

**ON THE JOB
EMPLOYMENT DISCRIMINATION FAQ’S:
“LEAVE OF ABSENCES”**

I must take a leave of absence from my job because of my disability. What are my options?

Depending on your situation, you may be able to take leave either as:

- a. A reasonable accommodation under the Americans with Disabilities Act (ADA), the New York State Human Rights Law or the New York City Human Rights Law, or
- b. As a right under the Family and Medical Leave Act (FMLA)

How do I know if my employer is covered under the ADA, the state or city Human Rights Laws, or FMLA?

The ADA covers employers with 15 or more employees.

The New York State and New York City Human Rights Laws both cover employers with four or more employees.

The FMLA applies to employers with 50 or more employees.

The ADA and FMLA applies to state and local government employers, regardless of the number of employees.

What is the Family and Medical Leave Act (FMLA)?

This is a federal law that requires private employers with 50 or more employees and state and local government employers of any size, to provide up to 12 weeks of unpaid leave during a 12-month period to eligible employees in the following situations:

- a. The birth of child, and to take care of the newborn child;
- b. The placement of a child through adoption or foster care, and to care for that child;
- c. To care for the employee’s spouse, child, or parent with a serious health condition; &
- d. The employee cannot perform the essential functions of the job because of a serious health condition.

[This fact sheet does not cover all the aspects of FMLA. For more information about FMLA, contact the Wage and Hour Division of the U.S. Department of Labor. Their FMLA website is <http://www.dol.gov/dol/esa/fmla.htm>. They may be reached at: 201 Varick Street, Room 750, New York, NY 10014, (212) 337-2016.]

If I have a “serious health condition” under FMLA, am I considered to be a person with a disability under the ADA?

No. Under FMLA, a “serious health condition” is an illness, injury, impairment or physical or mental condition that involves either

1. inpatient care in a hospital, hospice, or residential care facility *or*
2. continuing treatment by a health care provider

A disability under the ADA is a physical or mental impairment that substantially limits a major life activity, a record of such an impairment or being regarded as having such an impairment. Because of these two different definitions, a FMLA “serious health condition” will not necessary be a disability under the ADA and a disability under the ADA will not necessarily be a FMLA “serious health condition.” Be sure to check the definitions carefully before requesting leave under these statutes.

Who is an “eligible” employee under FMLA?

The FMLA applies only to employees who work for FMLA covered employers and who:

- Have worked for at least one year;
- Have worked 1250 hours over the previous twelve months; and
- Work at a location where at least 50 employees work or within 75 miles of where at least 50 or more employees work.

NOTE: There are special FMLA rules for leave and reinstatement that apply to employees of “local educational agencies,” which includes public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools.

Thus, “local educational agencies” have different rules than the general rules discussed in this fact sheet. These special rules, however, do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools. Contact the U.S. Department of Labor (DOL) for more information about the FMLA rules for “local educational agencies.”

Does FMLA’s 12-week leave limit mean that 12-weeks is what should be considered reasonable for reasonable accommodation purposes?

FMLA’s 12-week leave limit does not necessarily mean that under the ADA a leave of more than 12 weeks would impose an undue hardship on the employer, for reasonable accommodation purposes.

When I asked for a leave of absence, my employer asked for medical information. Is this legal?

Yes, to the extent that they asked for information tailored to determining the need for a leave.

ADA: Under the ADA, employers are allowed to ask for reasonable documentation to verify the existence of the disability and the need for an accommodation. Employers are allowed to request that the employee go to a health care professional that the employer chooses, as long as the employer pays for it and the medical examination is limited to the existence of the disability and the need for reasonable accommodation.

FMLA: Under the FMLA, employers are allowed to ask for certification from the health care provider of the employee (or of the ill family member). In the certification, the employer can ask questions about the medical condition, such as when the serious health condition began, the likely duration of the condition, and the appropriate medical facts about the condition. In addition, if the employer has reason to doubt the medical information provided by the employee, the employer can require you, at the employer's expense, to get a second opinion.

The employer can choose the health care provider to give the second opinion, as long as the chosen health care provider is not someone employed on a regular basis by the employer. If the two medical opinions differ, then the employer may require a third health care provider that the employer and employee both agree upon, to give another opinion. The third opinion is considered final and binding on both the employer and employee.

When I am out on leave, can my employer ask me about my medical condition or ask me whether I intend to come back?

