

CHECKLIST | DETERMINING EMPLOYEE ELIGIBILITY UNDER THE FMLA

Presented by Employco USA, Inc.

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons. Eligible employees may take up to 12 weeks of FMLA leave during a 12-month period (26 weeks to care for a covered service member). The law applies to (among other entities) private-sector employers with 50 or more employees in 20 or more workweeks in the current or previous calendar year.

An employee is generally eligible for FMLA leave if they:

- Work for a covered employer;
- Have worked for the employer for at least 12 months as of the date the FMLA leave is to start;
- Have at least 1,250 hours of service for the employer during the 12-month period immediately before the date the FMLA leave is to start; and
- Work at a location where the employer employs at least 50 employees within 75 miles of that worksite as of the date when the employee gives notice of the need for leave.

In addition, employers must determine:

- If the employee’s leave is for a qualifying reason;
- If the employee still has FMLA leave available (if the employee has already used FMLA leave in the year); and
- If the employee provided sufficient advance notice of their need to take FMLA leave.

An important requirement in processing an FMLA leave request is determining an employee’s eligibility. This checklist outlines key steps for employers to determine an employee’s eligibility for FMLA leave. Keep in mind that complying with the FMLA may involve additional steps depending on the facts of a specific situation. Also, many states (and some localities) have their own family and medical leave laws that provide broader leave protections to employees. Employers will need to comply with the FMLA and any applicable state and local leave laws.

FMLA Leave Request

Employee name	
Date of leave request*	
Dates of anticipated leave	

* An employer may learn of a request for FMLA leave when the employee submits a request or when the employer acquires knowledge that an employee needs leave that may be for an FMLA-qualifying reason. When requesting FMLA for the first time, an employee is not required to specifically mention the FMLA. However, the employee must provide enough information for the employer to know that the leave may be covered by the FMLA.

Determining Employer Coverage

Employer Coverage	Yes	No
<p>Does/did the employer have 50 or more employees in 20 or more workweeks in the current or previous calendar year?</p> <p>An employee is considered to be employed each working day of the calendar week if the employee works any part of the week. The workweeks do not have to be consecutive.</p> <p>Employees who must be counted include:</p> <ul style="list-style-type: none"> • Any employee who works in the United States or any territory or possession of the United States; • Any employee whose name appears on payroll records, whether or not any compensation is received for the workweek; • Any employee on paid or unpaid leave (including FMLA leave, leaves of absence and disciplinary suspension), as long as there is a reasonable expectation that the employee will return to active employment; • Employees of foreign firms operating in the United States; and • Part-time, temporary, seasonal and full-time employees. <p>Others who do <u>not</u> have to be counted include:</p> <ul style="list-style-type: none"> • Employees with whom the employment relationship has ended, such as employees who have been laid off; • Unpaid volunteers who do not appear on the payroll and do not meet the definition of an employee; • Employees of U.S. firms stationed at worksites outside the United States, its territories or possessions; and • Employees of foreign firms working outside the United States. <p>Once an employer meets the requirements for FMLA coverage, it is a covered employer and will remain covered as long as it employs 50 or more employees in 20 or more workweeks in either the current or previous calendar year.</p>	<input type="checkbox"/>	<input type="checkbox"/>

Determining Employee Eligibility

Employee Eligibility	Yes	No
<p>Has the employee worked for a covered employer for at least 12 months as of the date the FMLA leave is to start?</p> <p>The 12 months of employment do not have to be consecutive. Part-time, temporary or seasonal work generally counts towards the 12 months of employment. If an employee is maintained on the payroll for any part of a week, that week counts as a week of employment. Any combination of 52 weeks equals 12 months.</p>	<input type="checkbox"/>	<input type="checkbox"/>

Employee Eligibility	Yes	No
<p>If the employee had a break in employment that lasted seven years or more, the employer is not required to count the time worked prior to the break, unless:</p> <ul style="list-style-type: none"> • The break in employment is due to service covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA); or • There is a written agreement, including a collective bargaining agreement, outlining the employer’s intention to rehire the employee after the break in employment. <p>An employer may voluntarily consider periods of employment before a break of more than seven years, but it must do so uniformly for all employees with similar breaks in employment.</p>		
<p>Does the employee have at least 1,250 hours of service for the covered employer during the 12-month period immediately before the date the FMLA leave is to start?</p> <p>The hours-of-service requirement will be met if an employee has worked a total of 1,250 hours of service in the 12 months immediately preceding the start of the FMLA leave. This averages to a little more than 24 hours of work a week in the 12-month period.</p> <p>Generally, the principles for compensable hours of work under the federal Fair Labor Standards Act are used in determining the hours of service that an employee has worked. Only the time actually worked, including overtime hours worked, is counted. Time not actually worked, including vacation, personal leave, sick leave, holidays and any other form of paid time off, is not counted towards the 1,250 hours of service. Unpaid leave of any kind or periods of layoff are also not counted. Time worked as a part-time, temporary or seasonal employee counts toward the requirement.</p> <p>An employee returning from fulfilling a USERRA-covered military service obligation is credited with the hours of service that would have been performed but for the period of military service. The employee’s pre-service work schedule can generally be used for calculations to determine hours that would have been worked during the period of military service.</p> <p>If an employer does not maintain accurate time records of hours worked by an employee, the employer has the burden of showing that the employee has not met the hours-of-service requirement. An employer has the burden of showing that the employee has not met the hours-of-service requirement, even if it is not required to maintain time records for that employee. This may be the case with certain employees, such as school teachers, who may work additional time outside of the classroom or at home.</p>	<input type="checkbox"/>	<input type="checkbox"/>

