

Compliance update webinar Q&A

During our live presentation, we received several questions from participants through the chat function. We have combined some similar questions and provided answers. If you asked a question that is not shown here, please feel free to reach out to abigailo'connell@sunlife.com.

	Question	Answer
FMLA		
1.	Should employers send required notices and other communications under the Family & Medical Leave Act (FMLA) only through U.S. mail or could employers communicate through email?	The designation notice for FMLA must be in writing. The employee may want to receive it via email and in that case, we suggest you send it to the employee's recently confirmed personal email. Certain FMLA notices must be mailed through the US Post Service, such as notice of rights where the leave has been reported and is already underway, the key employee notices (delivery required in person or by certified mail) and notice when the employer will drop health benefits for nonpayment of the employee portion of premium.
2.	Can we require a doctor's note for each intermittent FMLA absence?	No. Once you have received a medical certification that properly certifies the need for intermittent absences, you may not request a doctor's note for each individual absence. If the health-care provider has certified intermittent absence based on best estimates (as opposed to specific dates), you can have written call-in procedures that require the employee to call out each occurrence to the employer and FMLA administrator (if different from employer), but you cannot request a doctor's note for each absence. The regulations permit you to request recertification in certain circumstances. When the original certification is for a period of more than 30 days, the employer can only request a new FMLA certification if there is a request to extend the leave, the circumstances described in the certification have changed significantly, or the employer receives information that casts doubt on the employee's stated reason for leave or its validity. For example, if the person certified to take an estimated 3 days per month took 6 days in a single month, there may be an opportunity to re-certify the leave. See 29 CFR §825.308.
3.	What if we suspect abuse?	You can recertify if you receive information that casts doubt of the employee's stated reason for leave or its validity. This would be governed under 29 CFR section 825.308. We would suggest that you first initiate a conversation with the employee to explain the information you received and invite the employee to respond before you seek re-certification.
4.	We require a note for intermittent FMLA days if out more than 3 days and/or before or after a holiday. Is this permissible?	No. Under the FMLA, it is the medical certification that governs. If you suspect abuse, there are certain remedies but you should not request doctor's notes.

5.	We are a small manufacturing company that doesn't fall under the FMLA. Other than common sense, are there any "rules" we need to follow for medical time off?	It depends on what city and state you are in. Certain cities and states have paid sick leave laws, paid time off laws, and/or paid family and medical leave law that may entitle employees to certain job-protected time off. Many of these local or state laws apply if the employer has one or more employee working in the jurisdiction. In addition, the Americans with Disabilities Act applies to employers with 15 or more employees and courts have made clear that a leave can be a reasonable accommodation under the ADA.
6.	Does the call-in requirement apply only to intermittent leaves?	You can require an employee to call in for both the initial request for a continuous or intermittent leave as well as for each separate intermittent absence. You cannot require an employee to call in each day of an approved continuous leave.
7.	Are these federal policies?	Some laws are federal and some are from state and local areas. Sun Life Absence Management provides leave management for federal, state and local leave laws.
8.	I have an employee who has been granted intermittent leave. However, recently the employee just decided to leave in the middle of his shift, stating that he has to take his mother to her chemo treatment. Based on his doctor's certification, we know that the mother has treatment on specific dates. Are we allowed to request documentation on the days that he just leaves in the middle of the shift without notice?	You should not request documentation because under the FMLA it is the medical certification that governs. You could begin by asking the employee to explain the discrepancy. If you are not satisfied with the answer, you may be able to request a recertification in accordance with the requirements of the FMLA regulations. .
9.	What was the DOL Request for Info in ~April 2020?	The Department of Labor is going to review the FMLA regulations and process and will seek comments from the public.
10.	If an employee gets hurt away from the job but decides to take unapproved time off, what steps do we need to take after we have reached out to this employee multiple times but have yet to hear back? Can we terminate?	You should really consult an employment attorney with questions about whether you can terminate employment. To help avoid a lawsuit, you should make sure you have made what would be considered reasonable efforts under the circumstances to contact the employee. For example, if the employee is hospitalized or incapacitated, the employee may not be able to communicate and the employee may not know that you are trying to contact him or her. If the employee has been unresponsive, and you have an emergency contact listed in the personnel record, you could reach out to the emergency contact, focusing primarily on concern about the well-being of the employee. If you know that the employee is absent for an FMLA, covered leave reason, this may trigger an obligation to send an FMLA notification.

