



County Technical Assistance Service
INSTITUTE *for* PUBLIC SERVICE

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Employee Rights During and After Leave

Dear Reader:

The following document was created from the CTAS website (ctas.tennessee.edu). This website is maintained by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Employee Rights During and After Leave

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Substitution of Paid Leave.^[1] Generally, FMLA leave is unpaid leave. However, if an employee has accrued paid leave under the employer's established paid leave policies and the employee complies with the employer's policies for taking that leave, the employee may choose to substitute the accrued paid leave for all or part of the FMLA leave entitlement. Even if the employee does not choose to substitute paid leave, the employer may require the employee to substitute the employee's accrued paid leave. This substitution means that the FMLA leave and the accrued paid leave will run concurrently and the employee receives pay during the period of otherwise unpaid FMLA leave. If neither the employee nor the employer elects to substitute paid leave, the employee will remain entitled to all paid leave earned or accrued under the employer's leave plan.

Maintenance of Benefits.^[2] Generally, the employer is required to treat employees on FMLA leave the same as employees who are on non-FMLA leave (paid or unpaid) for benefits purposes. Employers are not required to maintain most benefits unless the employer does so for employees who are on other similar types of leave.

Group Health Coverage.^[3] Regardless of how other benefits are handled, employers are required to maintain group health plans for employees on FMLA leave on the same terms and conditions as if the employee were continuously at work during the entire leave period. "Group health plan" is defined as any plan provided by or contributed to by the employer to provide health care to employees, former employees or the families of these employees.^[4] If the employer provides a new health plan or benefits or changes benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan or benefits to the same extent as if the employee were not on leave. Any other plan changes, such as changes in coverage, premiums, or deductibles, apply to the employee as well. The employee on FMLA leave must be notified of these changes like other employees.

If employees are required to pay a share or all of their group health coverage premiums, the employee must continue to pay these premiums while the employee is on FMLA leave. If premiums are raised or lowered during the leave, the employee is subject to the new rates. If the FMLA leave is paid leave, the employee's share of the premiums must be paid by the method used during any paid leave (usually payroll deduction). If it is unpaid, the employee must make payments during leave. The employer may require the employee to pay either the employer or the employer's insurance company, in any of the following ways:

1. payment due at the same time as if done by payroll deduction;
2. payments due on the same schedule as under COBRA;
3. payments pre-paid pursuant to a cafeteria plan at the employee's option;
4. using the employer's existing rules for payment of premiums on leave without pay as long as they do not require pre-payment of all premiums before the leave begins; or
5. using another system voluntarily agreed to by the employer and employee, which may include pre-payment.

The employer must provide the employee advance notice of the terms and conditions under which these payments must be made. This is done in the Notice of Eligibility and Rights & Responsibilities (DOL Form WH-381).

Failure to Pay Premiums.^[5] If an employee's payments are more than 30 days late (or longer if the employer has an established grace period that is longer), the employer's obligation to maintain health insurance coverage ceases. The employer must provide written notice to the employee that the coverage will be dropped on a specified date at least 15 days after the date of the letter unless payment is received prior to that date, and the letter must be mailed to the employee at least 15 days before coverage is to cease.

If coverage lapses for non-payment, the employer is still required to reinstate the employee's coverage when the employee returns to work, and the coverage must be reinstated to the same level the employee would have had if leave had not been taken, including any family or dependent coverage. The employee may not be required to meet any qualification requirements imposed by the plan, including any pre-existing condition waiting period, or to pass a medical examination to obtain reinstatement of coverage.

If the employee fails to return to work after FMLA leave has been exhausted or expires, the employer may recover its share of health plan premiums paid during *unpaid* FMLA leave, unless the reason the employee does not return to work is either the continuance, recurrence, or onset of another serious health condition, or other circumstances beyond the employee's control. The employer may require certification of the serious health condition. An employee is deemed to have returned to work if the employee works for at least 30 calendar days. Also, an employee who transfers directly, or within 30 days after FMLA leave, to retirement is deemed to have returned to work. An employer may not recover its share of premiums paid during any kind of paid leave.

If the employer elects to pay the employee's share of health or non-health premiums in order to maintain the coverage during leave (e.g., to enable the employer to reinstate the employee with the same benefits upon return to work), the employer may recover these payments (but only the employee's share) regardless of whether the employee returns to work. If the employee fails to return to work, the amount may be deducted from any amounts owed to the employee, such as unpaid wages, vacation pay, and the like, subject to applicable state and federal laws. Alternatively, the employer may initiate legal action against the employee to recover these costs.

[1] 29 C.F.R. § 825.207.

[2] 29 C.F.R. § 825.209.

[3] 29 C.F.R. §§ 825.209, 825.210.

[4] 29 C.F.R. § 825.800.

[5] 29 C.F.R. § 825.212.

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