



**WENZEL FENTON CABASSA** P.A.

Employee Rights Attorneys

# UNDERSTANDING FMLA: HELPING YOU, YOUR JOB, AND YOUR FAMILY



# INTRODUCTION



# INTRODUCTION

## TAKING CARE OF YOUR FAMILY: PROTECTED FAMILY AND MEDICAL LEAVE

We all get sick and miss the occasional day of work. But what if it's more serious? A surgery, chronic condition, or maternity leave often requires months of recovery. You don't want to lose your job while taking care of your—or a loved one's—health.

A federal law called the Family and Medical Leave Act ("FMLA") entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons.

That means that if you qualify, you can take 12 weeks off each year to take care of yourself or an immediate family member. And during this time, your health benefits must be maintained as if you were still working. Your employer can't stop you from taking this time, and you can't be fired for using it.

The FMLA, which became effective in 1993, was designed to help employees balance their work and family responsibilities. It also helps employees with serious health problems, and helps promote equality in the workplace, as women are most often the ones taking leave to care for a newborn or a family member.

In order to qualify for protection under the FMLA, both the employee and employer must be covered.



# AM I QUALIFIED FOR FMLA LEAVE?





# AM I QUALIFIED FOR FMLA LEAVE?

Not everyone is entitled for FMLA leave. Both the employer and employee need to be covered by the law. When it comes to employers, the FMLA applies to all:

- 1 - public agencies, including government employers and public schools; and
- 2 - private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year.

By definition the law excludes a lot of small businesses. This doesn't mean that if you work for a small company that you aren't entitled to some of the same protections. That just means that if your employer offers you leave, it's an agreement between you and your employer. It's not something this federal law will protect if things turn south.

And that's just the first hurdle. To be covered by the FMLA, an employee must work for a covered employer and also must:

- 1 - worked for that employer for at least 12 months;
- 2 - have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and
- 3 - work at a location where at least 50 employees are employed at the location or within 75 miles of the location.



# AM I QUALIFIED FOR FMLA LEAVE?

If you worked for an employer for 12 months, it's not difficult to reach 1,250 hours. That's 25 hours a week with two weeks of vacation in a 52-week period, so part-time workers often qualify.

Still, there is some fine print. (Of course, right?) For example, the 12 months must be continuous. Also, the 1,250 hour requirement does not include any leave time. You must have actually worked those hours. These requirements may seem picky, but it's better to be certain before you assert your rights. Don't assume you're protected by the FMLA. If you're in doubt, ask an attorney.







**DON'T RELY ON YOUR  
EMPLOYER TO KNOW YOUR  
RIGHTS UNDER FMLA**

# DON'T RELY ON YOUR EMPLOYER TO KNOW YOUR RIGHTS UNDER FMLA

Recently, a woman came into our office because she had been fired from her call center job. She was an older woman, and she hadn't had the easiest life. She suffered from persistent back pain—a problem that affects most Americans at some point.

Some employees mocked the way she walked, but she needed the paycheck, so she sucked it up and continued showing up to work each day. She depended on her job.

Then one day, she slipped and fell in the break room. She told her boss, who sent her home right away. The fall increased her back problems, so she stayed home for several days, recovering. She returned to work the following Monday, but her boss told her to go home. The company said she needed a doctor's note releasing her back to work.





# DON'T RELY ON YOUR EMPLOYER TO KNOW YOUR RIGHTS UNDER FMLA

This confused her. The company didn't have a policy stating that she had to get a release note. Nonetheless, she showed up to work the next day with an emergency room report. That day, the company fired her.

When she came to us, she was jobless. It didn't make sense to her—she had to miss work because of her fall. Why would her company punish her when she didn't have a choice?

Our client wasn't sure how -- or if -- she'd find another job.

We got involved right away, gathering information and evidence and preparing for trial. The company's actions were unlawful, we asserted in court. They had interfered with her attempts to use FMLA leave, and they were wrong in firing her.



# DON'T RELY ON YOUR EMPLOYER TO KNOW YOUR RIGHTS UNDER FMLA

It didn't matter that our client hadn't explicitly asked for "FMLA leave." She and her employer were both covered by the law, and her back issues qualified as a serious health condition. If the emergency room document wasn't enough to prove her condition, her employer was required by law to tell her they needed a different form to verify her issue.