11.	It is my understanding that employers with fewer than 50 employees do not need to offer FMLA. Is that the case?	<p>That is the case for private employers with fewer than 50 employees. An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers regardless of the number of employees employed. See §825.600.</p> <p>Be aware that some states have lower thresholds for FMLA laws, including California and New Jersey. Further, some states and cities have paid sick leave laws that apply to smaller employers. And, the ADA applies to employers with 15 or more employees and leave may be a reasonable accommodation under the ADA.</p>
12.	If an employee was provided with FMLA paperwork and given the 15 days to return it but does not, can we deny the FMLA request even if it is clearly an FMLA-covered condition? The paperwork I'm waiting on is the doctor's certification part (form 380 - medical provider's certification). The employee works in Kentucky.	It is advisable to follow-up to assist the employee. When the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with any certification, the employer may deny the FMLA leave. See §825.305(d). Per your second note, this would be the process for the federal FMLA. Kentucky has an adoption leave law to be mindful of.
13.	For FMLA, if HR "hears through the grapevine" that an employee is going out on leave or has already gone out on leave, is HR responsible for contacting the employee regarding applying for FMLA?	Yes. It is advisable to contact the employee and provide him or her their rights notice, including any instructions on applying for leave.
14.	When do you have to alert employees that they are officially on FMLA (if they stopped coming to work because of illness)?	If employees are absent for 3+ continuous days due to illness, it is advisable to give them their FMLA rights notice.
15.	I'd like more information on the DOL FMLA opinion letter from 2019, in which an employer may not designate more than 12 weeks as FMLA. Where can I read more on this subject?	It can be found at this link: https://www.dol.gov/whd/opinion/search/index.htm?FMLA

16.	I have an employee who needs to care for a family member who is ill but not living in the US. What medical documentation is required to apply for FMLA?	The same FMLA certification form can be used to certify care of a family member when the family member is outside the United States.
17.	At the end of the FMLA leave, on our termination report, our reason for termination is "Medically unable to return to work." Should we continue with this or do you have other recommendations?	You should not terminate immediately upon the expiration of the 12 weeks of FMLA leave if the FMLA leave is caused by an employee's own serious health condition. At that point, the ADA may be triggered and you should engage in an interactive process to determine whether additional leave is needed and, if so, whether it is a reasonable accommodation, as well as whether other accommodations are needed.
18.	Can you explain how intermittent FMLA is calculated currently? If someone uses 8 hours in any given week, is that counted as one week against their 12-week allotment?	If someone uses 8 hours of FMLA intermittent leave in a week, that would reduce the 12-week allotment by 8 hours. Assuming full-time work, 12 weeks is calculated to be 480 hours. An employee who works 4 days a week and 8 hours each day is entitled to 384 hours of leave.
ADA		
19.	FIBROMYALGIA... does anyone qualify if they have this health condition?	Fibromyalgia may qualify as a disability under the ADA if it substantially interferes with one or more major life activities. It also may qualify as a serious health condition under the FMLA.
20.	Must the employee ask for an accommodation? Does the employer have to ask if he/she wishes an accommodation? Especially, if employer already tried to accommodate his/her situation?	There are no magic words required. If the employee asks or the employer sees a potential need for accommodation, they should engage in the interactive dialogue. Further, the duty to accommodate does not end after one attempt to assist.
21.	If an employee asks for an ADA accommodation, can you provide other duties not part of his or her job description if that person is unable to perform his or her essential functions? (For example, can a PM be given Admin Assistant duties for the requested time frame?)	Yes, you can propose that as an accommodation. It needs to be an interactive dialogue. If the employee raises objections to the proposal, you need to evaluate the employee's concerns.
22.	Can you expand on "recommended" accommodation from a physician?	The doctor needs to recommend one or more accommodations that the doctor believe in his or her medical opinion will assist the employee in performing his or her job in view of the medical condition. Sometimes, employees ask for an accommodation but the medical documentation that is returned does not mention the accommodation.

