notice of this in writing.

If your employer has not told you about your family and medical leave rights and you believe your employer is covered under FMLA, ask them for information about these rights.

5. What happens to my pay, my position and my benefits if I take family and medical leave?

Generally your position, pay and benefits do not change if you take FMLA time off (although the leave itself is generally unpaid). You have the right to return to the same salary and the same or an equivalent position, unless that position has been eliminated for legitimate business reasons that have nothing to do with your leave. If you have health benefits before you take leave, you also have a right to have that same level of benefits both during your time off and after you return. If you do not return from leave you may have to pay your employer back for the cost of your health benefits during the leave. If the reason you cannot return is beyond your control (for example, your health condition continues to prevent you from working), you will *not* have to pay your employer back for the cost of health benefits.

6. Do I have to tell my employer that I need to take family or medical leave?

Yes. If you (or your family member) have a planned medical procedure, such as major surgery, you must give your employer 30-day notice. If there is a medical emergency, you or a family member must tell your employer as soon as possible, usually within a couple of days. You should notify your employer in writing of your need for family or medical leave. Make sure to keep a copy of your employer’s response.

You are not required to disclose your (or your family member’s) specific diagnosis to your employer, but you must give your employer enough information to understand that it is a serious health condition.

Be sure that you understand your employer's rules for family and medical leave before you take leave. Ask your employer for a written description of your rights and responsibilities for family and medical leave.

7. What information may my employer ask for if I take family or medical leave?

Before you take family or medical leave, your employer is allowed to ask you to provide medical certification from a health care provider (such as a doctor's note that says you have (or your family member has) a serious health condition. Your employer may ask you for certification from two or three doctors, but only if they are willing to pay for the additional doctor's visits.

During your time off your employer may ask for recertification if the original certification expires. They may also ask for regular reports about your status and intent to return to work.

Sometimes your employer may request a medical "fitness for duty" certification before you return to work. They may only ask for this if it is job-related and necessary.

If you are asking for leave to care for a family member, your employer may ask for confirmation of your relationship to your family member, such as a birth or marriage certificate.

8. What information should medical certification contain?

Medical certification should contain:

- the date the serious health condition began;
- how long the condition will probably last;
- a statement that the condition makes you (or your family member) temporarily unable to work at all or temporarily unable to perform one or more of the functions of your job;
- how much time off you (or your family member) will probably need; and
- a statement that proves that you will need to have an irregular or reduced schedule, if applicable.

Generally your employer may not ask you or your doctor (or your family member's doctor) for more than this basic information. **Your employer must keep any medical information in a certification confidential.**

9. May I take intermittent (broken up) time off or work part time?

Sometimes. FMLA gives you the right to up to a total of 12 weeks off if necessary to recover from an injury, illness, or condition. Some conditions are best addressed by taking the 12 weeks all together. Other conditions are better addressed by taking leave as necessary (for example, if you need to take leave for asthma, you might only need to take time off on days where the air quality is particularly bad). In some cases, it may be medically best to work on a reduced (part-time) schedule. For example, after recovering from an injury caused by domestic or sexual violence, you may not be strong enough to work full time and may need a part-time schedule. In this case, each hour or day that you take off from your regular working schedule counts as FMLA leave. You can take off up to 12 weeks' worth of hours.

To qualify for part-time or intermittent leave, you must show that it is medically necessary. You must attempt to arrange a schedule with your employer that meets your medical needs without being disruptive to the work environment. Your employer may temporarily transfer you to another position with the same pay rate and benefits that is better for a part-time employee.

If you are taking leave to care for a family member, you may take leave on an intermittent or reduced work schedule when your family member's care is best accommodated through an intermittent or reduced work schedule. You may take intermittent leave not only where the family member's need for care is off-and-on (for monthly chemotherapy, for example), but also where you are needed only intermittently (such as when sharing care responsibilities with others).

Your employer may not make you take more leave than is medically necessary. Your employer also cannot transfer you as punishment for taking leave (for example, transfer you from the day shift to the late night shift). Once you no longer need a reduced schedule, your employer must let you return to the same or equivalent position – and the same number of hours -- that you held before taking leave.

10. Can I get paid while taking time off?

Sometimes. Although FMLA leave is unpaid, there are ways to receive a paycheck while you are taking time off. If you have saved up vacation, personal leave and/or sick time, either you or your employer may choose to apply this paid time off to your FMLA time off. For example, if you have 6 weeks of paid vacation saved up and you take 12 weeks of FMLA leave, you can be paid for 6 out of your 12 weeks off. At the end of your FMLA leave, you will have used up all of your FMLA time and all of your saved up vacation time.

Sometimes if you have a serious health condition, you may be eligible for state temporary disability insurance benefits. If so, you can receive payments while taking FMLA time off (if you are not using sick days or vacation days or other paid time off). Check into your state disability laws for more information.

If you are injured at work you may qualify for Worker's Compensation. It may be better to take Worker's Compensation than FMLA because under Worker's Compensation, you generally receive some pay. For more information, see the EHRSA guide on Worker's Compensation.

11. Where can I get help regarding my family and medical leave rights?

For information about family and medical leave laws and your particular situation, contact **Legal Momentum** (see below for information).

If you think your employer has violated the FMLA, you can file a complaint with your local office of the United States Department of Labor, Wage and Hour Division no later than two years after the earliest discriminatory act (check the U.S. Government listing in your local telephone directory or visit www.dol.gov/esa/whd/). If you sue your employer for violating family and medical leave laws, the court may make your employer give you back your job and the wages you should have been paid or a promotion you should have received. They may also have to pay your legal costs.

Time limits apply. You should take action immediately if you think your rights have been violated.

12. Talk to the appropriate agency or an attorney about your rights.

This guide tries to provide accurate, general information regarding family and medical leave laws. Yet, because laws and legal procedure change frequently and are interpreted differently, Legal Momentum cannot guarantee the information in this guide is current. Legal Momentum also cannot be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your legal rights in your particular situation. If you need assistance in finding a lawyer, contact Legal Momentum, the bar association in your state, or your local legal services office, domestic violence coalition, sexual assault coalition, or service provider.

For more information or assistance, please contact 212-925-6635 or ehrsa@legalmomentum.org.

This guide is available for downloading at www.legalmomentum.org.

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