We stood by her side until we won a favorable settlement for her. The details are confidential, but the take-away from her story is: as an employee, you don't have to understand the FMLA inside-and-out to have a gut feeling that what your boss is doing is wrong. She sought our advice, and we were happy to pursue justice for her.





A photograph of a newborn baby being held by a person, likely a parent. The baby is lying on its back, and the person's hand is visible, gently holding the baby. The image has a dark teal overlay. A teal rectangular box is positioned in the lower-left quadrant, containing white text.

**WHEN CAN I USE LEAVE  
UNDER THE FAMILY  
MEDICAL LEAVE ACT?**

# WHEN CAN I USE LEAVE UNDER THE FAMILY MEDICAL LEAVE ACT?

This law is pretty specific here. You can take FMLA leave:

- 1 - for the birth and care of a newborn child,
- 2 - for an adoption or foster care placement,
- 3 - to care for an immediate family member (spouse, child, or parent) with a “serious health condition”
- 4 - or when you are unable to work because of your own “serious health condition.”

This means female employees can take time off after giving birth—or for pregnancy complications. And workers can take time off to care for themselves or their child, spouse or parents—but only if it is a “serious health condition.”





# WHEN CAN I USE LEAVE UNDER THE FAMILY MEDICAL LEAVE ACT?

What's a serious health condition? This can get complicated very quickly, but it basically includes pregnancy and prenatal care, as well as an illness, injury, impairment, or physical or mental condition that:

- 1 - requires an overnight stay in a hospital or other medical facility,
- 2 - incapacitates you or your family member for more than three consecutive days and involves continuing medical treatment,
- 3 - is chronic and results in incapacitation that requires treatment at least twice a year,
- 4 - results in periods of incapacity due to either a chronic serious health condition (such as asthma, diabetes, and epilepsy),
- 5 - results in periods of incapacity due to a condition for which treatment might not be effective (such as Alzheimer's and stroke), or
- 6 - requires absences to receive multiple treatments for a condition that would likely result in incapacity for more than three consecutive days if left untreated (such as chemotherapy, physical therapy, and dialysis).



# WHEN CAN I USE LEAVE UNDER THE FAMILY MEDICAL LEAVE ACT?

You or your family member only needs to fall into one of the above categories to have a qualifying condition. Again, you and your employer still need to be covered by the law, so this is just one of a few requirements for FMLA protection.

Because the FMLA's definition of a serious health condition is quite specific—and not all human resource managers understand the law completely—it is important to talk to an attorney before assuming your condition is covered, or before taking your employer's word for it.

Please note that Florida law does not require employers to provide personal leave for vacations, sick days or holidays. These benefits are usually made by agreement between an employer and employee and are not covered by the FMLA.

One other note: While you can take time off to care for an immediate family member with a qualifying health condition, "immediate" means only spouses, children, and parents—no one else. So parents "in-law" are not covered, nor are boyfriends/girlfriends, nieces, nephews, cousins or other close family members.







# FMLA PAPERWORK: WHAT AM I RESPONSIBLE FOR?

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One of our clients came to us after surviving a terrible scare. She had been an employee at a medical school, and she was a good worker who had been there for several years. Suddenly one day, she contracted a rare and very alarming disease. She was hospitalized for a month.

During this time, she kept in contact with her boss, updating the boss on her status and when she would likely return. Each time, she was told “don’t worry” and “get better!” A co-worker even stopped by with a card signed by a bunch of people at the school. To her face, everyone seemed supportive.

However, when our client got out of the hospital and returned home to finish her recovery, she found a letter in a stack of mail that had been sent from her workplace. It said the medical school needed documentation from her doctor. She took it to her physician at her next appointment, just three days later, and she called her company’s human resources director to tell her that she had done this.





# FMLA PAPERWORK: WHAT AM I RESPONSIBLE FOR?

However, during that call, the HR director told our client that she had been fired for “job abandonment.”

The company said our client hadn’t filed the proper FMLA paperwork. It was her fault, they said. But when she came to us, we told her of her rights under the FMLA—and of her employer’s responsibility to inform her about any necessary paperwork.