23.	What if an employee has a note that her foot must be elevated but when the employer makes job modifications to have the leg elevated, the employee does not want to do that aspect of the job "in case" she gets bumped (e.g., lunch lady working the register with a leg up). What can the employer do?	You could send a supplemental medical certification to the health-care provider to clarify.
24.	If an employee does not qualify for FMLA, can he or she be covered under ADA due to a cancer diagnosis?	Yes, leave as an ADA accommodation should be considered.
25.	I'm confused about why the 60-day recertification request was unreasonable. We have employees who have to wear respirators and must be clean shaven to wear them to do their job per OSHA regulations. Would this be determined under ADA? If so, is it unreasonable for us to place them out on leave or evaluate other areas to accommodate?	<p>The 60-day recertification was deemed unreasonable because the employee's medical condition that necessitated the accommodation was not a temporary condition but a long-term condition. Therefore, there was no business need to justify a frequent recertification request and it was viewed as unfair to the employee.</p> <p>You are raising a separate issue about essential job functions. If wearing a respirator is an essential function of the job, you may not have to allow the accommodation request. You may have to transfer the employee to another vacant job that can accommodate the medical condition.</p>
26.	Have you seen where courts are penalizing employers who don't support employees who incur ongoing intermittent absences when FMLA is exhausted (write-up for unplanned absences, etc.) as an ADA accommodation?	You need to be careful not to violate the ADA because the Equal Employment Opportunity Commission (EEOC) could begin an investigation and/or an employee could bring a lawsuit. Each request for an accommodation needs to be evaluated on an individual basis in view of the requirements of that particular employee's job and the limitations imposed by the medical condition. If the intermittent absences are relatively infrequent or temporary in nature, there could be an obligation to accommodate.
27.	In a service pet policy, can you require that the animal be hypoallergenic, with documentation proving that it's a service animal? Our truck drivers don't use the same truck every day and I don't want someone else to have an allergic reaction.	Having an absolute requirement that the dog be hypoallergenic could be problematic. You can have requirements that the truck driver must clean the cabin and, if there are still problems after that, you may be able either deny the accommodation or require that the animal be hypoallergenic. If employees regularly share the same truck, you may need to schedule the sharing with another employee who is not allergic.
28.	If an employee has been out on leave for 6 months, and is on long-term disability with no idea of return date, or if they will even be able to return due to nature of	The EEOC has disapproved of automatic termination policies. Before you terminate employment, you should reach out to the employee and determine whether the employee may be able to return to work in the near future either with or without accommodation. If the employee says no, you may have grounds

