



Federal Family and Medical Leave Act (FMLA) Guide

What Should Trans & Non-Binary People Know?

I. Introduction



At some point during the course of our lifetimes, most if not all of us will experience the need to take leave from work, whether it is to care for a sick loved one, bond with a new child, or recover from illness, injury, surgery, medical or other health needs.

Unfortunately, the United States does not have a universal paid leave program that covers workers across the country. Only 13 states and Washington D.C. have their own paid family and medical leave programs (and several are so new that workers will not be eligible for paid leave until 2026). Although some employers choose to offer their own paid family and medical leave benefits, most do not. Though there is currently no national paid family and medical leave program, the Family and Medical Leave Act of 1993 (FMLA) does offer unpaid, job-protected leave to recover from a serious health condition, bond with a new child, care for a seriously ill family member, or address certain needs related to a family member's military service.

This guide was created to help transgender, non-binary, and gender-nonconforming people understand their rights under the FMLA, but much of the information here will be helpful to others as well. Although the FMLA provides important protections to covered workers and their loved ones, the law falls short for many transgender individuals and their families, due to the FMLA's narrow definition of family and restrictive eligibility requirements.



This guide is designed to assist you in understanding your basic rights under the FMLA. It does not cover all aspects of the law and does not constitute legal advice.

I. Introduction

What does this guide cover?

This guide provides an overview of the FMLA with a focus on scenarios that transgender and non-binary people may experience, including the need for leave to recover from gender-affirming surgery and other medical care, bond with a child, or take care of certain loved ones.

As stated above, some states have **paid** family and medical leave laws that are broader than the FMLA and expand on the FMLA's protections, definitions of family, and/or coverage requirements. For more information and state-by-state analysis see our [Statewide Paid Leave Protections Guide](#).

It is important to note that your employer's leave policies may be more generous than the minimum standards set by the FMLA and state paid family and medical leave laws. Even if you are not covered by the FMLA and/or do not live in a state with a paid family and medical leave law, employers can and may provide additional coverage.



II. Overview of the FMLA



What is the FMLA and what does it provide?

The Family and Medical Leave Act of 1993 (FMLA) is a federal law that requires employers that meet certain requirements to offer unpaid, job-protected leave to qualifying individuals recovering from a serious health condition, bonding with a child, or caring for certain seriously ill family members. The law does not cover all workers, or all situations that may require leave, and it is important to understand your rights.

In short, the FMLA provides up to 12 weeks of **unpaid**, job-protected time off (in a 12-month period) to:

Recover from your own serious health condition (including pregnancy)

Care for a parent, child,¹ or spouse with a serious health condition

Care for and bond with a newborn, adopted, or foster child recently placed with you

Deal with certain obligations arising from a spouse, parent, or child being on, or called to, active duty abroad in the military

¹ This includes a child under the age of 18 years of age, or an older child only where the child is "incapable of self-care because of a mental or physical disability." 29 U.S.C.A. § 2611.

II. Overview of the FMLA

Additional Key Facts About the FMLA

The FMLA also offers up to 26 weeks of unpaid leave (within a 12-month period) for workers whose spouse, child, parent, or next of kin (closest living relative or relatives) is a member of the armed services with a covered service-connected illness or injury.

Although the FMLA only guarantees *unpaid* leave to covered workers, your employer may require you to take any paid vacation, personal leave, or other leave you have accrued during any part of your FMLA leave.²

With a few exceptions, you must be able to return to your original job or a position equivalent in pay, benefits, and other terms after you return from FMLA leave.

The FMLA allows you to take “intermittent leave” when medically necessary, which means you can take your 12 weeks in smaller amounts of time (like several hours or a day or two at a time) to schedule treatment of you or your family member’s serious illness.

² Your employer is not required to give you your job back if you would have been laid off during this period anyway. For example, you can be laid off if general downsizing occurs during your period of leave. Also, if you are a salaried employee who is among the highest paid 10% of all employees in your workplace, your employer can decide not to give you your job back after FMLA leave if your restoration would cause a “substantial and grievous economic injury” to the employer’s operations. 29 C.F.R. § 825.218.

II. Overview of the FMLA

Am I Eligible to Take Leave Under the FMLA?

The FMLA's eligibility requirements exclude newly employed workers, as well as many workers employed in smaller businesses and part-time workers. To be covered under the FMLA, you must meet **all** of the following requirements:



Work for an employer that has 50 or more employees within 75 miles of your job site (if you are a remote worker, your job site is the office to which you report or from where your assignments are made)



Have worked for this employer for at least one year



Have worked at least 1,250 hours for this employer in the 12 months before taking leave

Roughly 56% of the total workforce is eligible for leave under the FMLA. This can be a devastating fact for the more than 40% of people who are not covered. However, 13 states and Washington, D.C. currently have paid family and medical leave laws. See our [Statewide Paid Leave Protections Guide](#) for more information.

As stated above, if you are not covered by the FMLA, your employer may provide these same (or better) benefits. It is important to understand your workplace leave policies. If you are uncertain about your leave options, reach out to a human resources member, a supervisor, or union representative, if applicable.

