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## Family Medical Leave Act ... an Updated Guide

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# Family Medical Leave Act

## *... an updated guide*

Bonnie C. Jones, Human Resource Consultant  
February 2012

THE UNIVERSITY of TENNESSEE   

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MUNICIPAL TECHNICAL ADVISORY SERVICE

*In cooperation with the Tennessee Municipal League*



# Family Medical Leave Act ... *an updated guide*

**Bonnie C. Jones**  
**Human Resource Consultant**  
**February 2012**

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# FAMILY MEDICAL LEAVE ACT

Bonnie C. Jones, Human Resource Consultant

## PURPOSE

This publication will attempt to provide your city with an overview of the Family and Medical Leave Act (FMLA) including recent amendments, legislative history and the intersection of FMLA with ADA (Americans with Disabilities Act) and GINA (Genetic Information Nondiscrimination Act).

## BACKGROUND

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.

## THE NATIONAL DEFENSE AUTHORIZATION ACT OF 2010

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:

- 1) **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;



## 2) **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.

### **FINAL FMLA REGULATIONS EFFECTIVE JANUARY 1, 2009**

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 includes 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-organizes the traditional FMLA regulations and clarifies 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. The DOL took the opportunity to review thousands of employer and public comments and questions on all areas of

FMLA and addressed many of those administrative issues in the final 762 pages of regulations. The final regulations can be accessed at <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>.

In short, the DOL used a common sense approach to help Americans better comprehend their benefits under the FMLA while taking into consideration the cumbersome administration burdens the FMLA requires. Employers, employees, and members of the public all had a chance to provide input in the formulation of these new regulations and the DOL offered much legislative background behind its final decision.

## **A LOOK AT FMLA**

### **FMLA ELIGIBILITY**

Generally, Family Medical Leave (FML) eligibility remains unchanged.

- 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 new legislation 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.



## FMLA HISTORY

November 21, 2009	GINA legislation goes into effect.	
October 28, 2009	President Obama signs National Defense Authorization Act of 2010 which modifies FMLA to expand availability and clarify regulations from 2008.	Assume effective immediately, as the law does not specify an effective date.
January 16, 2009	New FMLA regulations take effect.	These regulations helped employers in applying the new types of military leave provided under NDAA as well as clarifying traditional types of FML.
December 2008	DOL issues Final Rule on FMLA.	Became effective January 16, 2009.
November 17, 2008	DOL publishes regulations.	First significant regulations since law was enacted in 1993.
January 28, 2008	NDAA for 2008 signed into law by President Bush. This FMLA Expansion provided enhanced benefits for military families including QE leave and Military Caregiver Leave.	
August 5, 1993	FMLA becomes effective.	
February 5, 1993	FMLA is signed into law.	

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

The new 2009 regulations provide 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**

Much to employers' relief, 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 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, 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

As reported by the HR Specialist, “Employment lawyers have found that 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 critical. 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

The final rule specifies that 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.

In a new ruling, 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).

In attempt to tighten up this section, the final regulations indicate that even 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

As the DOL pointed out, there is much confusion surrounding FMLA and pay. It is unique to each employee and employer circumstance. As the UT Municipal Technical Advisory Service (MTAS) commonly tell cities, “FML is a protection, not a paycheck.” 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 new and revised 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. *Previously, the DOL may have had different procedural requirements for using FML vs. sick, personal or annual leave.* 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

Time spent in light duty positions cannot be used against an employee's FML entitlement. *Under previous FMLA regulations, the employer could count the light duty assignment against the employee's entitlement.* The provision has been revised and 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).

### PERFECT ATTENDANCE AWARDS

Prior FMLA regulations specifically held that employee awards **based solely** on attendance should not be denied to employees if those absences are related to FML.

The final regulations now state that bonus awards can be administered based on "achievement of a specified goal such as hours worked, products sold or perfect attendance" which means they can be denied to employees who have taken FML. However,

FML and similar non-FML must be treated the same for purposes of such awards and bonuses. 29 C.F.R. § 825.215(c)(2).

### 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

The new 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 (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.
- Employers who believe the medical certification form is incomplete or insufficient must specify in writing what information is needed and provide the employee with seven calendar days to remedy this.
- 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, visit <http://www.dol.gov/whd/fmla/index.htm>.

### FITNESS FOR DUTY CERTIFICATION

- **Job Safety Exception** – Restrictions still apply for those employers requesting fitness for duty certificates for employees on intermittent FML. Under the new legislation, employers are now 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.



## TWO NEW LEAVE PROVISIONS FOR MILITARY FAMILIES

In 2008, FMLA was first amended to provide new benefits for military personnel and their families resulting from the National Defense Authorization Act (NDAA) for Fiscal Year 2008 (Public Law 110-181). This was further clarified and expanded in October 2009.

