



Sizzling in the Summer Kitchen with the Alphabet Soup of Leaves of Absence



A Live Webinar Event

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The “Soup Recipe”

Are our State leave laws different than Federal? What do we follow?

How do I handle benefits while on leave?

Do I have to hold jobs open/ accommodate disabled workers?

What are the rules for time off for other needs?

What do we do about FMLA with a pregnancy?

What about Workers' Compensation leaves?

What are the requirements for military USERRA leaves?

What compliance requirements should we know?



What We're Cooking Today

Basic
Ingredients
and Standard
Flavors

FMLA/State
Mini-FMLAs

Spices that
heat things
up:
ADA
GINA

Other leaves –
USERRA, Donor
Leaves, Workers'
Compensation

Pregnancy
Disability

Your Recipe For
Success and
Questions

The Main Ingredient: FMLA

The Basics: Eligibility and Basis for the Leave

Eligibility

- ✓ *Job and benefits protection leave, NOT wage replacement*
- ✓ Are you a covered employer?
 - At least 50 employees employed in 20 or more workweeks in the current or preceding calendar year. (part-time employees count!)
- ✓ Is the employee eligible?
 - “At least” 12 months of service (FLMA)
 - 1,250 hours of work in the 12 months preceding the leave
 - 50 or more employees within 75 miles

Basis for the Leave

- ✓ Employee’s own serious health condition that makes the employee unable to perform the essential functions of the position
- ✓ Birth or adoption of a child or placement of a child for foster care
- ✓ Care for a family member (child, spouse, or parent) with a serious health condition
- ✓ Care for a relative who is a “covered service member”
- ✓ “Qualifying exigency” arising out of the fact that a covered family member is on active duty or called to active duty status as a member of the National Guard or Reserves

The Main Ingredient: FMLA

The Basics: Duration

- ✓ 12 weeks during a specified 12-month period
- ✓ 26 weeks during a specified 12-month period to care for a relative who is a “covered service member”
- ✓ Methods by which the employer can calculate the benefit year (annual, rolling calendar year, fixed “leave year”)
- ✓ Leave may be taken on an intermittent basis or reduced schedule
 - Employee must make a “reasonable effort” to schedule treatments so as not to disrupt operations
 - For baby bonding time: Use of intermittent leave subject to employer’s approval

TIP: Document calculation method in writing to employees!

- ✓ How you calculate the leave year is critically important
- ✓ Rolling Backward Method: Only leave year calculation that prevents “stacking” back-to-back FMLA leaves
- ✓ No documentation = Leave calculated with method most favorable to the employee
- ✓ Military caregiver leave starts on the first day of leave (not rolling year designation)

The Main Ingredient: FMLA

The Basics: Effect on Pay and Benefits



FMLA is unpaid	Remains on group health plans under same terms as active employees
<ul style="list-style-type: none"> • Can use accrued vacation, sick leave or PTO (but cannot require for military leaves) • May be supplemented with short-term disability, paid family leave or Workers' Comp benefits 	<ul style="list-style-type: none"> • Must make employee contributions (if any) while on leave • Entitled to accrual of seniority and participation in plans as applicable to other leaves

The Main Ingredient: FMLA

The Basics: Employee Notice Requirements

- ❑ Need for leave known: At least 30 days' notice (scheduled surgeries, pregnancy and childbirth, etc.)
- ❑ Need for leave unforeseeable: As much advance notice as is feasible under the circumstances
- ❑ First time: Do NOT need to ask for FMLA leave, but MUST specifically reference FMLA for future leaves
- ❑ Documentation should include:
 - ✓ Eligibility to take leave/need for more information to certify the leave (i.e. medical certification)
 - ✓ Consequences of failure to provide (i.e. leave will be denied)
 - ✓ Employee rights under the leave
- ❑ When information received, let employee know:
 - ✓ Leave is designated and will be counted as FMLA
 - ✓ Right to use paid leave, whether the employer requires the substitution of paid leave and any condition on the substitution of paid leave
 - ✓ Requirement to make premium payments to continue benefits

The Main Ingredient: FMLA

The Basics: Other Notice Requirements

Include in the notification letter:

- ✓ Fitness-for-duty certification before returning to work
- ✓ “Key employee” (if applicable): May be denied reinstatement
- ✓ Right to reinstatement to the same or an equivalent position upon return
- ✓ Potential liability for insurance premiums paid on the employee’s behalf during the leave if the employee fails to return from the leave
- ✓ Requirement for periodic status reports during the leave and intent to return to work

The Main Ingredient: FMLA

The Basics: Reinstatement Requirements

- ❑ “Original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment”
- ❑ Exceptions:
 - ✓ Position no longer available
 - ✓ Unable to perform the essential functions of position
 - ✓ Employee is a “key employee” and reinstatement would cause “substantial and grievous” economic injury to the company’s operations

KEY POINT: No greater rights to reinstatement or other benefits & conditions of employment than if the employee had been continuously employed

Additional Flavor: State FMLAs

Follow the regulations that are most beneficial to the employee!!

