

UCOP Leave of Absence FAQ's

February 11, 2010

APPENDIX D—QUESTIONS AND ANSWERS

1. Under FMLA and CFRA an eligible employee is entitled to 12 workweeks of family and medical leave during a 12 month period. How is the 12 month period calculated?

Within the University, the 12 month period is calculated on a calendar year basis. Each calendar year, an employee will be eligible for a new 12 workweek entitlement to FML. Employees who request leave in the new leave year must meet eligibility requirements (i.e., has employee been employed 12 months and worked 1250 hours in the last 12 months?) and up to 12 weeks of FML provided if eligible.

If the employee begins leave within the last 12 weeks of the calendar year and continues to be unable to return to work once the new year begins, he/she is eligible for a new 12 workweek entitlement on January 1. In this situation involving a continuous need for leave, the answer to the question of whether the employee must requalify on January 1 is not clear. However, since the regulations provide that the 1250 hour requirement must be met immediately preceding the need for leave, it appears that the employee would not need to requalify.

Medical certification can be required for the new calendar year once the original specified leave period has ended. The University's contribution for health benefits must continue for up to 12 additional weeks in the new calendar year.

2. Does the 1,250 hours worked requirement mean 1,250 hours of actual work or 1,250 hours on pay status?

The 1,250 hours worked requirement means 1,250 hours of actual work after subtracting all periods of paid leave including all observed holidays, vacation, compensatory time off, administrative leave, and sick and unpaid leave.

3. What about FLSA exempt staff for whom no time records are kept? How does the University determine whether the 1,250 hours worked requirement has been met?

Since time records may not be kept for most FLSA exempt employees, you should assume that an exempt appointee who has at least 12 months of University service is eligible for family and medical leave unless there are written records or other good evidence that indicate that the employee has worked less than the 1,250 hours.

4. Is the 1,250 hours worked requirement pro-rated for part-time or partial year non-exempt staff?

No, it is not. Although it is harder for part-time and partial year employees to satisfy this requirement, most part-time employees appointed at 75 percent or more time and full time partial year employees will meet the 1,250 hours worked requirement, provided that paid and unpaid absences during the previous 12 month period have not been excessive. If the employee hasn't worked 1250 hours, the leave granted is not a "family and medical leave."

5. How is eligibility determined for academic appointees?

Academic appointees must meet the same 12 months service criteria as any other employee to be eligible for family and medical leave. In addition, full-time faculty are deemed to have worked the 1,250 hours unless the University can clearly demonstrate that the faculty member has not worked the requisite hours.

6. Are teaching assistants, research assistants, per diem and contract employees eligible for family and medical leave?

Teaching and research assistants, per diems and contract employees are entitled to family and medical leave if they meet the eligibility requirements; however, leave need not be granted beyond a predetermined separation date. Under FMLA and CFRA, University-paid health care coverage is required only if the employee has an entitlement to health care coverage at the time the leave is requested. For the purpose of administering family and medical leave for TA's, RA's, and other student academic employees, the Graduate Student Health Insurance Program (GSHIP) premiums paid by the University are considered employer-provided health care benefits if the employees are entitled to GSHIP benefits under University policy.

7. How is a workweek counted for employees who have an appointment of less than full time?

An eligible part time employee is entitled to family and medical leave for a period not to exceed 12 of his or her workweeks. For example, an employee who works four hours a day, five days a week is entitled to leave for 12 of those workweeks.

8. Can an employee be on a temporary layoff or furlough and FML at the same time?

No.

9. How is a workweek counted for employees who take leave on a reduced work schedule?

When a full-time employee takes leave on a reduced work schedule or on an intermittent basis, only the amount of leave actually taken is counted toward the 12 workweeks of leave entitlement. For example, a full time employee who works 40 hours a week would be eligible for up to 480 hours of leave (normal workweek of 40 hours times 12 workweeks).

This total should be reduced hour for hour when he or she takes a reduced work schedule or intermittent FML. If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period should be used to calculate the employee's normal workweek.

10. Is an employee entitled to an additional day of leave if a holiday falls during the employee's family and medical leave?

No. The fact that a holiday may occur within the week taken as family and medical leave has no effect; the week is still counted as a full workweek of family and medical leave. However, if employees generally are not expected to report to work for one or more weeks (e.g., winter holiday closure) the days of the closure do not count against the employee's entitlement to family and medical leave.

11. Can an employee be provided with additional leave beyond that required by family and medical leave?

The FMLA, CFRA, and PDL define the legally required minimum amounts of leave. The University may decide to provide more leave or additional continuation of health benefits beyond that required by the law. However, the leave is not a legally protected leave; thus, rights guaranteed by the FMLA, CFRA, or PDL – such as return to work – will be governed by applicable personnel policy or collective bargaining agreement in which the extended leave was granted. You should check the applicable personnel policy or collective bargaining agreement for details about additional leaves and your benefits office for details about benefits coverage during those leaves and inform employees about the differences.

12. Is the University required to give written notice to an employee that his or her request for leave has been designated as family and medical leave?