### (1) Military Caregiver Leave

The NDAA provides 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.*

### (2) 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.

**NOTE:** 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.

## 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 recent 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 FML, 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.

According to Personnel Policy Service, Inc.

*“At first glance, this case seems to allow employees to take FMLA-protected time off for just about any adult child who is sick. The standard for “incapable of self-care” appears fairly easy to meet if a person only has to be unable to cook, clean, shop, and take the bus. However, since the adult child also must be disabled to fall under the FMLA’s protections, employers should be able to limit these absences to legitimately ill and needy adult children. Thus, an employee may be able to take FML to care for an adult child in the hospital with cancer (typically considered a disability) but may be denied leave to care for an adult child with a broken leg (generally not considered a disability). In addition, to verify further the employee’s need for leave, employers may (and should) require medical certification from the adult child’s health care provider. This certification must show that the employee is needed either (1) to assist the child in basic medical or personal needs, safety, or transportation; or (2) to provide psychological comfort that would be beneficial to the child.*

*“Since very few courts have addressed the issue of FMLA to care for adult children, it is difficult to*



*predict whether other jurisdictions will follow this decision. However, since this court relies heavily on the FMLA statute and its regulations, there is good reason to believe that others will adopt its rationale.”*

<http://www.ppspublishers.com/articles/fmla-adult-children.htm>

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.

Because this is not a common issue addressed by the courts, your city should pay attention to case law and new developments in how FMLA and ADA intersect.

### **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.

### **SO WHY THE LINK BETWEEN GINA AND FMLA?**

When asking for medical information in the course of administering FML/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.

In November, the EEOC issued new regulations under GINA that define terms and provide guidance for employers administering the act’s provisions. They specifically reference certain issues under FMLA.

### **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.

## 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 conservative!

## REQUESTS FOR MEDICAL LEAVE: FMLA/ADA/WORKERS COMPENSATION ETC.

GINA specifically prohibits an employer from asking about an employee's family genetic health information. There is another 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.

The new regulations make it clear that the employer is required to take certain steps to make sure employee medical requests do not seek genetic information.

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 is 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.

### WHAT IF YOU DON'T WANT TO USE SAFE HARBOR LANGUAGE?

When approving FML for an employee caring for an eligible family member, family medical history is needed — so that is the one time an employer may deviate from this safe harbor notice.

### EMPLOYERS — HOW TO STORE INFORMATION

- Don't share water cooler information about people's medical conditions or history.
- Genetic testing and documentation should be kept confidential in the same way FMLA, and medical information under ADA on an employee is not disclosed.

Bottom line: When are asking for medical information under FMLA make sure it falls under a GINA exception and does not violate the law.

## 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.
- ✓ DID YOU KNOW: All public employers subject to notice requirements; even if no employees are currently eligible for FMLA.
- ✓ <http://www.dol.gov/whd/fmla/finalrule/FMLAPoster.pdf>





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## FREQUENTLY ASKED QUESTIONS

**Question 1A: People on occasion will go to their doctor if their cold or flu lasts more than three days. The doctor may prescribe an antibiotic (which the patient may or may not fill) in case there is a bacterial infection. The regulations state that, ordinarily, unless complications arise, the common cold and flu are not serious health conditions for purposes of FMLA. Can a cold or the flu ever be a serious health condition for purposes of FMLA? (Note: This would also apply to the H1N1 virus).**

Yes, the cold or flu may be a serious health condition for FMLA purposes, if the individual is incapacitated for more than three consecutive calendar days and receives continuing treatment by a health care provider, as defined in the regulations.

**Question 1B: What if the employee telephones the doctor but does not actually see the doctor for an examination?**

If an employee, who has the flu, only telephones the doctor but is not seen or examined by the doctor, those circumstances would not qualify as treatment under the regulations. Treatment means an examination to determine if a serious health condition exists, evaluations of the condition, and actual treatment by the health care provider to resolve or alleviate the condition. A telephone conversation is not an examination. An examination or treatment requires a visit to the health care provider to qualify under FMLA.

**Question 1C: What if the doctor only prescribes medication “in case your cold turns into something more serious?” What if the employee does not have the prescription filled or does not follow the doctor’s orders?**

A prescription that is given “in case your cold develops into something serious” raises the question of whether the existing condition is a serious health condition for purposes of FMLA. In all likelihood, the employee has not yet suffered the complications that would qualify the illness as a serious health condition for FML purposes. An employee who does not follow the doctor’s instructions is probably not under a “regimen of continuing treatment by or under the supervision of the health care provider” within the meaning of the FMLA regulations.

