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Brain Tumor
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Quick Guide to the Family and Medical Leave Act:

A TOOL FOR THOSE COPING WITH A BRAIN TUMOR DIAGNOSIS



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A brain tumor diagnosis changes everything. While you are trying to process the diagnosis, make treatment decisions, and cope with the recovery process you may find yourself unsure about your rights at work.

This Quick Guide provides you with information and resources to help navigate the Family and Medical Leave Act (FMLA). Many people believe that the FMLA is only useful if you are trying to take a large amount of time off from work at once, but the reality is that it can be a useful tool if you are trying to work through treatment and recovery. FMLA is a federal law that allows eligible employees to take up to a total of 12 weeks of unpaid, job-protected leave, per year:

- For their own serious medical condition
- For the care of a parent, child, or spouse with a serious medical condition
- For the birth of a son or daughter, and for bonding time with that child
- For placement of a son or daughter with the employee for adoption or foster care, and for bonding time with that child
- For any qualifying crisis (such as deployment) arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status
- Or, for any combination of the qualifying reasons above

EMPLOYERS COVERED BY THE FMLA:

- Private employers, that have 50 or more employees during 20 or more workweeks in the current or preceding calendar year
- Public agencies, including a local, state, or federal agency, regardless of the number of employees
- Public or private elementary or secondary schools, regardless of the number of employees

EMPLOYEES ELIGIBLE FOR LEAVE UNDER THE FMLA:

- Work at a location where the employer has at least *50 employees within 75 miles* of the employee's worksite; and
- Have worked for a covered employer for at least *12 months* in the last seven years (note: the 12 months don't have to be consecutive, just cumulative); and
- Have worked at least *1,250 hours* for the employer during the 12 months immediately before the leave.

WHAT HOURS COUNT TOWARDS MEETING THE WORK REQUIREMENT?

The 1,250 hours of work include only those hours actually worked for the employer. Any type of leave, paid or unpaid, will not be included in the calculation.

Work for the employer that occurred more than seven years ago could still be counted, if the break in employment was due to fulfillment of military obligations or governed by a collective bargaining or other written agreement.

WHAT IS A SERIOUS HEALTH CONDITION UNDER THE FMLA?

Serious health conditions are those that make an employee "unable to perform the functions of the position."

Generally, a health condition will be considered serious if it:

- Causes an overnight stay in a hospital, or
- Causes incapacitation for more than three days AND needs continuing medical treatment (i.e., multiple appointments or one appointment and follow-up care or prescriptions), or
- Is chronic or requires ongoing treatment over time (2 or more appointments per year)

WHAT ARE YOU ENTITLED TO UNDER THE FMLA?

Eligible employees are entitled to a total of 12 work weeks of unpaid, leave from work every 12 months. Unused weeks do not roll over to the next 12 month period.

HOW IS THE 12 MONTH PERIOD CALCULATED?

Employers have the right to determine what 12 month period they will use. It can be measured in four ways:

- a calendar year
- the 12-month period measured forward from the date an employee first takes leave
- a “rolling” 12-month period measured backward
- any other “fixed 12 month period.”

You have the right to be notified of how your employer counts the year-long period for FMLA purposes. An employee handbook or policies and procedures document is often a good place to look for this information. If your employer doesn't have a handbook, you may want to ask the person at your job who handles employee benefits (e.g., health insurance, payroll, etc.).

After that 12 month period has passed, as measured by your employer, and you have fulfilled the hour requirements, you are again entitled to another 12 weeks of FMLA leave for the next 12 month period.

WHAT HAPPENS TO YOUR HEALTH INSURANCE IF YOU TAKE TIME OFF UNDER THE FMLA?

If you receive health insurance coverage from your employer, your employer must continue to offer you that coverage, under the same terms and conditions that were in place before taking leave. For example, if your employer pays 50% of your monthly premium while you are working, they must continue to do so while you are on FMLA leave. Your employer is required to inform you how to make your portion of the premium payments while you are out on leave.

WHO ARE THE ELIGIBLE FAMILY MEMBERS FOR WHOM YOU CAN ACT AS A CAREGIVER?

Under the FMLA, you can act as a caregiver for a parent, child, or spouse with a serious medical condition.

A parent is defined under the FMLA as the biological, adoptive, step, or foster parent of an employee or an individual who stood in *loco parentis* (in place of a parent) to the employee when the employee was a child. An individual is considered in *loco parentis* when they take over the day to day responsibilities of caring for or financially supporting a child, even if there is no other biological or legal obligation. The FMLA law does not include parents-in-law in its definition of parent. For example, you are not legally entitled to FMLA leave to care for a mother-in-law.

A child is a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis* of a minor child. A child could be older than 18 if they are “incapable of self-care because of a mental or physical disability.” According to the Department of Labor, cancer qualifies as a disability.