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13

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II. Overview of the FMLA

What Relationships Are Covered Under the FMLA?

The FMLA allows for individuals to take up to 12 weeks of unpaid, job-protected leave to recover from one's own serious health condition, or to care for a parent, child, or spouse with a serious health condition. Unfortunately, other family relationships, like parents-in-law, siblings, and other extended family are not covered by the FMLA.³ The FMLA also does not cover chosen family members (individuals who have a close relationship with a worker that are equivalent to a family relationship).



Parent



Child



Spouse



Parents-in-Law



Siblings



**Other Extended
Family Members &
Chosen Family**

³ The only exception is that an eligible worker who is "next of kin" of a covered servicemember with a serious injury/illness may take FMLA leave to care for the servicemember. See: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FMLA_Military_Guide_ENGLISH.pdf to determine if you qualify as "next of kin."

III. Gender-Affirming Healthcare & the FMLA



Can I Take FMLA Leave to Recover From a Gender-Affirming Surgery or Other Medical Treatment?

Possibly. An eligible worker (see [Section II](#)) can take FMLA leave to recover from a serious health condition that makes the worker unable to perform the functions of their position. Importantly, the FMLA defines a covered “serious health condition” as an “illness, injury, impairment, or physical or mental condition that involves inpatient care...or continuing treatment by a healthcare provider...”⁴

Under this definition, gender-affirming surgery or other health needs involving an overnight stay in the hospital are likely to qualify for FMLA leave because the definition of “inpatient care” is met. The same is true for gender-affirming surgeries or other health needs that require you to be out of work for three consecutive days and involve ongoing treatment from—or under the supervision of—a health care provider.

If you are seeking leave for a gender-affirming surgery or other treatment that does not involve an overnight stay or continuing treatment by a healthcare provider, you may not qualify for FMLA, even if you are otherwise eligible, because this scenario would likely not meet the definition of serious health condition needed to qualify for coverage.

Despite this general guidance, determination of eligibility requirements for FMLA leave will depend on your individual situation.

⁴ 29 C.F.R. § 825.113(a). See 29 C.F.R. §§ 825.114, 825.115 for guidance on what constitutes inpatient care and continuing treatment by a health care provider.

III. Gender-Affirming Healthcare & the FMLA

Certification Requirements Under the FMLA

To take FMLA leave, you must submit verification of your serious health condition by a healthcare provider and information about how that condition makes you unable to perform one or more essential functions of your job to your employer. When you request FMLA leave, your employer must give you written notice of the required documentation.

The Department of Labor (DOL) has a standardized [FMLA form for healthcare providers](#) to complete and allows (and in some states, requires) the healthcare provider to exclude information about diagnosis and other private medical information.

It is possible that, in some cases, these certification requirements could reveal a person's transgender status. If this is a concern, you may want to raise the issue proactively with your healthcare provider when requesting certification.

Can I Take FMLA Leave to Care for a Parent, Child, or Spouse Recovering From Gender-Affirming Healthcare?

Possibly. In order to qualify for FMLA leave to care for a parent, child, or spouse recovering from gender-affirming surgery or other medical treatment, that person's condition must be found to meet the definition of serious health condition described above. Again, decisions are made on a case-by-case basis and depend on individual situations.

Individualized Assistance With the Process

If you have questions, or need more information about your specific circumstances we recommend getting in touch with an attorney, legal assistance organization, transgender rights group in your city or state, or [Transgender Law Center](#) or [A Better Balance](#).

IV. Caring for Loved Ones Under the FMLA



Caring for a Spouse Under the FMLA



Anyone who is legally married is eligible to take FMLA leave to care for their spouse, regardless of gender or sexual orientation.

Can I Take Leave to Care for a Domestic Partner?



Unfortunately, domestic partners and civil union partners are not covered under the FMLA. To date, Congress has not expanded the definition of “spouse” in the law to include domestic or civil union partners even if individuals in these relationships have the same rights and responsibilities as spouses under state law.

Even if you are not covered by the FMLA, or the law doesn’t recognize your relationship, it is possible that your employer’s policies are more generous or another law could be helpful to you. If you need to care for a partner we recommend getting in touch with an attorney, legal assistance organization, Trans or LGBT rights group in your city or state, or [Transgender Law Center](#) or [A Better Balance](#) to assess whether any laws could be helpful to you. There is a growing movement to pass state and local workplace leave laws, and several states have laws providing paid or unpaid leave to care for domestic or civil union partners (as well as other family relationships that are not covered by the FMLA). See our [Statewide Paid Leave Protections Guide](#) for more information.

IV. Caring for Loved Ones Under the FMLA

Caring for Parents and Children Under the FMLA



Note: Though this guide uses the word “child,” the FMLA itself uses binary, gendered language in its family definitions.⁵ Advocates across the country are continuing to push for modernization of the FMLA including on expansion of its family definitions. For more about ABB’s key role in those efforts, see [Our Issues: Recognizing All Families](#).

