

# COMPLIANCE OVERVIEW

Provided by Better Business Planning, Inc.

## FMLA and Workers' Compensation: Common Questions Answered

An employee's workers' compensation absence may be due to an on-the-job injury or illness that also qualifies as a serious health condition under the Family and Medical Leave Act (FMLA). In this scenario, the workers' compensation absence may be counted against an employee's FMLA leave entitlement if the employer properly notifies the employee that the absence will be designated as FMLA leave.

Although an employer may offer the employee a light-duty position under workers' compensation rules, the FMLA does not require the employee to accept the light-duty position. The employee may decline the light-duty position and continue on FMLA-protected leave until he or she is able to return to the same or equivalent job he or she left. If the employee does not accept the light-duty position, however, he or she may lose workers' compensation benefits.

This Compliance Overview addresses common questions regarding employee leaves that qualify for protection under both the FMLA and state workers' compensation laws.

### LINKS AND RESOURCES

- The Department of Labor's (DOL) [FMLA regulations](#) address the interplay between the FMLA and state workers' compensation laws.
- The DOL has issued an [FMLA Employer Guide](#) to help employers understand their obligations under the FMLA.

### HIGHLIGHTS

#### FMLA

- The FMLA applies to private-sector employers with 50 or more employees.
- It provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons.
- Eligible employees may take FMLA leave for their own serious health conditions.

#### WORKERS' COMPENSATION

- FMLA leave may run concurrently with workers' compensation benefits.
- If an employee receiving workers' compensation benefits is also on FMLA leave, his or her employer must maintain the employee's group health plan coverage as if the employee had not taken the leave.

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.



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## ***Does FMLA leave run concurrently with a workers' compensation absence?***

An employee's FMLA leave may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a "serious health condition" under the FMLA. Thus, an employee could receive workers' compensation benefits to replace lost wages, while at the same time having health benefits maintained under the FMLA. However, if appropriate, the employer must designate this leave as FMLA-qualifying leave and must give notice of the leave designation to the employee. Failing to designate this leave as FMLA leave may be a violation of the FMLA, and the employee may still be entitled to FMLA leave once the workers' compensation absence has ended.

***A workers' compensation absence that also qualifies as FMLA leave due to the employee's own serious health condition may be designated by the employer as FMLA leave and counted against the employee's FMLA leave entitlement.***

## ***Can an employer require an employee to substitute accrued paid leave if the employee is concurrently on workers' compensation and FMLA leave?***

Under the FMLA, as a general rule, employees may elect or employers may require employees to substitute accrued paid leave, such as vacation or personal leave, for unpaid FMLA leave. Since the workers' compensation absence is already considered paid leave, the FMLA provision for substitution of the employee's accrued paid leave for unpaid FMLA leave does not apply. Consequently, if the employee has elected to receive workers' compensation benefits, the employer cannot require the employee to substitute any accrued paid leave for any part of the absence that is covered by the payments under a workers' compensation plan.

An employee is also precluded from relying upon the FMLA's substitution provision to insist upon receiving both workers' compensation and accrued paid leave benefits during such an absence.

However, employers and employees may agree, where state law permits, to have paid leave supplement the workers' compensation benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary. In addition, if workers' compensation benefits cease (for example, because an employee declines an employer's light-duty job offer) either the employee may elect or the employer may require the substitution of accrued paid leave.

## ***What benefits is an employee entitled to while on concurrent workers' compensation and FMLA leave?***

If an employee receiving workers' compensation benefits is also on FMLA leave, his or her employer must maintain the employee's group health plan coverage as if the employee had not taken the leave. Also, if the employer designates the workers' compensation absence as FMLA leave, then the employee is entitled to all employment benefits accrued prior to the date on which the leave commenced. The FMLA does not specifically entitle the employee to the accrual of any seniority or employment benefits during any period of FMLA leave, or any right, benefit or position of employment other than that to which he or she would have been entitled had the employee not taken the leave.

Nevertheless, in addition to the group health benefits guaranteed under the FMLA, an employee on FMLA leave may be entitled to additional benefits while absent, depending on the employer's established policy for providing such benefits when employees are absent on other forms of leave.

### ***How may an employee on concurrent workers' compensation and FMLA leave pay for group health coverage? For other non-health benefits?***

An employee who is receiving payment as a result of a workers' compensation injury must make arrangements with his or her employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. Employers should make sure payment arrangements are in place in advance of the leave or shortly after the leave begins. Likewise, an employer will also want to make prior arrangements for employee payment of other non-health benefit premiums when an employee is receiving payment as a result of a workers' compensation injury and is simultaneously taking unpaid FMLA leave.

As a general rule, if an employee does not return to work after the end of an unpaid FMLA leave, an employer may recover its share of health plan premiums. However, because workers' compensation leave is not unpaid leave within the meaning of the FMLA, an employer may not recover its share of health plan premiums when employees on concurrent FMLA and workers' compensation leave do not return to work at the end of FMLA leave.

### ***What may an employer do if it questions the adequacy of a medical certification?***

When FMLA leave is taken because of an employee's own serious health condition, an employer may require the employee to provide a medical certification form from a health care provider to verify the leave. If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions. That is, the employer may have direct contact with the employee's health care provider in the manner in which the workers' compensation statute provides. The employer may then use this information in determining the employee's entitlement to FMLA leave.

Furthermore, the FMLA regulations provide that an employer can contact an employee's health care provider to authenticate or obtain clarification of the medical certification, so long as the employer has first given the employee a chance to cure any deficiencies.

### ***Is an employee required to return to a "light-duty" job when it is not the same job or is not equivalent to the job the employee left?***

If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light-duty job, the employee may decline the employer's offer of a light-duty job if it is not the same or is not an equivalent job to the job the employee left. However, as a result of turning down this light-duty job, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the FMLA entitlement is exhausted. Additionally, when

the workers' compensation benefits cease, the employee may elect or the employer may require the substitution of accrued paid leave.

If the employee accepts the light-duty position in lieu of FMLA leave or returns to work before the FMLA leave entitlement ends, the employee retains the right to the original or to an equivalent position. However, the period of time employed in a light-duty assignment cannot count against FMLA leave entitlement. The right to restoration is suspended during the period of time the employee performs a light-duty assignment. That right is not unlimited and ceases at the end of the applicable 12-month FMLA leave year. Restoration under the FMLA is dependent on the employee's ability to perform the essential functions of the same or an equivalent position at the end of FMLA leave.

***What happens to an employee on concurrent workers' compensation and FMLA leave once the FMLA leave entitlement has run out?***

If the employee is unable to return to work or is still in a light-duty job after the FMLA leave entitlement has run out, the employee no longer has the protections of the FMLA and must look to the workers' compensation statute or to the federal Americans with Disabilities Act (if the employee is a "qualified individual with a disability") for any further relief or protections.