



NORTH RISK PARTNERS™

Non-FMLA Leaves of Absence

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Introduction

What to do when employees request a Non-Family and Medical Leave Act (FMLA) leave of absence from work, and how to reduce the impact of their leave on your business.

- survey of all leave types;
- when Non-FMLA leaves are appropriate;
- an analysis of state laws providing leave other than FMLA;
- an explanation of applicable state laws in the region; and
- a review of a sample leave of absence policy



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Introduction

As an employer, you want to minimize the effects an employee's leave of absence has on your business, while still providing the time away from work your employees need. With several laws protecting employees, you must practice caution to guard against costly litigation should a dispute arise.



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Introduction

What is a leave of absence?

- There are two types of leaves: mandatory and voluntary.
- Federal and/or state laws govern a mandatory leave of absence.
- Many cities have specific paid sick leave laws in place.
- These leaves include medical absences governed by the Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA), military leave, and other state-mandated leaves.
- Whether the laws surrounding these leaves of absence apply to you is often based on the number of employees working for your company and where an employee is working.
- You must grant job-protected leave to eligible employees in these situations.



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Introduction

Voluntary leaves aren't required by law

- These leaves of absence are offered as a courtesy to employees per company policy or per a collective bargaining agreement with a labor union.
- Companies often offer medical or personal leaves to employees who have exhausted all of their time off and who don't otherwise qualify for mandated leaves. A personal leave may be granted to allow extended time off for a special circumstance, such as an educational opportunity.
- Because these leaves are non-mandatory, you grant them based on your discretion and according to the guidelines you have set in your leave policy. Also, you do not have to offer job protection during a voluntary leave, although you may choose to do so.



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Family Medical Leave Act (FMLA)

Is your company covered by FMLA?

- The FMLA covers private employers if they employ 50 or more employees within 75 miles of the worksite for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The 20 weeks need not be consecutive.
- An employer may be deemed a "covered" employer in the current year even though it currently employs less than 50 employees if it employed 50 or more employees in the prior year for 20 or more calendar workweeks.



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Family Medical Leave Act (FMLA)

Is your company covered by FMLA? (pg 2)

- Because the FMLA defines "employer" broadly to include "any person acting, directly or indirectly, in the interest of a covered employer, corporate officers and supervisors may be personally liable for FMLA violations for refusing to grant leave or failing to reinstate the employee to his or her prior position at the expiration of the leave period.
- For purposes of determining FMLA applicability, full-time and part-time employees are considered to be employed for each working day of a calendar workweek as long as they are on the payroll for the entire week. You should also count employees on a **leave** of absence or who have been suspended if a reasonable expectation exists that they will return to work. When in doubt, count them. An employer remains covered until it no longer employs 50 or more employees for 20 calendar weeks in both the current and preceding calendar years.



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Family Medical Leave Act (FMLA)

How does an employee qualify for FMLA?

- For birth of a son or daughter, and to care for the newborn child
- For placement with the employee of a son or daughter for adoption or foster care
- To care for the employee's spouse, son, daughter, or parent with a serious health condition
- Because of a serious health condition that makes the employee unable to perform the functions of the employee's job



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Family Medical Leave Act (FMLA)

How does an employee qualify for FMLA? (pg 2)

- Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status) –and–
- To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember

The FMLA requires you to hold your employees' jobs until their leave ends or offer one that is equivalent. An FMLA leave allows employees to take up to 12 weeks off in a 12-month period.



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Family Medical Leave Act (FMLA)

If the employee's absence is not protected by the Family and Medical Leave Act (FMLA), then it's considered a non-FMLA medical leave. However, their leave may still be protected under the ADA and ADA Amendments Act (ADAAA). In this case, your employees' jobs and wages are still protected by law.



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Americans with Disabilities Act (ADA) Considerations

The Americans with Disabilities Act (ADA) as amended, affirmatively requires employers to make reasonable accommodations to the known limitations of disabled employees or applicants.

The accommodation provided cannot pose an undue hardship on the operation of the business of the employer.

The ADA applies to "employers" in an industry affecting commerce. The term employer includes private, state, and local governmental agencies, employment agencies, and labor organizations.