Employee Eligibility	Yes	No
<p>Does the employee work at a location where the covered employer employs at least 50 employees within 75 miles of that worksite as of the date when the employee gives notice of the need for leave?</p> <p>The 50 or more employee count is determined based on the number of employees on payroll, regardless of whether they are part-time, temporary or seasonal employees. The 75 miles are measured from the employee’s worksite by surface miles, using surface transportation over public streets, roads, highways and waterways, along the shortest route possible.</p> <p>The worksite is ordinarily the site to which the employee reports or from which the employee’s work is assigned. A worksite can refer to a single location, a group of buildings, such as a campus or industrial park, or to separate facilities in geographic proximity to one another.</p> <p>An employee’s personal residence is not a worksite. For employees who work from home under “telework” or “flexi-place” arrangements, or other employees, such as salespersons who may leave to work from and return to their residences, the worksite is the office to which they report or from which they receive assignments.</p> <p>For employees with no fixed worksite, such as construction workers, transportation workers and airline flight crew, the site to which they report, from which their work is assigned, or the location to which they are assigned as their home base, is their worksite.</p> <p>If 50 employees are employed within 75 miles of the employee’s worksite, the employee meets the requirements for the test, regardless of where the employee is currently performing their duties.</p>	<input type="checkbox"/>	<input type="checkbox"/>

If an employee does not meet the eligibility requirements, the employer may not designate the leave as FMLA, even if the leave would otherwise qualify for FMLA protection. If the employee is not eligible for FMLA leave, the employer may grant the employee leave under the employer’s policy. Once the employee becomes eligible and the leave is FMLA-qualifying, any of the remaining leave period taken for an FMLA-qualifying reason becomes FMLA-protected leave.

For example, a pregnant employee has been with the company for 11 months as of Dec. 1. She has more than 1,250 hours of service and works at a location that has more than 50 employees. The employee takes leave under the employer’s policy beginning on Dec. 1. One month later, on Jan. 1, when she has reached 12 months of service, she becomes immediately eligible for FMLA and can now take up to 12 workweeks of FMLA-protected leave.

Additional Requirements

Requirements	Yes	No
<p>Is the employee’s leave for a qualifying reason?</p> <p>Is the leave for one of the following FMLA-qualifying reasons?</p>	<input type="checkbox"/>	<input type="checkbox"/>

Requirements	Yes	No
<ul style="list-style-type: none"> • The birth of a child and to bond with the newborn child within one year of birth; • The placement of a child for adoption or foster care and to bond with the newly placed child within one year of placement; • A serious health condition that makes the employee unable to perform the functions of their job, including incapacity due to pregnancy and for prenatal medical care; • To care for the employee’s spouse, child or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care; • Any qualifying exigency arising out of the fact that the employee’s spouse, child or parent is a military member on covered active duty (or call to covered active duty status); or • Care for a covered service member with a serious injury or illness if the employee is the spouse, child, parent or next of kin of the service member (referred to as military caregiver leave). <p>The most common serious health conditions that qualify for FMLA leave are:</p> <ul style="list-style-type: none"> • Conditions requiring an overnight stay in a hospital or other medical care facility; • Conditions that incapacitate an employee or their family member (for example, unable to work or attend school) for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication); • Chronic conditions that cause occasional periods when an employee or their family member is incapacitated and requires treatment by a health care provider at least twice a year; and • Pregnancy (including prenatal medical appointments, incapacity due to morning sickness and medically required bed rest). 		
<p>If the employee has already used FMLA leave this year, does the employee still have FMLA leave available?</p> <p>Eligible employees may take up to 12 weeks of FMLA leave during a 12-month period (26 weeks to care for a covered service member). To make this determination, confirm which 12-month period (leave year) is used by your organization to calculate FMLA leave. An employer’s options for the leave year are:</p> <ul style="list-style-type: none"> • The calendar year (Jan. 1 through Dec. 31); • Any fixed 12-month period, such as a fiscal year or a leave year beginning on the first day of an employee’s employment; • A 12-month period measured forward from the first date an employee takes FMLA leave (the next 12-month period would 	<input type="checkbox"/>	<input type="checkbox"/>

Requirements	Yes	No
<p>begin the first time the employee takes FMLA leave after the completion of the prior 12-month period); or</p> <ul style="list-style-type: none"> • A rolling 12-month period measured backward from the date an employee uses FMLA leave (each time an employee takes FMLA leave, the remaining leave is the balance of the 12 weeks not used during the immediately preceding 12 months). 		

If you answered “no” to any of the questions above, the employee is not eligible to take leave under the FMLA. Provide the employee with a Notice of Eligibility & Rights and Responsibilities ([Form WH-381](#)) and a Designation Notice ([Form WH-382](#)) within five business days of the employee’s request for leave, indicating that the employee is not eligible for FMLA leave. Also, consider whether the employee is eligible for leave under any other employer leave policy or federal, state or local law.

<p>Did the employee provide sufficient advance notice of their need to take FMLA leave?</p> <p>Generally, an employee must give at least 30 days’ advance notice of the need to take FMLA leave when they know of the need for the leave in advance and it is possible and practical to do so. If an employee does not provide at least 30 days’ advance notice, but it was possible and practical to do so, the employer may delay the FMLA leave until 30 days after the date the employee provides the notice.</p> <p>When the need for leave is unexpected, the employee must provide notice as soon as possible and practical. It should usually be reasonable for the employee to provide notice of leave that is unforeseeable within the time required by the employer’s usual and customary notice requirements.</p>	<input type="checkbox"/>	<input type="checkbox"/>
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Employers can use this checklist as a guide when reviewing an employee’s eligibility for FMLA leave. If an employee is eligible for FMLA leave, the employer should move forward with processing the leave request, such as by providing notice and obtaining certification, as applicable. Employers should contact local counsel for further assistance.