

Leave Rules Related to Private Schools

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Presenter



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Family and Medical Leave Act (“FMLA”)

- **Purpose:** Eligible employees entitled to up to 12 workweeks (26 weeks for certain military family leave) of unpaid leave in 12-month period for qualifying conditions
 - Continuous or intermittent
- **Covered Employers:**
 - Private employers with 50 or more employees
 - Public employers regardless of number of employees
 - **Private and public primary and secondary schools regardless of number of employees**
- **Employee Eligibility:**
 - Employed at least 12 months
 - Employed for at least 1,250 hours during the previous 12-month period
 - Employed at a work site where 50 or more employees are employed by the employer within 75 miles of that work site

Qualifying Reasons for FMLA

- Qualifying Reasons for **Basic** FMLA Leave
 - The birth of a son or daughter or to care for a newborn child;
 - The placement of a child for adoption or foster care;
 - To care for the employee's spouse, son, daughter, or parent with a serious health condition;
 - To recover from the employee's own serious health condition that renders the employee unable to perform the functions of his/her job.
- Qualifying Reasons for **Military** FMLA Leave
 - Military exigency
 - Caretaker leave

FMLA - Notices Required

- ❑ Employers must display general notice of FMLA (FMLA poster)
- ❑ Employer must also provide each employee with general notice containing information about FMLA as contained in poster
 - ❑ Clear written policy in employee handbook or other written materials about leave/benefits
 - ❑ Must be provided upon hire
- ❑ Eligibility Notice and Rights & Responsibilities Notice— Must be provided within **5 business days** of initial request for leave or when employer has knowledge that employee leave may be for FMLA qualifying reason, **even if employee does not meet eligibility criteria for FMLA!**
 - ❑ Form WH-381
- ❑ Written Designation Notice – Within **5 business days** of having sufficient information to determine that the requested leave qualifies as FMLA
 - ❑ Form WH-382

Certification Forms

- **Employee's Serious Health Condition – WH-380-E**
- **Care for Family Member with Serious Health Condition - WH-380-F**
- **Qualifying Exigency – WH-384**
- **Military Caregiver Leave (Current Servicemember) – WH-385**
- **Military Caregiver Leave (Veteran) – WH-385-V**

NOTE: Bonding Leave – Cannot request a certification for FMLA to bond with healthy newborn child or child placed for adoption or foster care

Certification (continued)

- Do not have to use DOL forms (but recommended)
- Notice of certification must be included in written notice of FMLA rights and responsibilities provided to employee when leave is first requested
- **15 calendar days** to provide the requested certification
- **Complete and Sufficient Certification**
 - If certification is incomplete or insufficient, employer must provide written notice stating what additional information is necessary
 - 7 calendar days to provide additional information
 - Employer may not request additional information after receiving complete and sufficient certification

Designating FMLA Leave

- FMLA **must** be designated if sufficient information provided for employer to know need for leave is qualifying
 - USDOL Opinion Letter FMLA 2019-1-A

Interplay with PTO, DBL, WC

- FMLA regulations permit employers to require use of PTO
- **Exception:** If FMLA leave would otherwise be paid, then employer cannot require use of PTO
 - e.g., If employee is receiving short-term disability or workers' compensation wage replacement benefits, NYS PFL, cannot require use of PTO
 - FMLA should run concurrently with short-term disability, workers' comp., or NYS PFL (**Tip:** Make sure policy is clear on leave counting against applicable leave allotments and when policies run concurrently)

Intermittent Leave / Reduced Leave Schedule

- **Intermittent leave** – Taking leave in separate blocks of time for a single qualifying reason
- **Reduced leave schedule** – Reducing employee's usual weekly or daily work schedule
- FMLA leave may be taken intermittently or on a reduced leave schedule when medically necessary.
 - If taken for planned medical treatment, employee must make reasonable efforts to schedule treatment so not to unduly disrupt the employer's operations
- **Note:** Leave to bond with new child may only be taken intermittently with employer's approval

Three Special Rules for Schools

1. Instructional Employees Intermittent / Reduced Schedule Leave Rule
2. Instructional Employees Using Leave Near End Of Academic Term Rule
3. All School Employees When Returning to Work After FMLA Leave Rule

Instructional Employees

- Instructional employees are employees whose main job is to teach and instruct students in a class, a small group, or an individual setting.
- Includes classroom teachers as well as athletic coaches, driving instructors, and special education assistants (e.g., American Sign Language (ASL) interpreters for individuals who are deaf or hard of hearing)
- Not instructional employees:
 - Teacher assistants or aides who do not have as their main job actual teaching or instructing
 - Counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, and bus drivers

Instructional Employees Intermittent / Reduced Schedule Leave Rule

- **General Rule:** If employee needs intermittent or reduced schedule FMLA leave that is foreseeable based on planned medical treatment (or based on agreement between the school and employee for bonding with new child), the school may temporarily transfer the employee to a different job for which the employee is qualified that better accommodates their need for recurring leave
 - Temporary reassignment must be at least the same pay and benefits
 - Cannot transfer the employee to discourage employee from using FMLA leave or to cause the employee a hardship
- **Special School Rule:** If instructional employee uses intermittent or reduced schedule leave that is:
 - Foreseeable based on planned medical treatments and
 - Needed for 20% or more of their working days during the period they need leaveThe school can grant the intermittent leave request or provide employee with a choice of transferring to an alternative position or taking FMLA for a particular duration (a set amount of time). It is up to the employee to choose if school applies this rule.

NOTE: Must reinstate employee to original position when leave is over.

