

*Family Friendly Leave*  
**Selected Questions and Answers**

**Q1. If an employee is using FMLA leave on an approved intermittent basis for a chronic condition (e.g., diabetes, asthma, etc.), must the employee notify the supervisor every time the employee will be absent from work?**

A1. Yes. An employee is responsible for notifying the agency in a timely way of any absences from work. Additionally, if the absence is one the employee could anticipate, such as a medical appointment, the employee is explicitly responsible for giving the notice in advance.

**Q2. Can the agency deny an employee's request for FMLA leave if the supervisor and personnel staff cannot understand the information on the medical certification?**

A2. No. A health care provider representing the agency may contact the health care provider of the employee, **with the employee's permission**, to clarify information on the medical certification. If the need for leave is immediate, you must grant "provisional" FMLA leave pending submission of an acceptable medical certification. If you doubt the validity of the original medical certification, you may require a second or third opinion.

**Q3. If an employee initially requests annual leave or sick leave instead of FMLA, can he or she later invoke entitlement to FMLA leave to extend the period of absence?**

A3. Yes. An employee may invoke his or her entitlement to FMLA leave for one or more of the four purposes during any 12-month period. For example, a birth mother may use accrued sick leave and approved annual leave before notifying the agency of her intent to use leave without pay under the FMLA. (FMLA leave for the birth of a child and care of the newborn may be used within 1 year after the date of birth.) In addition, if the employee uses only a portion of the 12-week entitlement to FMLA leave for birth of a child, and after returning to work loses her child care provider, the employee may use any remaining entitlement to FMLA leave to care for her child.

An employee receiving treatment for a serious chronic condition may use accrued sick leave and approved annual leave before notifying the agency of his intent to use LWOP under the FMLA for his serious health condition. However, you may deny an employee's request for annual leave if the employee's services are needed at work. If you deny the request for annual leave in these situations, the employee could invoke entitlement to FMLA leave and substitute annual leave for LWOP. Thus, the 12-week entitlement to FMLA leave would begin immediately after using sick leave.

**Q4. If an employee requests leave for an extended period, can a supervisor assume the request is for FMLA leave?**

A4. No. An employee is responsible for invoking his or her entitlement to FMLA leave. Supervisors must inform employees about their entitlement and responsibilities under the FMLA, and having done so, may ask what kind of leave the employee is requesting. The agency cannot designate leave, paid or unpaid, as FMLA leave unless the employee confirms his or her intent to use FMLA leave and to substitute appropriate paid leave for leave without pay under the FMLA leave.

**Q5. What if an employee does not initially request the leave under FMLA, but invokes it after the fact?**

A5. OPM regulations say an employee may *not* invoke FMLA retroactively, but MSPB case law appears to carve out an exception if there is no evidence that the employee received proper notice about FMLA and then chose not to invoke it. Agencies will want to be able to show the concrete steps they have taken to be sure all employees are on notice of their FMLA rights and obligations.

**Q6. Is an employee immune from reduction in force (RIF) if he or she is on FMLA leave?**

A6. No. An employee who invokes his or her entitlement to FMLA leave is not immune from the impact of a reduction in force before, during, or after the period of FMLA leave.

**Q7. Can an employee who has approved FMLA leave be placed or retained on leave restriction during that 12-week period?**

A7. No. An agency may not impose stricter procedures for providing notification and documentation for leave requested under the Act than those specified in the Act and its implementing regulations. An employee who meets the criteria and requirements described there for FMLA leave is entitled to the leave under the law. An employee can be held responsible for following the notice and documentation requirements provided in FMLA regulations, however. An employee may also be disciplined on the basis of evidence showing he or she gave false information to gain approval of the leave.

**Q8. What are an employee's grievance rights under the FMLA?**

A8. The head of an agency is responsible for the proper administration of the FMLA for Federal employees. If an employee believes an employing agency has not fully honored his or her rights under the law, he or she may file a grievance under applicable agency administrative or negotiated grievance procedures. Except when a claim for FMLA leave

is covered by a negotiated grievance procedure, an employee who is unable to resolve a claim for FMLA leave with the agency may then submit the claim, accompanied by the agency's decision, to OPM for further review under the procedures contained in 5 CFR part 178.

**Q9. Can employees take FMLA claims to court?**

A.9. No. Both the Fourth and Ninth Circuit Courts of Appeals have ruled, and both have found that Title II of the Act, which covers most Federal employees, did not include a waiver of sovereign immunity and a private right of action. (See *Mann v. Haigh*, 120 F.3d 34 (4th Cir. 1997) and *Russell v. Army*, 191 F.3d 1016 (9th Cir. 1999).)

***Family Leave and Reasonable Accommodation***

**Q.10. Are Federal employees covered by both the Rehabilitation Act and the Americans With Disabilities Act (ADA)?**

A.10. The Rehabilitation Act of 1973 was amended to incorporate the disability discrimination standards of the ADA. That is why guidance will sometimes refer to the ADA and regulations or other material issued under the ADA.

**Q.11. Is the agency required to continue approving leave for a disabled employee once it is clear there are no jobs available that the employee can perform within his or her medical restrictions?**

A.11. No. If the employee meets the criteria for a leave category that is an entitlement under the law, such as sick leave or FMLA, the agency may not terminate the leave, but approval need not prevent the agency from initiating action to remove the employee for medical inability to perform.

**Q.12. Can an employee be held accountable at appraisal time for the work left undone because of lengthy absences?**

A.12. The employee may not be held accountable for work that did not get done because of an absence for which the employer approved leave. In fact, if the leave was a reasonable accommodation for a medical condition under the Rehabilitation Act, penalizing the employee for the missed performance would be an act of discrimination.

**Q.13. If an employee takes a lengthy period of leave as a reasonable accommodation, must the agency hold his or her position open, or can the employee be assigned on return to an equivalent position?**

A13. The Rehabilitation Act requires you to hold the employee's original position unless the agency can show that this would cause an undue hardship. This is one of several differences between the provisions of the Rehabilitation Act and those of the Family and Medical Leave Act (FMLA). An employee may have rights under both statutes, and receives the greater benefit whenever there are differences.