One of the unique features of the FMLA is that employees aren’t responsible for knowing every detail of how it works. In fact, it is one of the rare employment laws that puts specific duties on the employer to inform the employee about their rights. Our client didn’t know about this letter because she was in the hospital. No one had told her when she called in to work. It was her employer’s job to fill her in—and her employer failed.

We secured a favorable settlement for our client—something to cover all the back pay she had lost. Her company shouldn’t have treated her that way and, ultimately, after we stood up to the company, we achieved a favorable outcome on her behalf.



**WILL MY EMPLOYER SEE  
MY PRIVATE HEALTH  
RECORDS WITH FMLA LEAVE?**





# WILL MY EMPLOYER SEE MY PRIVATE HEALTH RECORDS WITH FMLA LEAVE?

Your employer has a right to verify that you indeed have a serious health condition, but this can get touchy. You also have privacy rights. You probably don't want your boss to know everything about your health problems!

The law states that an employer may require a certification by a healthcare provider to verify that you or your family member indeed has a serious health condition. A certification does not include all your medical records. It just needs to contain enough facts to establish that a serious health condition exists.

The Health Insurance Portability and Accountability Act (HIPAA) protects patients' privacy, so an employer cannot ask a health care provider for information beyond the certification. Also, an employer must allow you at least 15 days to get the certification—and you choose the doctor.



# WILL MY EMPLOYER SEE MY PRIVATE HEALTH RECORDS WITH FMLA LEAVE?

Your company may, at its own expense, require that you get a second certification from a provider of its choosing. If the opinions of the two providers differ, the employer may require you to get a certification from a third provider (again, at your employer's expense). This provider must be approved by both the employer and employee. This opinion is final and binding.





# WILL MY EMPLOYER SEE MY PRIVATE HEALTH RECORDS WITH FMLA LEAVE?

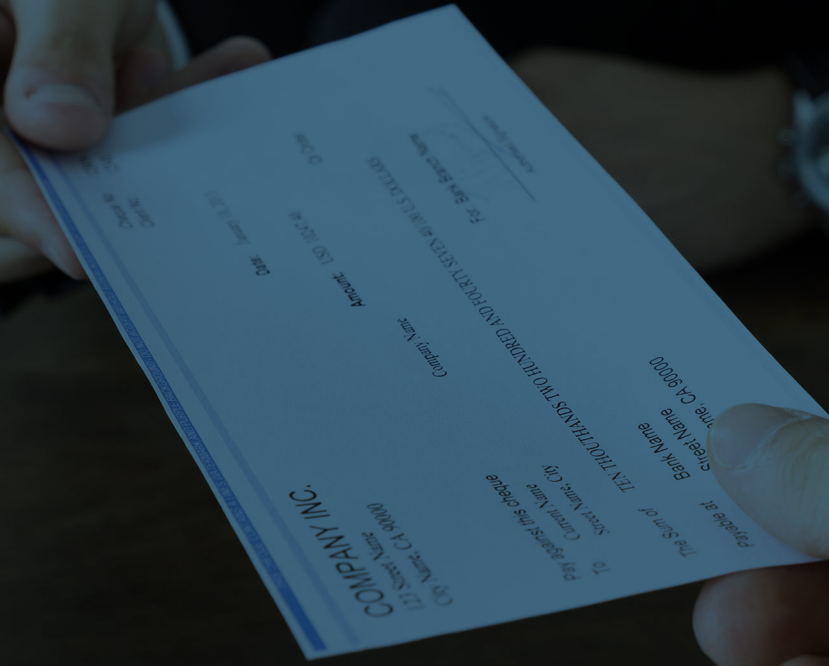
## Providers who can provide certification include:

- 1 - doctors of medicine or osteopathy authorized to practice in their state;
- 2 - podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (who provide manual manipulations of the spine to treat a problem verified by X-ray) who are authorized to practice in their state;
- 3 - nurse practitioners, nurse-midwives, and clinical social workers authorized to practice in their state;
- 4 - Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
- 5 - any healthcare provider recognized by the employer or the employer's group health plan's benefits manager; and
- 6 - any of the above providers who practice in a country other than the United States and who are authorized to practice under the laws of that country.