A spouse is a member of any legally married couple, whether opposite-sex or same-sex, or couples married under common law. So long as a common law marriage or same-sex marriage was legal in the state where the marriage took place, the members of the couple are spouses under the FMLA. This is true even if the couple no longer lives in that state.



WHAT TYPES OF ACTIVITIES COUNT AS CAREGIVING?

Caregiving activities are those that “assist” in “the recovery” of a person with a serious health condition. Generally, caregiving activities can include helping with activities of daily living, providing basic medical, hygienic, nutritional or safety needs, and transporting your family member to and from the doctor. Providing psychological comfort to a son or daughter with a serious health condition who is receiving inpatient care or home care qualifies as caregiving under the FMLA. Other caregiving examples include: bathing, feeding, dressing, housework, paperwork, organizing prescription medication, grocery shopping, and assisting in chores.

WHAT IF YOU ARE DEALING WITH YOUR OWN SERIOUS MEDICAL CONDITION AND ACTING AS A CAREGIVER TO SOMEONE WITH A SERIOUS MEDICAL CONDITION?

Generally, an employee is limited to 12 total weeks of FMLA leave per year for a qualifying reason or any combination of qualifying reasons.

The only exception is if the employee is requesting leave to care for a seriously ill or injured military service member. In that circumstance only the employee is entitled to a combined total of 26 weeks of FMLA leave in a year. For example: if you need time off to care for your daughter, an injured soldier, and you also must receive surgery, you can take no more than 12 weeks of FMLA leave in a year for your own serious health condition, and no more than 26 combined weeks total in a year for both reasons.

HOW DO YOU ASK FOR FMLA LEAVE?

You should consult your employee handbook to see if your employer has laid out a process for requesting FMLA leave. The request for leave does not necessarily have to mention the brain tumor diagnosis, but does need to contain enough information so that the employer can determine if you are eligible for the leave under the FMLA. For example, requesting leave because you are undergoing a procedure and recovery under the care of a healthcare provider, rather than specifying that the procedure is for treatment of a brain tumor.

If an employer wants additional information about your leave they must ask for it in writing. You then have to be given at least seven days to provide the additional information.

An employer has five business days to respond to your request for FMLA leave. If your FMLA leave is denied, your employer must provide you with at least one appropriate reason why you do not qualify for FMLA leave.

WHEN SHOULD YOU ASK FOR FMLA LEAVE?

Generally, employees should request FMLA leave as soon as they know they need time off work. If the need for leave is foreseeable, employees must provide their employers with at least 30 days notice. For example, if you know you need surgery in two months, you should request leave within the next month. If the need for leave is unforeseeable, employees must provide their employers with notice “as soon as practicable.” This generally means providing notification to an employer within one to two days of when the need for leave arises. For example, you are experiencing side effects from treatment, go to the emergency room and end up being admitted to the hospital. You suspect that you will miss work for the next few days. You should call your employer as soon as you are well enough to let them know you need FMLA leave.

Note: In these situations, you are still required to follow your employer’s protocol for absences, unless you are receiving emergency medical care. If you do not follow the call-in rules for your employer, your application for FMLA leave may be affected.

WHAT MEDICAL INFORMATION ARE YOU REQUIRED TO SHARE WITH YOUR EMPLOYER TO TAKE FMLA LEAVE?

Your employer is entitled to a medical certification from a healthcare provider to show why you are entitled to FMLA leave. However, your employer doesn't necessarily need to know about the brain tumor diagnosis if you don't want to share that information. If you are concerned about disclosing your diagnosis with your employer, there are options for protecting your privacy. Your employer only needs as much information as necessary to show that you are eligible for FMLA leave. For example, if you are experiencing pain and difficulty swallowing as side effects, the healthcare provider could focus on discussing the pain and difficulty swallowing on the medical certification form, and not include information about your underlying brain tumor diagnosis.

Your employer can ask for this certification as soon as you request FMLA leave, or within five days of the start of an unforeseeable leave. You have at least 15 calendar days to get the certification completed.

An employer is also entitled to a second medical opinion, if the employer doubts the legitimacy of the medical certification. The employer is responsible for any costs incurred for the second opinion.

It is important to know that employers are never entitled to copies of medical records and an employee cannot be forced to sign a medical record release or a waiver in order to receive FMLA leave.

Employers may contact the healthcare provider who completed the medical certification form, so long as the employee's direct supervisor is not the one contacting the healthcare provider. However, the employer is only allowed to ask the healthcare provider for clarification (e.g., what does line 2 say) or authentication (e.g., did you sign the form) of what is on the certification form. The employer is not entitled to additional information than what is included on the certification form.