	illness, can we term off our records as an active employee after 12 months?	to terminate because an indefinite leave is not a reasonable accommodation. If the employee says he/she will be able to return to work in the near future, you can request medical documentation.
29.	Say an employee has an episode with epilepsy while at work and goes out on STD. His doctor releases him to come back to work after STD maxes out; however, the company doctor does not clear him to return to his previous position because he is a safety risk in a dangerous manufacturing environment, and he is dismissed from employment. LTD was denied by provider because of employee's personal doctor's release. Employee has retained counsel. What are your thoughts?	You should consult counsel. You are allowed to deny an accommodation request if it creates a direct threat to the safety of the employee or others. You need to be able to demonstrate that there is a genuine threat that is real and substantial. You also need to bear in mind that you may need to transfer the employee to a position that can accommodate a person with an epileptic condition.
Pregnancy accommodation law changes		
30.	For new mothers expressing milk, are you required to pay the employee while she is doing that? I have heard of employees being unavailable for over a half-hour and having to be paid for that.	Barring any specific local law, you do not have to pay if you do not pay other employees for similar length breaks. Be very careful to not treat lactating employees differently than other employees. Also be careful if the employee is classified as exempt from overtime. Docking pay raises issues under the Fair Labor Standards Act.
31.	If your office does not have a room for lactation available, how does that work? What if you don't have space to make one?	If you do not have space or ability to create a permanent lactation space, you can provide a temporary lactation space. Employers can provide access to a manager's office, room with privacy (locks and window shades) or a storage area.
Paid Leave updates		
32.	How does paid Family and Medical Leave (PFML) work if someone is also on Short Term Disability (STD)?	Sometimes PFML and STD will run concurrently - if the person is eligible for both and qualifies for both. That is, if the employee is eligible and qualifies for both benefits at the same time, they will run concurrently. The employee's stator PFML benefit would be calculated and paid and then the STD plan would offset for that amount and pay the incremental benefit. For example, if the PFML statutory rate was 65% and the STD replacement rate was 80%, the state PFML benefit would be paid at 65% and thee employee would be eligible for an additional 15% from the STD plan. .
33.	Is MA PFL premium collection date incorrect in the slides?	Thank you for pointing that out. Premium collection was originally scheduled to start 7/1/19 but was delayed until 10/1/19. We have updated the slides we are distributing.
34.	If your business resides in one state and you have teleworkers in other states, does the state law (for example, pregnancy	Different laws have different eligibility rules. Most state and local laws apply if the employee works in the state regardless of where the business itself is located. Sometimes, the laws only apply if the employer has more than a certain number of employees in

	accommodation or PFML) for the state in which the employee resides overrule? If there are a number of employee requirements, is it based on the business home state or number of teleworkers in the actual state?	the state or city, but other times they apply even if there is just one employee in the state or city. For telecommuters, under the FMLA, their work location for purposes of eligibility is not their home, it is the office to which they report to or from which their work is assigned.
35.	Does Delaware have any parental leave that is more generous than FMLA? Specifically, is a mother entitled to 12 weeks total in a rolling 12 months or is a mother entitled to 12 weeks post-partum for bonding (even if she took time off prior to having the baby)?	Delaware has a law that provides paid parental leave for state employees. Employees who meet the eligibility criteria can take up to 12 calendar weeks of paid parental leave during the first 12 months following the birth or adoption of a child six (6) years of age or younger. The 12 weeks may be taken continuously or you may request two-week time period paid leave, subject to the agency's approval. There is no time available under this law for periods of absence before the birth. The other law to be mindful of is the Maryland Pregnant Workers Fairness Act, which outlaws employment discrimination based on pregnancy and related conditions.
36.	Who pays the paid time off? The state, or do we have to pay out of our pocket?	For the current state PFML laws, there is a state agency that administers the PFML benefit (except in NY, where private insurers administer the benefit). You can defer to the state agency (though you need to collect and remit premium from employees and, in some states, pay the employer share of the premium as well). You can also opt out of the state program in some states and provide the benefits through a private plan.
37.	Will the new MA PFML apply to a small company with fewer than 20 employees?	Yes. In MA employers with fewer than 25 employees in the state do not have to pay premium contributions, but your employees will need to contribute their share of premium and they are eligible for the MA PFML leave and benefits.
38.	In WA, does giving birth count as a mother's own serious health condition?	Yes, typically the period of 6-8 weeks post childbirth counts as time taken for the mother's own serious health condition.
39.	We only have one employee in Massachusetts. Does the new PFML law affect us?	Yes. In MA employers with fewer than 25 employees in the state do not have to pay premium contributions, but your employee will be required to pay their share of the premium, and your payroll vendor should be able to start deductions for you. You cannot back-date contributions, so you could start them on a go-forward basis if you have not already done so. Additionally, your employee will be eligible for the MA PFML leave and benefits commencing 1/1/21.
40.	These PFML paid leaves are paid at what rate? A short-term disability rate or must be at own pay rate if work?	The rates vary in each state. The newest laws pay a higher percentage for lower-income employees. For example, in Oregon, a lower-income wage earner may be eligible for 100% wage replacement.
41.	On the paid leave, is that full salary or a limited amount?	Paid leave programs vary by state. Historically, they have only provided partial wage replacement. However the most recent