If you plan on taking leave - or find yourself suddenly on it - ask your employer and your doctor what forms they need. Companies may have some internal forms for you to fill out, and most doctors are very familiar with the FMLA.



# WILL I GET PAID ON FMLA LEAVE?





# WILL I GET PAID ON FMLA LEAVE?

An employer is not required to pay its workers during FMLA leave. That's why, for example, most maternity leave is unpaid. However, it can voluntarily choose to do so. Or, in some instances, FMLA leave can run concurrent with worker's compensation claims and payment, or even concurrently with paid-time-off.

However, employees may also choose to use accrued paid leave or vacation time—and an employer may require the employee to first use that paid leave/vacation time to cover some or all of the FMLA leave taken.

Many other countries offer paid maternity leave. Unfortunately, the United States does not.



A woman with long brown hair, wearing a blue denim shirt, is sitting at a desk in an office. She is looking down at a calculator on the desk. In the background, there is a computer monitor with a few sticky notes on it. The scene is dimly lit, with a blue tint. A teal banner is overlaid at the bottom of the image.

**WHAT SHOULD I DO IF I  
NEED TO TAKE FMLA LEAVE?**



# WHAT SHOULD I DO IF I NEED TO TAKE FMLA LEAVE?

The law protects all qualified employees regardless of how the employees refer to their leave time. That means you don't have to announce to your employer: "I'm taking FMLA leave time," to be protected. All you need to do is:

- 1 - be qualified and
- 2 - have a serious medical condition or be taking care of someone with one and
- 3 - not take more than 12 weeks off work.

That said, some employers have FMLA paperwork that you can get through your company's human resources department. This is often meant to help large employers keep track of employees' leave and cover any tasks that need to be done while the employees are gone.



# WHAT SHOULD I DO IF I NEED TO TAKE FMLA LEAVE?

Filling out paperwork can also make it very explicit that you're taking federal law-protected leave, which makes it clear that your employer should not interfere or fire you for taking the time off work.

According to federal regulations, employees may be required to provide:

- 1 - 30 days' notice of the need to take leave, if it is foreseeable;
- 2 - notice "as soon as practicable" when it is not foreseeable (this usually means within one to two business days);
- 3 - enough information so the employer understands the need is for an FMLA-qualifying reason;
- 4 - and when the employer was not made aware that an employee had been absent for an FMLA reason—and the employee wants that past leave counted as FMLA leave—timely notice (generally, one to two business days) after returning from leave that the leave was taken for an FMLA-qualifying reason.



# WHAT SHOULD I DO IF I NEED TO TAKE FMLA LEAVE?

The short version: Keep in touch with your boss. Give your employer a heads up, when possible. Provide them with medical certification. If you feel like your employer is giving you the runaround or requiring a mountain of information, talk to an attorney. Sometimes companies make it unnecessarily difficult to take FMLA leave or unlawfully deny it. There's a limit to what you must do to take leave.





# IS LEAVE UNDER THE FAMILY MEDICAL LEAVE ACT FLEXIBLE?



# IS LEAVE UNDER THE FAMILY MEDICAL LEAVE ACT FLEXIBLE?

The most common form of FMLA leave is when an employee misses an extended period of work for a medical issue, or for the birth of a child. Here, the employee is limited to a total of 12 weeks of leave. But there is a different type of leave called “intermittent” or “reduced schedule” leave.

The FMLA allows people to take leave intermittently—or to work a reduced schedule—when it is medically necessary, or to care for a newborn or newly placed adopted or foster child. Like regular leave, it is for a single illness or injury that is covered by the FMLA. Only the amount of leave actually taken counts toward the 12-week total limit.