Instructional Employees Using Leave Near End Of Academic Term Rule

- **If leave begins more than five weeks before the end of a term.** An instructional employee's leave may be extended to the end of the term when their leave begins more than five weeks before the end of the term only if the leave will last at least three weeks, and the employee would return to work during the three-week period before the end of the term.
- **If leave begins during the five-week period before the end of a term.** An instructional employee's leave may be extended to the end of the term when their leave begins during the five-week period before the end of the term, only if the leave is for the birth or placement of a child or the care of a family member or covered servicemember and will last more than two weeks, and the employee would return to work during the two-week period before the end of the term.
- **If leave begins during the three-week period before the end of a term.** An instructional employee's leave may be extended to the end of a term when their leave begins during the three-week period before the end of a term, only if the leave is for the birth or placement of a child or the care of a family member or covered servicemember, and the leave will last more than five working days.

Breaks Between Semesters

- When any school employee uses leave for a period that ends with the school year and begins the next semester, the employee is using leave consecutively. The leave is not intermittent.
- The period during summer vacation when the employee would not have been required to report for duty is not leave from work and is not counted against the employee's FMLA leave entitlement.
- The employee must be provided with the benefits over the summer break that they would normally receive if they had been working at the end of the school year.

Instructional Employees Using Leave Near End Of Academic Term Rule

- If state law prohibits employer from requiring leave beyond actual period of pregnancy disability, cannot require the employee to remain on leave until the end of the academic term.
 - Considerations under NYSHRL - Employer cannot compel employee who is pregnant to take a leave of absence unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.
- If employee is out for extended leave through end of the academic term, the leave cannot be counted against the employee's FMLA leave and it cannot be counted against the employee for purposes of attendance or other purposes
- Must reinstate the employee to original position after leave is over

Academic Terms

- "Academic term" means the school semester, which typically ends near the end of the calendar year and the end of spring each school year.
- A school may not have more than two academic terms each year for purposes of the FMLA.

All School Employees When Returning to Work After FMLA Leave Rule

- FMLA requires employees to be restored to original job or equivalent job with equivalent pay, benefits, and terms and conditions of employment upon return from FMLA leave
- Recognition that restoration of employees of public schools to their original job or an equivalent job may be based on board or school policies, practices, and collective bargaining agreements
- Still must be restored to same or equivalent position
- For this rule to apply, the policy, practice, or CBA must:
 - Be in writing
 - Be made known to the employee prior to taking FMLA leave
 - Clearly explain employee's restoration rights upon returning from leave
 - Provide substantially the same protections as FMLA (equivalent pay, benefits, and other terms and conditions of employment)

NYS Paid Family Leave (“PFL”)

- Wage replacement benefit, job protected leave for up to 12 weeks in any 52-week period (continuous or intermittent (full day increments)) for qualifying reasons
- Applies to private employers (public employers may opt in)
- **Qualifying Reasons for PFL:**
 - **Bonding:** With new child following birth, adoption, foster care placement
 - **Caring:** Family member’s serious health condition
 - Spouse / Domestic partner
 - Child (need not be a minor)
 - Parent (including parent-in-law*)
 - Grandparent
 - Grandchild
 - Sibling
 - **Preparing:** Military Family Support Leave

REMEMBER: PFL is not available for employee’s own health condition

Employee Eligibility

“Regular Employment Schedule”	Eligibility Test
20+ hours per week	26 consecutive weeks
Less than 20 hours per week	175 days

NYS PFL

- Must be taken in full day increments
- Partial wage replacement (67% of AWW up to State set cap)
 - Employers cannot require use of PTO (personal, vacation, sick time) concurrently with receipt of PFL benefits
- Claims are processed through insurance carrier
- Should run concurrently with FMLA
 - Ensure that your written PFL and FMLA policies clearly state that the time will run concurrently
 - Notify employees when it will run concurrently at the outset of leave
 - Partial day FMLA – When add up to 1 day, may count it against PFL allotment

PFL Interplay with PTO

- Employers cannot require use of PTO (personal, vacation, sick time) concurrently with receipt of PFL benefits
- Employers have three options:
 1. Allow employees to supplement PFL benefits with available PTO to receive up to 100% of their wages – Note: This must be at employee's option!
 - Employee receives 67% of AWW from insurance and uses PTO to bring employee's wages as close to 100%
 2. Allow substitution of available PTO in full day increments (still count towards PFL allotment)
 - Employee receives 100% of wages directly from employer; employer is reimbursed by insurance
 3. Not allow employees to substitute or supplement PTO

Special PFL Rules for Private Schools

- Coverage is not required for:
 - Ministers, priests, rabbis, members of religious orders, sextons, Christian Science readers
 - Individuals that volunteer their services for nonprofit organizations and receive no compensation
 - Executive officers of an incorporated religious, charitable, or educational institution
 - Persons engaged in a professional or teaching capacity in or for a religious, charitable, or educational institution (501(c)(3))
- May voluntarily opt these employees in for DBL and PFL benefits
 - Special process for opting in

Leave as Accommodation

- Employers must provide reasonable accommodation to qualified candidate or employee unless to do so would create an undue hardship on employer
- Leave may be a reasonable accommodation
- Applicable laws: ADA, NYSHRL, PWFA/PDA ,Title VII
 - **Disability; pregnancy, childbirth, or related medical conditions; sincerely held religious beliefs, practices, or observances**
- Interactive process required
 - Understand information necessary to determine if employee is eligible for reasonable accommodation
 - Limitations that render employee unable to work
 - Duration of absence needed
- Case-by-case evaluation and consideration

Questions?