Yes. Departments must provide the employee with notice of eligibility and designation of the leave as qualifying for FML. The University's initial notice to an employee that a request for leave will be designated as family and medical leave may be given verbally or in writing within two business days of the date the leave was requested. However, if the notice is verbal, it must be confirmed in writing no later than the following payday (unless the payday is less than one week after the verbal notice, in which case the notice must be given no later than the subsequent payday). The written notice may be given in any form. A leave should be provisionally designated as FML pending the receipt of a medical certification or in cases where the Department does not have enough information to designate the leave as family and medical leave.

13. How should the notification to employees be handled if the area responsible for producing the notice is not informed until several days (or weeks!) have passed?

UC may retroactively designate a leave as FML with appropriate notice to employee – but only if UC's failure to timely designate the leave does not cause harm or injury to employee.

- Consult counsel first if you think there is any possibility employee could be harmed or injured.

UC and employee can mutually agree on a retroactive designation.

This information pertaining to retroactive designation was provided in the June 26, 2009 “Best Practices for Family & Medical Leave” presentation give by UCOP (Leslie Van Houten & Stephanie Leider).

14. What kind of information can the University ask for in a medical certification?

Medical certification is limited to the following information:

- a. confirmation that the employee or employee’s family member has a serious health condition as defined by Federal and State law;
- b. the date of the onset of the serious health condition;
- c. the probable duration of the serious health condition;
- d. a written statement that the employee is not able to perform the functions of the job; and
- e. if intermittent leave or a reduced work schedule is being considered, a statement that it is medically necessary.

If the leave is being requested because of the employee’s own serious health condition, the University may ask the employee to authorize his or her health care provider to disclose the diagnosis, but this disclosure must be optional. It is against California law to ask for a diagnosis without the employee’s agreement to disclose. An employee’s failure to disclose the diagnosis may be the basis for the University to request, at its own expense, a second medical certification from a health care provider selected by the University. Always consult with your local employee relations, human resources, or academic personnel office if you have questions about the validity of certification.

15. Is medical certification mandatory or discretionary?

Medical certification is discretionary under the law. Leave may be designated by the University as FML if you have knowledge or reason to believe a serious health condition exists (e.g. the employee is hospitalized). However, University personnel policies and collective bargaining agreements for staff and academic personnel differ on whether medical certification is mandatory in order to document a FMLA qualifying event, so check the applicable personnel policy or collective bargaining agreement, or consult with your local employee relations, human resources, or academic personnel office for guidance.

Note: The University may require medical recertification every 30 days for an employee on intermittent family and medical leave once the original specified leave period has ended or in cases where the leave period is indefinite.

16. What if an employee refuses FML altogether?

The employer is responsible for designating the FML, not the employee. Leave may be designated by the University as FML if you have knowledge or reason to believe a serious health condition exists (e.g. the employee is hospitalized, is off work due to an occupational injury, or has communicated to you that the need for leave is to care for a seriously ill family member). It is critical that the University designate qualifying leave as family and medical leave for a number of reasons: to ensure that the employee gets the benefit and protection of the laws, to establish that we have complied with our notice and designation obligations and to make sure that we are not obligated to give additional family and medical leave during that leave year simply because of a failure to properly designate the original leave.

17. What happens if the University questions the adequacy of an employee's medical certification?

The University is not permitted to request additional information from the employee's health care provider if the employee has submitted a complete certification signed by the health care provider. However, a health care provider that represents the University may contact the employee's health care provider (with the employee's permission) for the purpose of clarifying and authenticating the medical certification. If the medical certification is not complete, the University may ask the employee to provide a completed form before designating the leave as FML.

If the University has reason to doubt the validity of a medical certification, the University may request, at its own expense, a second and – under certain circumstances – a third medical certification from a health care provider selected by the University. Always consult with your local employee relations, human resources, or academic personnel office if you have questions about the validity of certification.

18. Who approves family and medical leaves?

Local procedures may vary, but generally the employee's department is responsible for validating and approving family and medical leaves.

For academic employees, the same delegation of authority that applies to academic leaves governs family and medical leaves. Academic leaves may be approved by the Department Chair, Dean, Provost, Vice Chancellor, Executive Vice Chancellor, or Chancellor in accordance with local procedures.

Once the FML is approved, the leave should be monitored to ensure any requests for extension of FML are properly designated and that benefits are continued as appropriate.

19. Can the University require an employee to provide proof of a family relationship?

Yes, a supervisor or department chair may require an employee to provide reasonable documentation such as a birth certificate or court document of a family relationship or a statement from the employee concerning the relationship; however, the employee is entitled to the return of the official document.

20. Can an employee be required to provide a return to work medical certification when leave has been taken due to the employee's own serious health condition?

- a. Certification of medical release to work may be obtained from staff employees who are not covered by a collective bargaining agreement if the department has a uniformly applied policy requiring all employees who take medical leaves for similar purposes to obtain medical certification of their ability to perform the essential functions of their position.
- b. Certification of medical release to work must be obtained from employees who are covered by system wide collective bargaining agreements where family and medical leave has been negotiated, provided that the employee has been granted a medical leave for any reason except pregnancy related disability.
- c. Certification of medical release to work may be required from academic employees in accordance with local procedures.