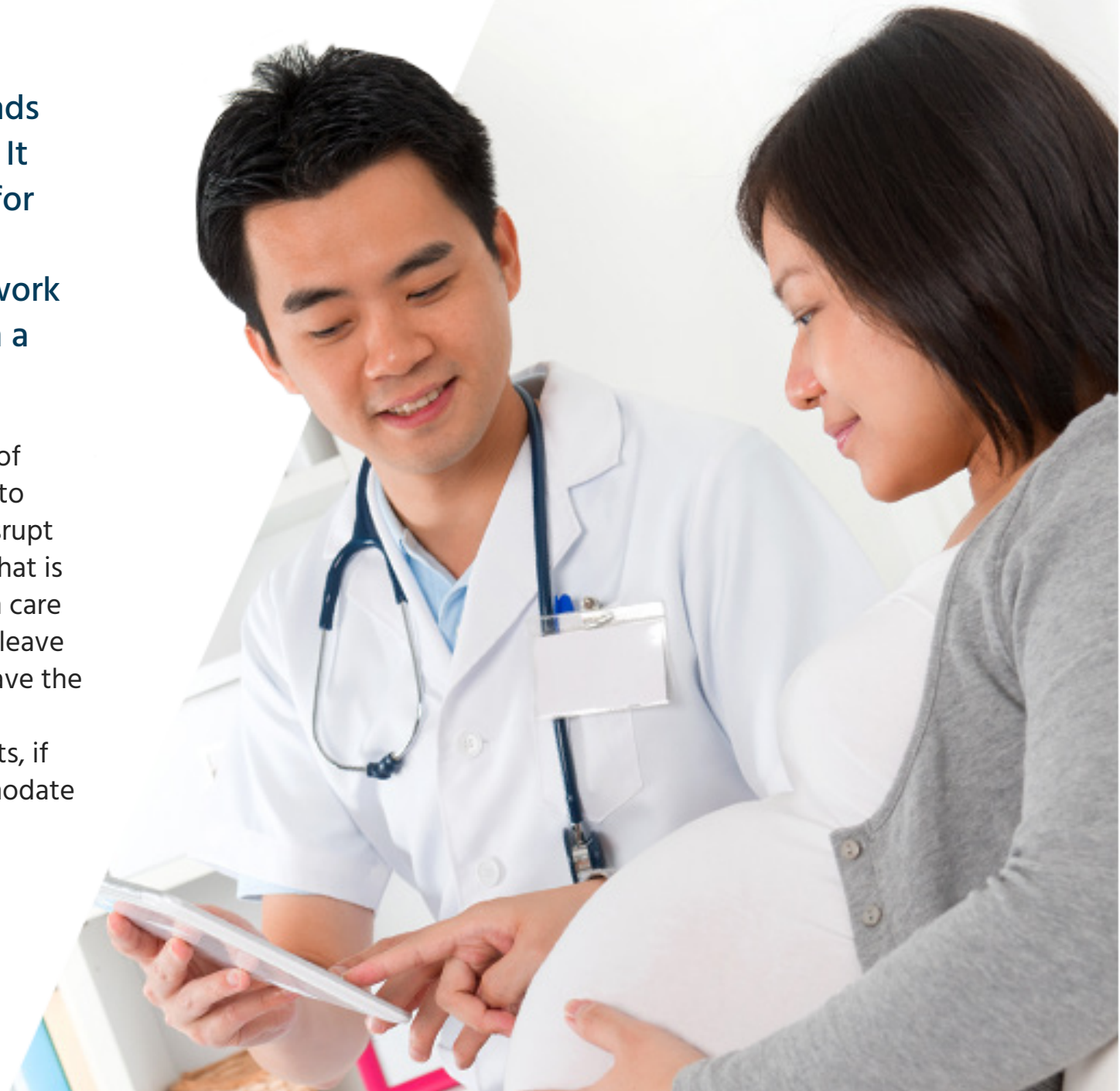




# IS LEAVE UNDER THE FAMILY MEDICAL LEAVE ACT FLEXIBLE?

This type of leave allows flexibility to balance the demands of work with family and health. It can be used to accommodate, for example, a standing weekly appointment or for a reduced work schedule while recovering from a procedure or disease.

Employees who want to use this type of leave must work with their employers to do it in a way that does not terribly disrupt the company's operations (as long as that is acceptable with the employee's health care provider). If an employer decides such leave does disrupt things too much, it can have the worker temporarily work in a different position with the same pay and benefits, if that other position will better accommodate the recurring leave.





A photograph of three people in an office setting, smiling and talking. The image is overlaid with a dark blue gradient. A teal banner is positioned across the middle of the image, containing white text.