**Question 1D: What if the doctor advises the employee to stay at home, drink plenty of fluids, and stay in bed for a few days?**

Staying at home, drinking fluids, and staying in bed are activities that can be initiated without a visit to a health care provider and do not constitute continuing treatment under the FMLA regulations. See section 825.114(b).



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**Question 2A: What if the absence is for strep throat or an ear infection, and the employee goes to the doctor and gets a prescription for an antibiotic, is that a serious health condition?**

The circumstances surrounding each illness must be evaluated to see if it meets one of the regulatory definitions of a serious health condition. If either a strep throat or ear infection results in incapacity of more than three consecutive calendar days and involves continuing treatment by a health care provider (which can include a course of prescription medication like an antibiotic), the illness would be considered a serious health condition for purposes of FMLA.

**Question 2B: Is strep throat without complications a serious health condition just because an antibiotic was prescribed?**

If an illness such as strep throat incapacitates someone for a period of more than three consecutive calendar days and involves continuing treatment by a health care provider (including a course of prescription medication like an antibiotic), the condition qualifies as a serious health condition for purposes of FMLA.

**Question 3A: What if the employee stays out because a child has bronchitis? The child goes to the doctor and medication may or may not be prescribed. Does this meet the criteria for a “serious health condition”?**

Bronchitis may itself be a serious health condition if it meets one of the regulatory definitions. Bronchitis ordinarily may not be a serious health condition because typically it does not involve incapacity of more than three consecutive calendar days and continuing treatment by a health care provider as defined by the regulations. In the case where the doctor does not prescribe any course of medication to resolve or alleviate the health condition, it would not qualify as a regimen of continuing treatment within the meaning of the regulations.

**Question 3B: If bronchitis may qualify as a serious health condition, does section 825.208(d) of the regulations contradict this when it says “e.g., bronchitis that turns into bronchial pneumonia?”**

No. The complications of an illness that is not itself ordinarily a serious health condition, i.e., does not routinely meet FMLA’s definition of a serious health condition, may convert a routine illness into a serious health condition for FML purposes (e.g., when bronchitis turns into bronchial pneumonia). In such a situation, it may be difficult to determine when the initial illness became a serious health condition for FML purposes as a result of complications. Any question regarding the onset of a serious health condition may be resolved by obtaining a medical certification from the employee’s health care provider and, where there is reason to doubt the validity of the certification provided a second medical opinion.



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**Question 4A: Employees occasionally stay home for a week or more with a child who has chicken pox. Assuming there are no complications, is the employee entitled to leave under FMLA?**

Based on the limited information in the situation, there appears to be no continuing treatment by a health care provider that would qualify the absence for FML.

**Question 4B: What if the employee gets chicken pox unrelated to a pregnancy?**

In the absence of additional information, there appears to be no continuing treatment by a health care provider that would qualify the absence for FML.

**Question 4C: What if a doctor advises the employee to stay home for a week?**

The regimen of care described appears to be treatment or activities that can be initiated without a visit to a health care provider. Under those circumstances, without other factors, the situations would not qualify as serious health conditions for FML purposes.

**Do several illnesses add up to one?**

It's difficult to determine whether an employee has a serious medical condition if several illnesses taken together may constitute a serious health condition, even though none of the illnesses alone would be considered serious under the FMLA.

**OTHER FREQUENTLY ASKED QUESTIONS BY MTAS CUSTOMERS**

**Question 5: As a municipality, what is the best option to select in terms of calculating FMLA years?**

Most experts recommend that FML be administered on a rolling year, measured backward. FMLA allows employers to select the way they define the 12-month period and there are a few different options outlined below. The rolling 12-month period avoids stacking 12 week FML periods back to back, and is measured backward from the date an employee uses any FML. The rolling year is the choice that best limits the amount of FML an employee can take. Under the rolling year option, the amount of leave remaining from the employee's 12-week allotment is 12 weeks less any leave the employee took in the 12-month period prior to the start of the new leave. If employers decide to change the method of calculating FML in a 12-month period, employees should receive a minimum of a 60-day notice.

