

# FMLA Medical Certification

## Right to Require Certification

- Employers may require medical certification to support FMLA leave for:
  - Employee's own serious health condition
  - Care of a covered family member
  - Qualifying exigency
  - Military caregiver leave
- FMLA leave is not automatic based solely on the employee's statement

It is the employer's burden to timely request certification

## Notice & Timing Requirements

- Employer must notify the employee of the certification requirement in the Rights & Responsibilities Notice
- Employee must be given at least 15 calendar days to return certification after the employer's request
- Extensions are required where the employee is making good-faith efforts or circumstances are beyond their control

## What Certification May Include

1. Health Care Provider name, contact information (address, phone, fax), and medical specialty/ practice
2. Condition Start Date and Duration
3. Medical Facts Supporting the Need for Leave
4. Employee's Inability to Work (Employee's Own Condition)
5. Need for Care (Family Member's Condition)
6. Intermittent or Reduced Schedule Leave for Planned Treatment
7. Intermittent Leave for Unpredictable Episodes (Employee's Condition)
8. Intermittent Leave to Care for a Family Member

Best Practice:

Use DOL model forms (WH-380-E / WH-380-F) or compliant equivalents.

### **Incomplete vs. Insufficient Certifications**

- Incomplete: Required sections not filled out
- Insufficient: Answers are vague, ambiguous, or non-responsive

Employer Must:

- Notify the employee in writing
- Identify exactly what is missing or unclear
- Allow 7 calendar days to cure the defect

### **Late or No Certification**

If certification is:

- Late or not returned → FMLA protections may be delayed or denied
- But only after:
  - The employer properly requested certification
  - The employee had full opportunity to comply
  - Extensions were considered for good-faith efforts

### **Authentication & Clarification**

- Employers may:
  - Authenticate (confirm the provider completed the form)
  - Clarify vague responses
- Contact must be made by HR, leave administrator, or health professional — not supervisors
- Written HIPAA authorization is required for clarification

**Recertification:** Generally permitted:

- Every Leave Year
- Every 30 days (or 6 months if serious health condition is over 30 days) in connection with an absence
- Earlier if:
  - Employee requests an extension of leave
  - Circumstances have significantly changed
  - Information casts doubt on the reason for leave

### **Second & Third Medical Opinions**

- Allowed when the employer has objective reason to doubt validity
- Employer pays all costs
- Third opinion is final and binding
- Not permitted on recertifications

## FMLA *In Loco Parentis* (ILP): Quick Reference

**Caring for a “parent”.** An eligible employee is entitled to take FMLA leave to care for a person who stood *in loco parentis* to the employee when the employee was a “son or daughter”: under the age of 18, or 18 years of age or older and incapable of self-care because of a mental or physical disability. *In loco parentis* relationship has to exist or had to have existed between the employee and the individual when the employee met the FMLA’s definition of a “son or daughter.”

**Caring for a “son or daughter”.** An eligible employee is entitled to take FMLA leave as a “parent” to care for a “child” if the *in loco parentis* relationship exists now or existed in the past and if the child is presently, at the time of the employee’s requested leave, under the age of 18, or 18 years of age or older and incapable of self-care because of a mental or physical disability.

**NOTE:** Per recent case law, *in loco parentis* relationship can develop during adulthood .Look at:

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- ✓ Whether the parties live together or near each other
  - ✓ Whether the caregiver provides financial and daily support
  - ✓ Whether the caregiver exercises control or has rights over the dependent adult
  - ✓ Close bond akin to that of a parent and child
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STEP 1: Is the employee requesting leave to care for someone?

- ✓ YES → Go to Step 2
- ✗ NO → ILP analysis not needed

STEP 2: Is the person a spouse, legal parent, or biological/adopted child?

- ✓ YES → Evaluate under normal FMLA rules
- ✗ NO → Go to Step 3

STEP 3: Does the employee describe a close relationship akin to parent and child? (see definitions and standards above)

- ✓ YES → Go to Step 4
- ✗ NO → Likely not ILP → escalate if uncertain

STEP 4: Is (or was) the relationship long term (more than temporary)?

- Ongoing caregiving (not short-term help)
  - Responsibility for daily needs, schooling, or medical care
  - Expectation the relationship would continue
- ✓ YES → Go to Step 5
  - ✗ NO → Usually not ILP but escalate if uncertain or if facts are mixed

## STEP 5: What type of care is being requested?

### A. Caring for a “Child”

- Is the child under 18, OR
- 18+ and incapable of self-care?

YES → Potential ILP → escalate for review

NO → Not FMLA-covered

### B. Caring for a “Parent”

- Did this person stand in loco parentis to the employee when the employee was a child (under 18 or disabled)?