**WHAT HAPPENS WHEN  
I'M ON FMLA LEAVE AND  
WHEN I COME BACK?**

# WHAT HAPPENS WHEN I'M ON FMLA LEAVE AND WHEN I COME BACK?

**You aren't entitled to pay during your leave, but you are entitled to maintain your health benefits while you are out. This is important, especially because the leave is usually for a medical condition for which you need your benefits.**

A covered employer is required to maintain group health insurance coverage, including family coverage, for an employee on FMLA leave just as if he or she were currently working.

If you were paying premiums each month, you will need to continue to pay them while you are out.

Your company's obligation to maintain your health benefits ends if and when you tell them you don't plan to return to work after your leave—or if you don't return to work when the 12-week leave time is exhausted.

Other benefits, like seniority or paid leave, do not need to continue to accrue while you are on leave. For miscellaneous benefits like elected life insurance coverage, you and your employer must make arrangements to continue those benefits during leave.

You are also entitled to your job or a similar position when you return. This means that if you are not given your exact position, the new one must be quite similar—and identical in terms of pay and benefits. We will discuss this more in the "retaliation" section below.

# WHAT HAPPENS WHEN I'M ON FMLA LEAVE AND WHEN I COME BACK?

There is one exception, though, that we want to point out: the FMLA doesn't guarantee certain "key" employees will get their positions back upon their return. A "key" employee is a salaried employee who is one of the highest paid 10 percent of all the company's employees in a 75 mile radius of the employee's worksite. Basically, the government says it wants to protect employers who might suffer "substantial and grievous economic injury" to its operations if it were required to reinstate certain highly-paid people.

To use this exception, an employer must notify the employee in writing of his or her status as a "key" employee, the reasons for denying job restoration, and provide the employee a reasonable opportunity to return to work after notifying the employee.