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Americans with Disabilities Act (ADA) Considerations

To be deemed a covered employer, the entity must have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year when the alleged discrimination occurred. The ADA applies regardless of the daily work schedules of the individual employees—meaning the employees need not work full time—so long as the entity employs the requisite number of employees for the relevant number of weeks. Additionally, the 20 calendar weeks need not run consecutively



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Americans with Disabilities Act (ADA) Considerations

- The ADA makes it unlawful for an employer to discriminate against—including failing to reasonably **accommodate**—a “qualified individual” with a covered disability.

Qualified Individual

A qualified individual means an employee or applicant who:

- Is otherwise qualified for the position, possessing the requisite skill, education, training, and job-related requirements –and–
- With or without reasonable accommodation, can perform the essential functions (as opposed to the marginal functions) of his or her job duties or the job duties for which he or she has applied



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Americans with Disabilities Act (ADA) Considerations

Covered Disability

- Whether an individual is disabled within the meaning of the ADA depends on the particular facts and circumstances specific to that individual. As a result, employers must take care not to make generalized assumptions about whether an individual suffers from an impairment that rises to the level of a disability. Instead, employers should approach each situation on a case-by-case basis.

A disability covered by the **ADA** includes:

- A mental or physical impairment that substantially limits one or more major life activities
- A record of having such an impairment –or–
- Being regarded as having such an impairment



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Americans with Disabilities Act (ADA) Considerations

In some circumstances, employers may have to permit an employee to take a leave of absence to reasonably accommodate the employee's qualifying disability. Under these circumstances, the ADA requires employers to analyze whether a leave of absence:

- Is a reasonable accommodation for an ADA-protected disability –and–
- Will assist the disabled individual in returning to work to perform the essential functions of their job.



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Americans with Disabilities Act (ADA) Considerations

Reasonable accommodation examples:

- Job restructuring (when disability impacts a *marginal* job function.
- Part-time or modified work schedules
- Leave of absence
- Reassignment to a vacant position
- Acquisition or modification of equipment or devices
- Appropriate adjustment or modifications of examinations, training materials, or policies
- The provision of qualified readers or interpreters



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Navigating Workers' Eligibility for Leave under Multiple Laws Simultaneously

Employees who need time off due to medical or disability related issues may have rights under several federal, state, and local laws at the same time. For example:

- **FMLA and workers' compensation leave.** An employee who suffers a work-related injury that would also meet the definition of a "serious health condition" under the FMLA would be entitled to take FMLA leave and at the same time collect workers' compensation benefits. Under the FMLA's 2013 Final Rule this same employee may be entitled to return to "light duty" work under the state's workers' compensation laws without impacting his right to FMLA leave.



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Navigating Workers' Eligibility for Leave under Multiple Laws Simultaneously

- **ADA, FMLA, and state workers' compensation laws.** In certain circumstances, provisions of the ADA, the FMLA, and state workers' compensation laws can apply to the same employee. For example, a work-related injury that results in an overnight hospital stay will generally qualify as a "serious health condition" under the FMLA, and if the condition becomes an "impairment" that "substantially limits a major life activity," the employee may also be entitled to leave as a "reasonable accommodation" under the ADA.

In most cases, the federal, state and local leave laws allow employers to run these leaves concurrently so that employees cannot "stack" leaves to obtain additional time off. You will want to expressly state in your leave policies that all statutorily mandated leaves will run concurrently unless prohibited by law.



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Absenteeism and Its Cost to Employers

Employee absenteeism amounts to a significant concern for most businesses. To be competitive, companies must have a reliable workforce.

In 2019 the U.S. Department of Labor (DOL) estimated that approximately 3% of an employer's workforce was absent on any given day. According to the Kronos Workforce Absence Manager, 35% of payroll costs are linked to employee absences.