A covered worker can take FMLA leave to care for a child with a serious health condition, bond with a new child, address certain needs related to the military service of a child, or care for a child who was seriously injured while a member of the armed services. The definition of child includes those under 18 years of age as well as an older child who is “incapable of self-care because of a mental or physical disability.” The FMLA broadly defines child to include a biological, legally-adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis to the child.

The term “in loco parentis” means one who is acting in the role of a parent. The U.S. Department of Labor (DOL) has made it clear that this type of parent-child relationship includes an LGBTQ parent who is raising a child but has no biological or legal relationship to the child.

Determining whether you stand “in loco parentis” to a child will depend on the specific circumstances of your situation. The key question is whether you assumed the role of a parent towards the child and have intended to act as a parent. The FMLA defines “in loco parentis” to include individuals who have day-to-day responsibilities to care for and financially support a child. In 2010, however, DOL clarified that one does not have to provide both day-to-day care and financial support to stand “in loco parentis” to a child. For example, if you provide daily care for a child with whom you have no legal or biological relationship, you may stand “in loco parentis” to the child even if you do not provide financial support.

You may be required to provide reasonable evidence to demonstrate that you stand “in loco parentis” to a child for purposes of FMLA leave. However, the requirements for documenting that you stand “in loco parentis” to a child are minimal; you only have to give your employer a simple statement asserting that an “in loco parentis” relationship exists.⁶

A covered worker can also take FMLA leave to care for a parent, which includes stepparents, and any individual who acted in “loco parentis” to you when you were a child.

⁵ The FMLA uses “son or daughter” rather than “child” to describe the parent/child relationship. 29 U.S.C.A. § 2611(West).

⁶ Ibid.; 29 C.F.R. § 825.122(j).

V. FMLA Enforcement & Other Considerations



Protection From Employer Interference, Retaliation Under the FMLA

The FMLA protects eligible employees from interference with their right to take leave under the FMLA and from any retaliation or discrimination for taking leave. This means that an employer cannot interfere with or attempt to restrain your rights under the FMLA including punishing you for asking for leave or taking approved leave. This also means that an employer cannot discriminate or retaliate against you, including firing or demoting you, for taking or attempting to take FMLA leave.

However, if you are not covered by the FMLA or if your employer takes action against you unrelated to the taking of FMLA leave, the FMLA will not protect you.

If you think your rights have been violated or you need more information the following options may be useful to you:



Call A Better Balance's free and confidential legal helpline at **1-833-NEED-ABB (1-833-633-3222)** or complete our [online contact form](#).



Contact Transgender Law Center's legal information helpdesk by using our [online intake form](#).

V. FMLA Enforcement & Other Considerations

Additional Protections Against Employment Discrimination

If you believe you have been denied leave under the FMLA because you are transgender or non-binary, or because you are seeking gender-affirming healthcare, you may have grounds for additional discrimination complaints.

Following the Supreme Court's landmark *Bostock v. Clayton County* decision in 2020, transgender and non-binary people with an employer that has at least 15 employees are protected under federal law against employment discrimination based on sexual orientation or gender identity. In addition to federal protections, many states and cities have their own anti-discrimination laws protecting against discrimination based on sexual orientation and gender identity. If you believe you have been discriminated against based on your sexual orientation or gender identity you can [file a complaint](#) with the Federal Equal Employment Opportunity Commission (EEOC).

You may also be able to file a complaint with your state and/or local discrimination enforcement agency. For more information about employment discrimination see Transgender Law Center's online [employment resources](#). If you feel that you are experiencing workplace discrimination, the Transgender Law Center's [Legal Information Helpdesk](#) can provide information about addressing employment discrimination and legal resources.



[File a Complaint](#)
with the Federal
Equal Employment
Opportunity
Commission



Transgender Law
Center's [Employment
Discrimination
Resources](#)



Transgender Law
Center's [Legal
Information Helpdesk](#)

V. FMLA Enforcement & Other Considerations

Reasonable Accommodations

Transgender and non-binary workers with an employer that has at least 15 employees may be eligible for reasonable accommodations under the Americans with Disabilities Act (ADA), **even where ineligible for FMLA leave**. State and local laws may provide protections for workers who work for employers with less than 15 employees. Examples of reasonable accommodations include leave to attend healthcare appointments, temporary schedule changes, or other changes in terms of employment. The process for requesting a reasonable accommodation is separate from the process for requesting FMLA leave.

When you request a workplace accommodation, your employer is required by law to engage in a good-faith interactive process with you to determine whether you have a qualifying disability and if so, whether there is an accommodation the employer can provide to address your health needs that will not cause an undue hardship to the employer. An undue hardship is an action requiring significant difficulty or expense, and is a case-by-case decision based on several factors including the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation.

Additionally, pregnant and postpartum workers nationwide, including pregnant and postpartum transgender and non-binary workers, may also be entitled to reasonable accommodations under the Pregnant Workers Fairness Act (PWFA) and the PUMP Act. For more information about the rights of pregnant trans workers, see our [Pregnant Workers Guide](#).