Failure to provide a medical release to return to work when requested by the University may result in denial of reinstatement until after the employee submits the required medical release.

21. How does family and medical leave interact with leave granted for an illness or injury compensable under Workers' Compensation?

If an employee receives temporary disability payments under Workers' Compensation and the employee has a serious health condition as defined by Federal and State family and medical leave statutes, the first 12 workweeks of the leave should be designated as family and medical leave, provided that the employee meets the eligibility requirements and has not already exhausted his or her 12 workweek entitlement.

22. Can an employee who is receiving temporary disability payments under Workers' Compensation concurrent with a family and medical leave refuse to accept a light duty assignment without losing his or her remaining entitlement to family and medical leave?

Yes, an employee can decline a light duty position without losing any remaining entitlement to family and medical leave. However, the employee may thereby lose his or her eligibility to workers' compensation payments.

23. Is family and medical leave paid or unpaid?

The use of paid leave, such as accrued vacation or sick leave, varies by personnel policy and collective bargaining agreement. A quick reference guide is provided in the Appendix of this handbook. You should also consult the applicable personnel policy or collective bargaining agreement for details.

An academic appointee who accrues vacation and/or sick leave may substitute his or her accrued time for unpaid family and medical leave. If an academic employee does not accrue sick leave or vacation leave, the leave may be granted with pay for up to 12 workweeks in accordance with the applicable personnel policy, local procedures, or collective bargaining agreement.

Even if a leave is fully covered by paid leave, it should still be designated as FML. It is critical that the University designate qualifying leave as family and medical leave for a number of reasons, including: to ensure that the employee gets the benefit and protection of the laws, to establish that we have complied with our notice and designation obligations and to make sure that we are not obligated to give additional family and medical leave during that leave year simply because of a failure to properly designate the original leave.

24. Can an employee use compensatory time off during family and medical leave?

Under no circumstances may the University require that an employee use accrued compensatory time off during family and medical leave. Further, if the University allows an employee who is otherwise qualified for family and medical leave to use accrued compensatory time off, such time cannot be counted toward the employee's entitlement to 12 workweeks of family and medical leave.

25. How can a supervisor or department chair determine if a request for vacation qualifies as family and medical leave without invading an employee's privacy?

It will not always be possible to determine if a request for vacation qualifies as family and medical leave. However, since vacation is granted at the convenience of the department, a department may postpone an employee's request for vacation due to staffing requirements if the employee has not specifically requested vacation for a family and medical leave qualifying reason. At this point, the employee will need to provide sufficient information to establish a qualifying reason under FMLA/CFRA so that the supervisor or department chair is aware of the employee's potential entitlement. The employee's request can then be addressed as a potential family and medical leave, and eligibility under FMLA/CFRA assessed.

26. How does the timing of medical, dental, and vision contributions work during a FML given that UC benefits are paid in advance?

Benefits and payroll representatives should remember that medical, dental and vision contributions are paid in advance. Therefore, the first month of benefits continuation during

a FML may already be paid. Benefits contributions should be tracked to ensure the contributions cover the months during which an approved FML is in effect, but not beyond.

27. How should a supervisor or department chair report leave taken in less than full-day increments for FLSA exempt employees?

Under the FMLA, employers are allowed to dock the leave banks and pay of FLSA exempt employees for partial day absences without affecting the employee's qualification for exemption under FSLA. Records of actual hours worked by FSLA exempt staff and faculty who are granted family and medical leave on either a reduced work schedule or on an intermittent basis must be kept to ensure that the employee or member of the faculty receives his or her complete entitlement to 12 workweeks of leave and so that the department knows when the family and medical leave ends.

28. Who is the Office of Record for family and medical leave records?

Local procedures may vary, but in most cases, the home department has been designated the Office of Record, and therefore has the responsibility for maintaining all documentation and records pertaining to the family and medical leave. It is also the department's responsibility to keep the local employee relations, human resources, or academic personnel office updated regarding the status of a given employee's family and medical leave.

29. What happens to an employee's family and medical leave records when the employee transfers to another department or campus?

The employee's family and medical leave records must be transferred to the new department or Office of Record at the new campus.

30. What is the significance of keeping complete and accurate records of all absences designated as family and medical leave?

The University is required to keep FML records for Department of Labor inspections for a period of no less than three years. Failure to maintain records is a violation of FMLA and subjects the employer to applicable sanctions. Additionally, failure to properly document leave as covered by FMLA could result in disciplinary action being taken against an employee based on absences that were for protected family and medical leave purposes. If that happens, the University could be subject to litigation and could be liable for back pay, reinstatement, and attorney's fees.

The University may also find itself in the position of granting additional time off with health care benefits coverage for a qualified family and medical leave because records do not exist showing that family and medical leave had already been taken.