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Absenteeism and Its Cost to Employers

The tangible and intangible costs of employee absences include:

- Increased temporary and substitute labor costs
- Increased spending on paid time off and overtime
- Higher health insurance costs
- Lower productivity
- Decline in service standards
- Lost business or revenue opportunities
- Increased safety risks –and–
- Lower morale and increased stress as workers have to absorb the responsibilities of absent co-workers



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Non-FMLA Leaves

There is a myriad of leaves now available to employees and just as many laws and regulations that surround them. Before you deny a leave or decide this isn't an issue you'll ever deal with, you should be aware employees may be entitled to a leave under state or federal law involving:

- Family and Medical Leave
- Victims of crime leave
- Family military leave
- Bone marrow donation leave
- Organ donor leave
- Jury duty
- Voting Leave
- Military



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When Employee requests Non-FMLA Leave

- Review company policy to determine what type of leave employee is requesting.
- Is employee eligible for leave?
- What is maximum duration of leave?
- Is the leave paid or unpaid and can the employee use paid time-off benefits during leave?
- What benefits are eligible to employees on leave?
- What is the impact to the employee's benefits? Are benefit payments required during the leave?



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When Employee requests Non-FMLA Leave

Pg 2

- Review what documentation is required from the employee and to the employee at the onset and during the leave
- Are there any precedent situations to consider?
- Approve (or deny) the leave
- Monitor leave time off and employee's return to work plan



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Family and Medical Leave and Flexible Leave

The following states offer private employer Family and Medical Leave and Flexible Leave

- Minnesota
- Wisconsin

Iowa, Nebraska, North Dakota and South Dakota have no applicable state or local laws regarding private employer family and medical leave.



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Family and Medical Leave and Flexible Leave

MINNESOTA Leave to Care for a Family Member
An employee may use his or her personal sick leave benefits for absences from work due to an illness or injury of the employee's:

- Child, including an adopted child, stepchild, and foster child
- Spouse
- Sibling
- Parent
- Mother-in-law
- Father-in-law
- Grandparent
- Grandchild, including an adopted grandchild, step-grandchild, and foster grandchild –and–
- Stepparent



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Family and Medical Leave and Flexible Leave

MINNESOTA Leave to Care for a Family Member (pg 2)

- Employee may use his or her personal sick leave benefits for a reasonable time as necessary for a family member's illness or injury on the same terms upon which the employee would be able to use such benefits for his or her own illness or injury
- Employer may limit an employee's use of his or her personal sick leave benefits for a family member's illness to 160 hours in a 12-month period, except with respect to absences for the illness or injury of a child under the age of 18 or under the age of 20 who is still attending secondary school



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Family and Medical Leave and Flexible Leave

Wisconsin:

- The Wisconsin Family and Medical Leave Act (WFMLA), defines "employer" as a person engaging in business in the state who employs 50 or more individuals on a permanent basis. "Employer" also includes the state and its departments and agencies, including the legislature and the courts
- The WFMLA defines an "employee" as a person employed by an employer in the state. The WFMLA does not apply to an individual employed by his or her parent, spouse, domestic partner, or child.



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Family and Medical Leave and Flexible Leave

Wisconsin (pg 2):

- To be eligible for leave under the WFMLA, an employee must have worked for the employer for more than 52 consecutive weeks and for at least 1,000 hours during the preceding 52-week period.
- Leave under the WFMLA is unpaid, but an employee may substitute his or her accrued leave while on a family or medical leave.
- The Wisconsin Family and Medical Leave Act (WFMLA), provides employees with up to six weeks of family leave in a 12-month period for the birth of a child or placement of a child for adoption with the employee. An employee's leave for these purposes must begin within 16 weeks of the child's birth or placement.



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Family and Medical Leave and Flexible Leave

Wisconsin (pg 3):

- Employees are also entitled to take up to two additional weeks of family leave in a 12-month period to care for a spouse, domestic partner, child, or parent with a serious health condition. Thus, an employee may take up to eight combined weeks of family leave in a 12-month period. An employee may take family leave in non-continuous increments.
- The WFMLA also grants an employee up to two weeks of medical leave in a 12-month period for a serious health condition that makes the employee unable to perform his or her duties.



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Pregnancy Leave Laws

The following states offer Pregnancy Leave

- Iowa
- Minnesota
- Nebraska
- Wisconsin

North Dakota and South Dakota have no applicable state or local laws regarding Pregnancy Leave



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Pregnancy Leave Laws

Iowa:

- Provides up to eight weeks of pregnancy leave
- Employers with four or more employees may be required to provide eligible employees with pregnancy leave
- To be eligible for pregnancy leave, an employee must be disabled by pregnancy and not have leave or sufficient leave available under any health or temporary disability insurance or sick leave plan
- An eligible employee is entitled to a leave of absence for the period that the employee is disabled by pregnancy, childbirth, or a related medical condition, or for eight weeks, whichever is less.