YES → Potential ILP → escalate for review

NO → Not FMLA-covered

## STEP 6: Final Employer Action

If any step suggests ILP might exist:

**DO**

- Document what the employee shared
- Escalate to legal counsel to discuss

**DO NOT**

- Deny solely due to lack of biological or legal relationship
- Require guardianship papers or court orders
- Make a final eligibility determination without review

## Examples

### Possible *in loco parentis* relationships.

- A grandfather who has now assumed ongoing responsibility for raising a grandchild.
- An aunt who assumes responsibility for caring for a child after the death of the child's parents.
- A person who will co-parent a same-sex partner's biological child.
- An employee who will share equally in the raising of a child adopted by a life partner, but who does not have a legal relationship with the child.
- A grandmother who cared for a grandchild when the child was under 18.
- An employee who cares for his girlfriend's son and assists the girlfriend's son with daily grooming, homework, and getting to school, goes to child's softball games, and contributes to the child's financial support.
- A sister who undertakes care of her adult disabled brother, including ongoing daily care such as assisting with hygiene, eating, and transportation to medical appointments.
- Parents who divorce and each develop a relationship with a "significant other"; the two "significant" others may have an *in loco parentis* relationship with a child of the original couple, giving the child four "parents".

### Not an *in loco parentis* relationship without more factors

- A friend or aunt who cares for a child while the child's parents are on vacation.
- A grandmother who assists the new mother with the baby and household matters for a few weeks after the birth of a grandchild
- A sister who cares for her adult brother during recovery from hip surgery but will not continue care of the brother after a few weeks of recovery.
- Employee cares for her father-in-law; both employee and her husband are appointed guardians
  - See DOL Opinion Letter  
<https://www.dol.gov/WHD/opinion/FMLA/prior2002/FMLA-96.pdf>

## **FMLA Leave Designation: Cannot Choose!**

FMLA designation is the employer's responsibility—not a choice

Once an employer has enough information that an absence is for an FMLA-qualifying reason, the employer must designate the leave as FMLA, even if:

- The employee asks to delay FMLA
- The employee wants to “save” FMLA for later
- The employee prefers to use PTO, sick leave, paid parental leave, or state PFML first

### Why This Matters

Failing to designate qualifying leave as FMLA may constitute FMLA interference

### What Employers Must Do

When the employer knows (or should know) that leave may qualify:

- Provide FMLA Eligibility and Rights & Responsibilities Notice
- Designate the leave as FMLA within 5 business days (absent extenuating circumstances)
- Run paid leave benefits concurrently with FMLA when applicable

### Employers must designate FMLA even when:

- An employee requests state paid leave or PTO instead
- A workers' compensation claim is filed for a medical condition
- An employee never uses the words “FMLA”
- An employee refuses to return paperwork but the condition clearly qualifies
- The employer believes delaying FMLA would benefit the employee

### Limited Gray Area

A prior Ninth Circuit case suggested employees could choose to save FMLA but the U.S. Department of Labor expressly disagrees in a 2019 opinion letter

### Employer Takeaway

If the reason qualifies, designate the leave as FMLA—whether the employee wants it or not

Eligibility	Entitlement	Certification	Administrative Highlights
<p><input type="checkbox"/> <b>Employees are eligible IF they:</b></p> <ul style="list-style-type: none"> <li>✓ worked at least 12 months (need not be consecutive) <b>and</b></li> <li>✓ have at least 1,250 hours actually worked during the 12 months before leave begins <b>and</b></li> <li>✓ are employed at a work site with 50 employees within 75 miles</li> </ul> <p><input type="checkbox"/> <b>Employers are covered IF they are:</b></p> <ul style="list-style-type: none"> <li>▪ private-sector employers with 50 or more employees</li> <li>▪ public-sector employers (all)</li> <li>▪ public and private elementary and secondary elementary schools (all)</li> </ul>	<p><input type="checkbox"/> <b>Time Available</b> 12 workweeks in a 12-month period (and up to a combined total of up to 26 workweeks in a single 12-month period for military caregiver leave).</p> <p><input type="checkbox"/> <b>Qualifying Absence Reasons:</b></p> <ul style="list-style-type: none"> <li>• Child bonding (birth, adoption, foster care)</li> <li>• Care of a family member (child, spouse, or parent) with a serious health condition,</li> <li>• Employee’s serious health condition (includes pre-natal care and pregnancy)</li> <li>• Qualifying military exigency</li> <li>• Covered servicemember care</li> </ul>	<p><input type="checkbox"/> <b>May require certification to support leave for:</b></p> <ul style="list-style-type: none"> <li>• Employee’s Serious Health Condition</li> <li>• Care of a Family Member</li> <li>• Qualifying Exigency</li> <li>• Covered Servicemember</li> </ul> <p><input type="checkbox"/> <b>Time to provide certification</b> Minimally 15 calendar days unless it is not practicable under certain circumstances.</p>	<p><input type="checkbox"/> <b>Job Protection</b> Unpaid, job-protected leave</p> <p><input type="checkbox"/> <b>Leave Frequency (can be taken)</b> Continuously, Intermittently or Reduced Schedule</p> <p><input type="checkbox"/> <b>Concurrent Rule</b> May run concurrent with disability, statutory paid/unpaid leave or employer leave of absence policy.</p> <p><input type="checkbox"/> <b>Minimum Increment of Time</b> Smallest increment of time used for other forms of leave (e.g., sick or vacation), provided it is no greater than one hour.</p> <p><input type="checkbox"/> <b>Use of Paid Time Off</b> Employees may choose or employers may require the substitution of accrued paid time off for unpaid FMLA.</p> <p><input type="checkbox"/> <b>Fitness for Duty</b> Employers may require employees returning from leave for their own</p>