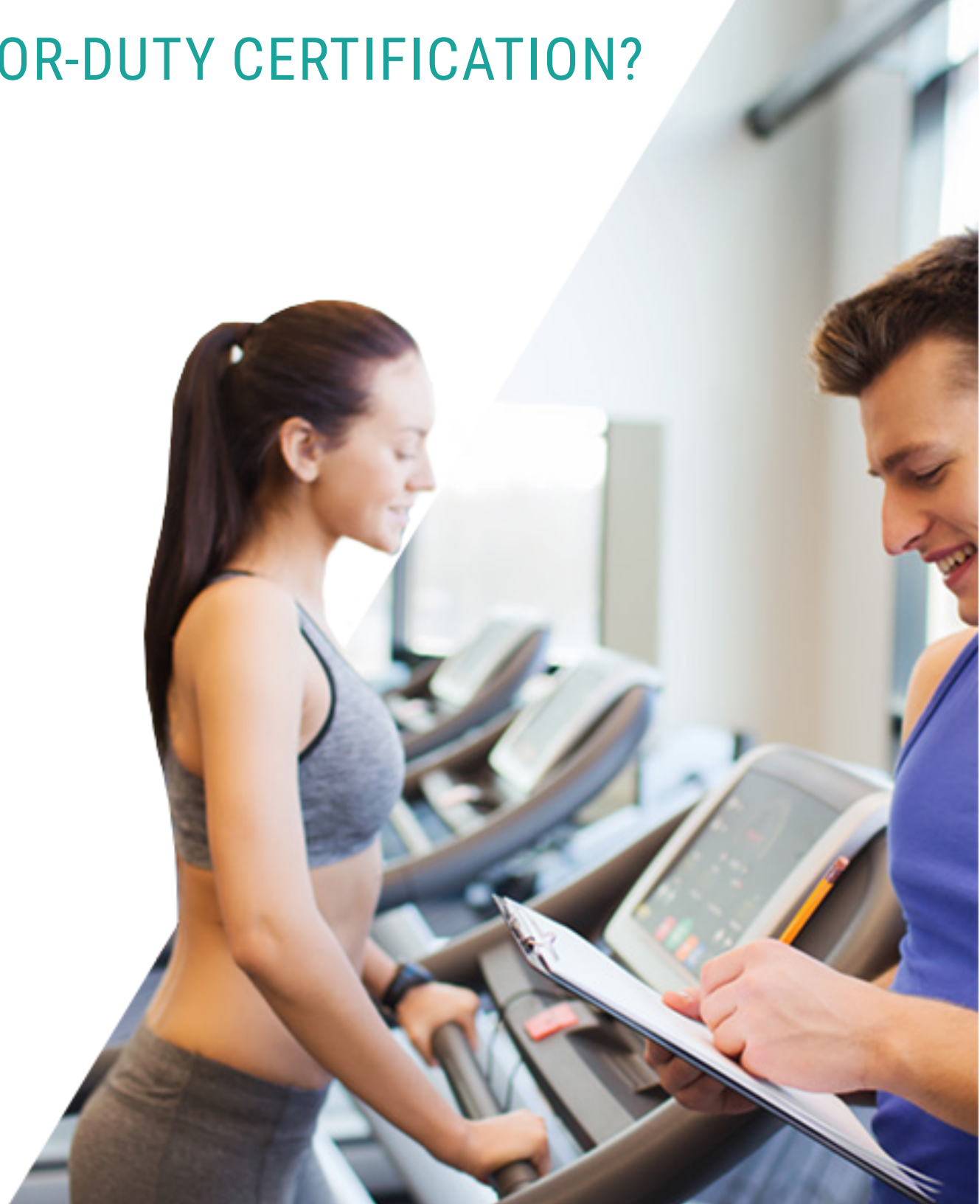


# WHAT IS A FITNESS-FOR-DUTY CERTIFICATION?

# WHAT IS A FITNESS-FOR-DUTY CERTIFICATION?

Some employers may require a fitness-for-duty certification before an employee can return to work after being gone for a serious health condition. Basically, it tells your employer that your health care provider thinks you can resume work.

An employer may require that the certification discuss the employee's ability to perform the essential functions of the position. (To require this, your employer must tell you and provide a list of essential functions.)



# WHAT IS A FITNESS-FOR-DUTY CERTIFICATION?

Additionally, an employer may require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the condition for which leave was taken.

If an employee fails to submit a properly requested fitness-for-duty certification, the employer may postpone the employee's return until it's submitted. If the employee never provides the certification, he or she may be fired.







# TWO WAYS EMPLOYERS VIOLATE THE FAMILY MEDICAL LEAVE ACT

# TWO WAYS EMPLOYERS VIOLATE THE FAMILY MEDICAL LEAVE ACT

Employers can't interfere with an employee's rights under the FMLA, and they cannot retaliate against someone for taking it. Also, it is illegal for an employer to fire or discriminate against anyone for opposing a practice—or participating in a proceeding—related to the FMLA (such as speaking out against your employer's unlawful denial of another person's FMLA rights).

Employers cannot use an employee's choice to take FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions.

In short, employers may violate the FMLA in two ways, by

- 1 - interfering with an employee's rights under the FMLA, and, by
- 2 - retaliating against an employee for using their FMLA rights.



# TWO WAYS EMPLOYERS VIOLATE THE FAMILY MEDICAL LEAVE ACT

## FMLA interference:

**Employers cannot refuse to authorize legitimate FMLA leave, and they cannot discourage an employee from taking it.**

If an employee is

- 1 - eligible for FMLA protections and entitled to leave, and
- 2 - the employer is covered by the FMLA, then as long as the employee provided notice of his or her intent to take leave, the employer cannot deny the FMLA benefits.

In this situation, the employee doesn't have to explicitly mention "FMLA" in his or her leave request. In fact, you can be completely ignorant about the law. It is your company's responsibility to recognize it as FMLA leave. All you need to do is give your employer enough information to show that you likely have an FMLA-qualifying condition.

After you have done so, your employer has a duty to figure out whether your leave is indeed FMLA leave, so if they need to request information from you, it's their responsibility to ask for it. If they fail to do so, they can be liable for interfering with your FMLA rights.





# TWO WAYS EMPLOYERS VIOLATE THE FAMILY MEDICAL LEAVE ACT

## FMLA retaliation:

Employers cannot retaliate against employees for taking FMLA leave or for participating in an investigation or claim about an FMLA violation. These are called “protected activities.” And if you are engaging in an activity protected by the FMLA, e.g., requesting FMLA in advance of surgery requiring hospitalization, your employer cannot fire you or otherwise retaliate against you.