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Pregnancy Leave Laws

Minnesota:

- The Minnesota Pregnancy and Parental Leave Act (MN Stat. Sec. 181.941) requires covered employers to provide up to 12 weeks of unpaid leave for the birth or adoption of a child or to female employees for prenatal care, pregnancy, childbirth, or related health conditions.
- Employers with 21 or more employees at any one site are covered by the law.
- An employee is eligible for leave under the Act if he or she performs services for hire for the employer for at least 12 months preceding the request.



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Pregnancy Leave Laws

Minnesota (pg 2):

- The employee must also perform services for hire for the employer for an average number of hours per week equal to one-half the full-time equivalent position in the employee's job classification as defined by the employer's personnel policies or practices or pursuant to the provisions of a collective bargaining agreement during the 12-month period immediately preceding the leave.
- Independent contractors are not covered by the Act.
- The length of the leave is determined by the employee, but may not exceed 12 weeks, unless agreed to by the employer. The length of leave may be reduced by any period of paid parental, disability, personal, medical, or sick leave, or accrued vacation.



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Pregnancy Leave Laws

Nebraska:

- Nebraska law requires covered employers to offer reasonable accommodations to employees for physical limitations related to pregnancy, childbirth, or a related medical condition.
- The Nebraska Fair Employment Practices Act (NFEPA) defines an employer as any person engaged in an industry with 15 or more employees for each day of 20 or more calendar weeks in the current or preceding calendar year.



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Pregnancy Leave Laws

Nebraska (pg 2):

- To be eligible for a reasonable accommodation, an employee must be employed by a covered employer and have a physical limitation from pregnancy, childbirth, or a related medical condition.
- Under the NFEPA, employees affected by pregnancy, childbirth, or related medical conditions must be treated the same for all employment-related purposes, including receipt of employee benefits and leave, as other persons similar in their ability or inability to work. Employers must provide reasonable accommodations to any individual who is pregnant, has given birth, or has a related medical condition unless accommodation would result in undue hardship to the employer.



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Pregnancy Leave Laws

Wisconsin:

- The Wisconsin Family and Medical Leave Act (WFMLA) provides employees with leave for the birth of a natural child and has been interpreted to provide sick leave for pregnancy-related morning sickness as a serious health condition.

A covered employer:

- is a person engaging in any activity, enterprise or business in Wisconsin
- employs at least 50 individuals on a permanent basis
- includes the state and any office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts



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Pregnancy Leave Laws

Wisconsin (pg 2):

- For purposes of leave following a child's birth or adoption and leave for morning sickness under the WFMLA, an eligible employee is an individual employed in Wisconsin by an employer. The WFMLA does not apply to an individual employed by his or her parent, spouse, domestic partner, or child. Id.
- Employee must have been employed by the same employer for more than 52 consecutive weeks and have worked for the employer for at least 1,000 hours during the preceding 52-week period.
- In a 12-month period, an eligible employee may take up to six weeks of family leave following the birth or adoption of a child if the leave begins within 16 weeks of the child's birth or placement. In a 12-month period, the combined leave available to an employee may not exceed eight weeks.



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Situation 1

Employee hasn't been to work for 30 days, can I terminate employment?

- Is/was employee on an approved leave? If so; what are leave policy guidelines and duration?
- Have you attempted to reach employee and documented the details?
- What does the most recent doctor note say, when is/was employee released to return to work?
- What does your attendance policy state?
- Do you have code of conduct policy regarding attendance?
- Any past precedent?
- Consider ADA



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Situation 2

Employee is out on Workers' Compensation, can I terminate employment? Again.....

- Is/was employee on an approved leave? If so; what are leave policy guidelines and duration?
- What does the most recent doctor note say, when is/was employee released to return to work?
- What does your attendance policy state?
- Do you have code of conduct policy regarding attendance?
- Any past precedent?
- Consider ADA



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