Be careful of medical certification forms created by the employer. They may request information that they are not necessarily entitled to, such as a specific diagnosis. The U.S. Department of Labor has a model form that

can be used for guidance as to what information an employer is entitled to:

- Certification of Health Care Provider for Employee's Serious Health Condition: <http://trriagecancer.org/FMLACert-Employee>
- Certification of Health Care Provider for Family Member's Serious Health Condition: <http://trriagecancer.org/FMLACert-Family>

Under the FMLA, employers are entitled to the type of practice or specialization of the healthcare provider completing the forms. Therefore, if you prefer to keep the diagnosis confidential, you may not want to have the oncologist complete the form. Under the FMLA, there are multiple healthcare providers who are eligible to complete the form, including primary care physicians or clinical social workers.

WHAT IF MY EMPLOYER SAYS S/HE DOESN'T HAVE TO ALLOW ME TO TAKE FMLA LEAVE?

If you are deemed eligible for FMLA leave, your employer cannot interfere with your right to take the leave.

The employer cannot retaliate against you just because you have attempted to take, or taken FMLA leave. The employer cannot use your FMLA leave against you in decisions related to your job, such as promotion, advancement, or discipline.

IF I DON'T NEED 12 CONSECUTIVE WEEKS OFF, CAN I STILL USE FMLA?

The FMLA allows eligible employees to take FMLA in smaller segments of time, instead of a 12 weeks at once. This is called intermittent leave.

For example, you will need Fridays off for the next few weeks for radiation therapy. That will be considered intermittent leave.

The medical certification for a request for intermittent leave should give a general idea of the potential lengths of the absences and the medical conditions that justify them.

Another option is to place you on a reduced schedule, or simply limit your hours. This reduction in your typical work schedule is called a reduced leave schedule, and would be considered a type of intermittent FMLA leave.

If an employee is taking FMLA leave in installments, instead of taking FMLA leave as one block of time, it is important to remember that the employee cannot disturb the typical operations of the employer. The employee and employer must work together to create a plan for the employee to take the intermittent FMLA leave as medically necessary, without the employer's business being disrupted.

If the employer is concerned that this intermittent leave would disrupt the employer's business operations, then the employer may temporarily place the employee in a different job. This different job must have the same benefits and pay as the employee's previous job, but can be a job that allows for more flexibility in scheduling.

It is important to remember that intermittent leave under the FMLA is still unpaid, job-protected leave.

HOW DOES THE FMLA WORK WITH OTHER TYPES OF LEAVE?

Your employer has the right to require you to substitute the unpaid leave under the FMLA, with paid leave, using your vacation or sick days. Your employer must notify you if this is a requirement.

Even if your employer does not require that you use your paid time off concurrently with FMLA, you have the option to do so.

For example, you have two weeks of paid sick time saved up and you need 8 weeks off for surgery and recovery. Your employer can require that you use your paid sick time during the first two weeks of your time off and then the remaining 6 weeks will be unpaid.

The benefit to having any leave related to your treatment and diagnosis designated as FMLA leave, is that it is job and health insurance protected, meaning that you cannot be let go during that leave.



WHAT CAN YOU EXPECT WHEN YOU RETURN TO WORK FROM FMLA LEAVE?

When you return from FMLA leave your employer must reinstate you to the same or an “equivalent” job.

Generally, an equivalent job is one with the same responsibilities, pay, and benefits as the original job.

When you return from leave, your employer has a right to require that you submit a certification that you are able to return to work, so long as this is part of a policy that would be applied to any similar employee in a similar situation. If at the end of 12 weeks of FMLA leave you are not ready to return to work, you may be able to request additional time off as a reasonable accommodation under the Americans with Disabilities Act (ADA). See ABTA’s Quick Guide on Returning to Work after a Brain Tumor Diagnosis: Accessing Reasonable Accommodations (<http://www.abta.org/secure/returning-to-work-after-a-diagnosis.pdf>)

STATE LEAVE LAWS

Many states have also passed leave laws, some of which offer more protections than the FMLA. For more information about the laws in your state, visit <http://trriagecancer.org/statelaws>.

For more information about the FMLA, visit:
<https://www.dol.gov/whd/fmla/index.htm>

For more information about work and cancer visit:
<http://trriagecancer.org/employment>.

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Visit www.abta.org for brain tumor information on all tumor types and for all age groups.

OUR MISSION

The mission of the American Brain Tumor Association is to advance the understanding and treatment of brain tumors with the goals of improving, extending and, ultimately, saving the lives of those impacted by a brain tumor diagnosis. We do this through interactions and engagements with brain tumor patients and their families, collaborations with allied groups and organizations, and the funding of brain tumor research.

For more information:

 **Call:** 800-886-ABTA (2282)

 **Facebook.com/theABTA**

 **Email:** info@abta.org

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