ADA: Under the ADA, there is nothing that prohibits an employer from asking whether you intend to come back to work. In addition, the employer can ask about your medical condition, as long as it is necessary to determine the continued need for the reasonable accommodation. For example, if you went out on indefinite leave, it would be reasonable for your employer to check from time to time if you will need to be out longer. If you do, employers can request that you document the need for the leave, unless the information that you have already given is enough for your employer to determine that.

FMLA: Under FMLA, the employer may require recertification of the medical condition on a reasonable basis. In addition, the employer is allowed to ask periodically on your status and whether you intend on returning to work.

What happens to my benefits, like health insurance, if I take a leave of absence from work?

ADA: Under the ADA, employers are required to continue health insurance coverage and other benefits only to those on leave under a reasonable accommodation if they provide health insurance coverage and benefits to other on leave status for other reasons.

FMLA: Under the FMLA, the employer is required to keep the employee's existing level of coverage under a group health plan. FMLA, however, does not give the employee the right to accrue any benefits, such as seniority, while on leave.

At the end of leave of absence, can I go back to my previous position?

ADA: Under the ADA, the employer must hold your job open and take you back into the same job, unless the employer shows that it would cause undue hardship to do so. Some of the factors that would be used to determine hardship include:

- Whether applicable civil service laws require the employer to hold a job open for an employee;
- Whether the employer has written manuals or personnel policies that provide for leave;
- Whether the employer holds jobs open for employees for other reasons [such as the Family and Medical Leave Act (FMLA), maternity leave, education, or travel];
- The nature of the job and of the workplace, and the ease or difficulty to the employer finding temporary replacements for the employee while he/she is on leave; and
- The length of the leave, and whether the employee knows how long he/she will be gone in advance

FMLA: Under FMLA, the employer must take you back into the same or equivalent job at the end of the leave, unless you are considered a “highly compensated employee” and it would cause “substantial and grievous economic injury” to the employer or an employee of a “local educational agency.”

A “highly” compensated employee” is a salaried employee who is among the highest paid 10% of the employees employed by the employer within 75 miles of the workplace where the employee works.

In order for an employer to deny a “highly compensated employee” the same or equivalent job at the end of a leave, the employer must tell that employee of its intent to do so at the time that the “substantial and grievous” economic injury would occur.

What if my employer has a more generous leave policy than FMLA?

If the employer has a more generous policy than FMLA requires (whether on its own its initiative or through a collective bargaining agreement), then the employee is entitled to the more generous policy. FMLA does not set a ceiling for leave policies; instead, it sets a minimum and encourages employers to be more generous than the FMLA. So, if your employer has a more generous policy, FMLA does not in any way affect your rights under the more generous policy.

How far in advance should I request leave?

Inform your employer of your request as far in advance as possible, so the employer has an opportunity to plan for your absence. Whenever possible, you should let your employer know in advance how long you expect to be gone.

ADA: Under the ADA, reasonable accommodations that are requested in advance and are definite and predictable are more likely to be found reasonable than those that are open-ended, unpredictable, or changing.

FMLA: Under FMLA, if leave is requested for a planned medical treatment, you should request it at least 30 days before you need the leave, if possible.

In addition, if there is some flexibility in scheduling the medical treatment, you must make a reasonable effort to schedule the leave, subject to the health care provider's approval, so it will not unduly disrupt your employer's business. If the doctor tells you that the treatment is needed in less than 30 days, tell the employer as soon as you can that you will need the leave.

My employer has a “no-fault” policy, under which employees are automatically fired if on leave for a certain amount of time. Is this legal?

ADA: The Equal Employment Opportunity Commission's (EEOC) states that the employer must make a *reasonable accommodation* of giving an employee who needs additional leave because of a disability additional unpaid leave. The exceptions are:

1. if there is another accommodation that would enable you to perform the essential functions of the job, *or*
2. granting additional leave would cause undue hardship to the employer

FMLA: If an employer who is under FMLA has a “no-fault” policy that fires employees for being on leave for less than 12 weeks in a 12-month period, employees who take a valid FMLA leave cannot be fired under the no-fault policy. If there is a conflict between FMLA and a policy of an employer who is covered by FMLA, FMLA wins.

Does the ADA require an employer to give me leave to take care of a family member with a disability?

No. There is no requirement under the ADA to provide leave for an employee to take care of a family member who has a disability. Unless your employer has its own policy about leave to take care of a family member who has a serious health condition, it is best to see if you qualify to take a FMLA leave.

**DUE TO THE GENERAL NATURE OF THE INFORMATION PRESENTED, THIS FACT SHEET
SHOULD NOT BE REGARDED AS LEGAL ADVICE**