Options employers have:

- The calendar year
- Any fixed 12-month period (i.e., fiscal or anniversary date)
- The 12-month period measured forward from the date any employee's first FML period begins (called "forward year")
- A rolling 12-month period measured by looking back from the first date the employee uses FML (called a "rolling year")



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**Question 6: I have an employee on intermittent FML who abuses the situation and it has created a hardship on the department and other employees. How do I get this under control?**

Intermittent leave abuse is a commonly asked question. Remember, in order for employees to be eligible to start a new FML period, they must have actually worked 1,250 hours in the preceding 12 months. In many cases employers are automatically approving intermittent leave without determining if the employee is truly eligible. Secondly, intermittent leave should not be used to “beat” the system. That means, you, the employer need to follow some guidelines when considering an intermittent leave request. (1) You can require that employees schedule their intermittent leave. The regulations allow you to insist that time off be scheduled with reasonable notice so that it does not negatively impact your city’s productivity. In addition the law requires that employees “make a good faith effort” to get any necessary medical treatment during off-duty hours or on their scheduled days off. (2) The law provides employers with the power to request a periodic re-certification to ensure the need for intermittent leave continues to exist. This should be at no cost to the city. (3) When an employee requests intermittent leave, you may insist that a medical certification specifies the projected number of treatments, dates, and recovery period needed after each episode or treatment. If the employee allows you to, you may have a health care provider that represents the city, or the human resources manager speak with the employee’s provider. Get specific and documented information up front, before trouble begins. (4) If the intermittent leave genuinely impedes productivity, you may transfer the employee to a different position if doing so would make the intermittent absences less of a hardship on the city. (Pay and benefits must remain the same.) (5) Deduct pay when an employee runs out of sick or vacation time. In this case, employers are allowed to dock exempt salaried workers without worrying about jeopardizing their exemption under FLSA. (6) Require employees to follow standard call-in procedures if they will be missing work. This includes having the employee confirm that each absence is related to their FML request.

Lastly, intermittent leave does not prevent an employee from being disciplined on the basis of breaking city rules or failing to perform essential job functions. However, you should never take a punitive action against an employee simply because he is on intermittent leave.

**Question 7: Are we required to approve all intermittent leave requests?**

Intermittent leave should only be approved if medically necessary; or after the birth of a healthy child or placement of a healthy child for adoption or foster care. Leave may also be taken intermittently on a reduced leave schedule in connection with military family leave due to a qualifying exigency or due to a serious injury or illness of a covered service member.

**Question 8: I have an employee who has exhausted all FML and is still chronically absent. What can I do about this?**

Once an employee’s FMLA/ADA protections end, you are not obligated to retain an employee who is not performing or is chronically absent. It is always best to focus on the “essential functions of the job” and



the employee's performance. If an employee works as a 911 operator and his job description requires regular attendance, you could certainly discipline the employee for chronic absenteeism and being unable to fulfill the essential functions of the job. If you do proceed with termination of employment or any disciplinary action, be sure that your reasoning is not based on the "health condition" but based on inability to perform the duties. You should notify employees as to when their protected leave ends, so that they are aware that additional occurrences may count against them.

**Question 9: We have an employee who was released back to work after exhausting FML, but the city has observed some safety concerns and is not comfortable with the employee performing certain essential functions of their job. What do we do?**

The city can send the employee for an independent "fit for duty" exam. Sometimes this takes several days and requires additional follow up testing. The health care provider should have a copy of the employee's job description and a statement from the employer as to what they have observed behaviorally or performance wise that is causing them to be concerned. Remember, ADA could apply here, and under ADA sometimes additional time off is needed and is considered a reasonable accommodation. You should have this dialogue with the employee to determine if there is an accommodation that can be made to assist the employee in performing his job duties. Document the dialogue and any discussion of accommodations. Even ADA doesn't require you to keep an employee who cannot perform the essential functions of the job.

**Question 10: The DOL does not seem to have sample letters that warn employees that their time is ending. Is it a good idea for me to send a letter prior to their leave expiring advising the employees what is expected of them and to work out a return to work date?**

Absolutely. However, any correspondence related to FML should be reviewed by a seasoned HR professional and the city attorney to ensure you are not causing any conflict or offering employees the impression their job is protected post-FML exhaustion. Keeping dialogue open between the employee on leave and the supervisor or HR director is critical in planning a successful return to work situation.

You should also ensure that an employee out on protected leave is not approached by multiple people asking about return to work dates. This can make an employee feel pressured into returning to work before he may be ready.

Chances are if you manage FML for your municipality, you also evaluate interaction between FML, ADA, and workers' compensation. Use caution when handling employee issues that may fall in the "bermuda triangle" of these three laws.



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## Question 11: I have an employee who is an alcoholic. Is this employee covered by FMLA?

Although substance abuse is not traditionally covered under FMLA, recent court decisions have made it clear that “treatment” of alcohol abuse may be covered. An employee enrolled in an addiction or treatment program may qualify for FMLA. FML may generally only be taken for treatment for substance abuse by a health care provider or by a provider of health care services. Conversely, absences due to the employee’s active alcohol abuse do not qualify for FMLA. 19 C.F.R. 825.119a. Refer to case *Picarazzi v. John Crane* for more information.

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