☐ 13 states plus the District of Columbia have “mini-FMLAs”:

- ✓ California
- ✓ Colorado
- ✓ Connecticut
- ✓ Hawaii
- ✓ Maine
- ✓ Massachusetts
- ✓ Minnesota
- ✓ New Jersey
- ✓ Oregon
- ✓ Rhode Island
- ✓ Vermont
- ✓ Washington
- ✓ Wisconsin

Another Flavor: Pregnancy

The Basics



Pregnancy Discrimination Act (federal)

- ✓ Protects all workers
- ✓ Some states have special statutes for additional leave time and other protections for pregnancy disability
- ✓ **Bottom line:** Pregnant women (or those affected by related conditions) must be treated in the same manner as other employees with similar abilities or limitations

What This Means:

- ✓ Treat pregnant women the same as other employees
- ✓ Provide accommodations (such as lighter duty) in the same manner you would for others temporarily disabled
- ✓ Provide the same benefits, leave and return rights

Add Another Flavor: Military Leave

The Basics



Permits Time Off for Military Service

- ✓ Applies to all employers regardless of size
- ✓ Available leave up to five years
- ✓ Reinstatement into the position the employee would have attained if not for the leave (“escalator principle”)

Military Leave is Unpaid

- ✓ Employee may elect to use vacation or PTO banks
- ✓ Employers cannot require use of accrued vacation or PTO
- ✓ Employee may elect to continue health coverage for a period of up to 24 months
- ✓ No break in service for pension vesting/benefits accrual

Spice It Up With Military Spouse Leave

The Basics



Permits Time Off for the Military Spouse

- ✓ Applies to employers with 25 or more employees

Military Spouse Leave is Unpaid

- ✓ Up to 10 days when spouse is on leave from active deployment in a combat zone

More Ingredients To Add

Donor Leave	Time Off to Vote
10 states have donor leave laws for private employers	Number of states have laws for time off to vote

- ✓ Includes blood donation, bone marrow donation and/or organ donation
- ✓ Depending on the state rules, can be either paid or unpaid
- ✓ Period of leave varies – generally up to 30 days for organ donors and up to 7 days for bone marrow donations

(Donor Leave States: California, Connecticut, Illinois, Louisiana, Maine, Minnesota, New York, Oregon, Pennsylvania, South Carolina)

General Rule of Thumb:

- ✓ At least two hours before beginning work or after leaving =
No voting time leave required
- ✓ Employers may specify the hours employees can take for voting

More Ingredients To Add

Jury Duty/Court Attendance

Federal requirement to give time off for jury service or other court appearance requirements (witness duty, crime victim, domestic violence)

- Cannot penalize employees who take these leaves
- Can require reasonable notice of need for leave
- 9 states plus the District of Columbia require some form of compensation for jury duty leave (Alabama, Colorado, Connecticut, Georgia, Louisiana, Massachusetts, Nebraska, New Hampshire, Rhode Island, Tennessee)
- Many states have laws for court attendance – make sure to check yours

Accommodating Time Off?



Is this reasonable?



12 weeks of FMLA Leave

Unlimited extra time under ADA?

What about employees on Workers' Compensation disability?

Adding Hotter Spices to the Soup: Accommodations

The Basics



Disability Accommodations	Alcohol and Drug Rehabilitation
<ul style="list-style-type: none">✓ Americans with Disabilities Act (ADA) plus state disability laws✓ Disability leave: Part of reasonable accommodation process, even past the 12 FMLA weeks✓ Employers NOT required to grant leave that would result in undue hardship to the business✓ Indefinite leaves of absence not required	<ul style="list-style-type: none">✓ Employee’s drug or alcohol condition may constitute a “serious health condition” that may trigger FMLA✓ Employee must be receiving inpatient care or continuing medical treatment for the problem✓ Condition must substantially limit a major life activity

Another Flavor: Privacy

What?

Genetic Information Nondiscrimination Act (GINA)

- ❑ Includes the following information:
 - ✓ a person's genetic tests
 - ✓ genetic tests of a person's family members (up to and including fourth-degree relatives)
 - ✓ any manifestation of a disease or disorder in a family member
 - ✓ participation of a person or family in research that includes genetic testing, counseling, or education

Why is it important?

- ❑ Prohibited from using genetic information to make employment decisions
- ❑ Limits employer's right to request, require, or purchase an employee's genetic information

IMPORTANT:

- ✓ *Be careful with the types of medical certifications you are collecting and/or conversations you are having with employees out on leave*
- ✓ *Limit the information given to others within your company*
- ✓ *Ensure GI is in the confidential file, never the personnel file*

Tips for Preventing FMLA Abuse

Process & Administration

- Choose method for determining the 12-month leave year
- Apply your leave and attendance policies consistently
- Complete medical certifications and ask for second opinions when needed to support the need for the leave; make sure you have recertification when needed
- Manage intermittent leave/reduced workweek schedules; track time off

Management Communications and Training

- Develop and communicate your policy
- Make sure that your employees know you need a “fitness for duty” medical certification upon return from medical leave
- Stay on top of the dates! Certify leaves immediately at the time the employee goes out, running leaves concurrently
- Train your supervisors and managers

Summary: Your Recipe for Success

- Ensure your policies and procedures comply with relevant laws
- Communicate your leave and disability management program to your employees
- Use the reasonable accommodation process in returning employees from leaves and DOCUMENT your discussions
- Amend your LOA policies that call for automatic termination of employment following a specified leave term
- Certify a Workers' Compensation leave as a concurrent FMLA leave
- Actively track your leaves and manage the process completely
- Follow all notification timelines when communicating with employees during all parts of the leave
- Keep confidential medical/genetic information you may gather VERY confidential
- Prior to making any termination decisions, consult with your labor attorney





Thank you for attending and allowing us to be part of your HR team!

- ✓ Check our Online Reference Center for more information OR
- ✓ Contact the ThinkHR Live Hotline for support with your leave of absence and other human resources questions at 877-225-1101, Monday – Friday, 9:00 am – 5:00 PM coast to coast

QUESTIONS??