		trend is to pay a higher percentage of wage replacement for lower-income employees. In Oregon, lower-income employees will be eligible for 100% wage replacement. In addition, the definition of wages varies and may not be limited to salary.
42.	Do any of these new paid leave laws apply to all employers or is a minimum number of employees needed to comply with these laws of paid leave?	You have to review the provisions of each law to determine eligibility. Most of the new PFML laws apply if you have even one employee in the state.
43.	Most of our employees are remote, scattered across every state. As for which employers are covered (minimum employee count) under paid leave laws, how do we know if it's considered employee count in that jurisdiction or total employee headcount across the organization?	It depends on the language in each applicable law.
44.	Can I get more of the Texas regulations to follow?	We are not sure what Texas regulations you are referring to. If you are asking about the Paid Sick Leave laws in Austin, Dallas and San Antonio, you can find out information from websites that each city maintains.
45.	Can an employee in MA choose to opt out and not contribute to MA PFML, understanding they cannot submit a claim?	Employees may not opt out of the MA PFML. Participation is mandatory. There is a small exception for self-employed individuals. See 458 CMR 206.
46.	Nevada has paid sick as well, correct?	No, Nevada does not now and never has had a paid sick leave law; it has a paid time off law effective 1/1/20.
47.	In Washington, can employees use STD in conjunction with state paid leave?	Yes. Typically, the STD plan will offset the amount of any WA PFML benefit to which the employee is entitled for the same period of leave and then pay the incremental difference.
48.	Do you have any information on Iowa?	Iowa has unpaid leave laws for Civic Volunteers (firefighter, emergency), Military Leave, Civil Rights/Pregnancy Leave Law (IPLL), and Crime Victim Leave.
49.	If an employee lives in one state, but works in another with a PFL requirement, is that employee subject to PFL law?	It depends on the provisions for eligibility in the PFL law. Many state PFML laws base eligibility on the state where the employee works.
50.	We are in Michigan and provide 40 hours for PFML. Can the employee cash it out instead of using it?	Michigan has a paid sick leave law so you will need to review its requirements as to payment upon termination. You will also need to review Michigan law regarding payment of PTO upon termination. We recommend you consult local employment counsel.

51.	What are the rules under FMLA/CFRA for leave for an adult child?	FMLA: age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence. CFRA: An adult dependent child. An adult dependent child is an individual who is 18 years of age or older and who is incapable of self-care because of a mental or physical disability within the meaning of Government Code section 12926(j) and (1).
52.	We are a multi-state employer and I just sent notices to our employee in NY but wasn't sure about IL and NJ.	<p>The New Jersey Department of Labor and Workforce Development (“NJDOLE”) provides employers with poster packets containing the required notices.</p> <p>For NJ Temporary Disability Benefits: Employers covered by the law must advise of benefits available to qualifying employees under disability insurance and unemployment compensation. The notice must be conspicuously posted.</p> <p>For the NJ Security and Financial Empowerment (“SAFE”) Act: The notice must be conspicuously posted, making employees aware of their rights under New Jersey’s SAFE Act, which provides job-protected leave for victims of domestic violence and sexual assault. The SAFE Act applies to New Jersey employers with 25 or more employees.</p> <p>For the NJ Family leave Act: Employers covered under the law, whether or not they have any eligible employees, must display the official Family Leave Act poster.</p> <p>For Illinois, there are several applicable leave laws. We suggest reaching out to counsel to ensure compliance with required notices.</p>

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