Retaliation is any kind of action that is likely to dissuade a reasonable employee from participating in one of these protected activities. It includes firing, demotions, pay cuts and transfers to offices that require a much longer commute.

To have a claim for retaliation, your employer’s actions must have been done because you participated in a protected activity (such as taking leave, requesting leave, reporting an FMLA violation, etc.).



# TWO WAYS EMPLOYERS VIOLATE THE FAMILY MEDICAL LEAVE ACT

Closeness in time is a good indicator that their actions were in retaliation—like the example earlier in this chapter of the call center employee who was fired the day she returned from leave with an emergency room note.

We've been asked: Is it retaliation if your employer moves you to a different job when you return from FMLA leave? You aren't entitled to the identical job, but it must:

- 1 - offer the same shift or general work schedule and be near your previous worksite (so you don't have a significantly longer commute);
- 2 - involve similar duties, responsibilities and status;
- 3 - include the same general level of skill, effort, responsibility and authority;
- 4 - offer identical pay, overtime and bonus opportunities, as well as profit-sharing or other payments, and any unconditional pay increases that happened during your leave; and
- 5 - offer identical benefits.





# ABOUT THE AUTHOR





## ABOUT THE AUTHOR



Matthew K. Fenton has been a member of the Florida Bar since 1994 and has been practicing exclusively in matters arising from the employment relationship since 1997. He received his law degree from the University of Florida, with honors, in 1993, where he served on the Editorial Board of the University of Florida Law Review. Shortly after graduation, he served as law clerk to U.S. Magistrate Judge Mark A. Pizzo from 1995 to 1997. Mr. Fenton is a trial lawyer who has tried numerous employment law cases in both state and federal courts.

He has been selected by his peers for inclusion in every edition of the Best Lawyers in America since 2009 and has been repeatedly selected by his peers as a Florida Super Lawyer in Employment Law, which denotes status as one of the top 5 percent of Florida's lawyers. He has also been selected as a member of the Legal Elite in Employment Law by Florida Trend Magazine, representing approximately 2 percent of the active Florida bar members who practice in Florida. In 2016, Mr. Fenton was selected by Best Lawyers in America as the "Lawyer of the Year" for individuals in Tampa Employment Law.

Mr. Fenton has spoken on employment law topics and authored numerous publications on employment law, most recently contributing a chapter to the American Bar Association's practice guide "Litigating the Workplace Harassment Case." Mr. Fenton is a member of several voluntary bar organizations, including the Hillsborough County Bar Association where he is a past Co-Chair of the Labor and Employment Law Section.

Mr. Fenton is active in both the Florida and national chapters of National Employment Law Association, the Tampa Bay Trial Lawyers Association and the Florida Justice Association. Mr. Fenton has been admitted to practice in all Florida courts, in the United States District Court for the Middle District of Florida, the United States District Court for the Southern District of Florida and in the Eleventh Circuit Court of Appeals.

Mr. Fenton, a lifelong resident of Tampa, Florida, is proud to be married to a first generation Cuban-American, Rebeca Fenton, and father to two wonderful boys. When he is not fighting for employee rights, Mr. Fenton enjoys traveling with his family, collecting and listening to music from a broad variety of musical genres, spending time at the beach, and watching or attending Florida Gator football and basketball.



# ABOUT THE FIRM

# ABOUT THE FIRM

At Wenzel Fenton Cabassa, P.A., we represent workers wronged by their employers. We strive to get to know each client's unique circumstances, and we advise them on the best course of action. Our objective is to secure justice for our clients and to hold their employers accountable.

At our firm, our attorneys have decades of experience representing employees, so we are uniquely positioned to advise you on the best course of action, whether you've been fired or you're facing problems in your current job.

At Wenzel Fenton Cabassa, P.A., we know that hard work doesn't always get rewarded and that employees are often abused or taken advantage of by their employers. Our firm handles cases involving employment discrimination and harassment, whistle-blowing, civil rights, wrongful termination, the Family Medical Leave Act (FMLA), wage and overtime disputes, workers compensation issues, contract disputes, severance-related issues, EEOC mediations, government investigations, and violations of non-compete and trade secret agreements, among others.

We offer a free initial consultation, during which we will listen to your employment-related issues and discuss the steps we can take to resolve them.



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Employee Rights Attorneys