FMLA and the SMACNA Contractor

The Family and Medical Leave Act (FMLA) provides eligible employees with up to 12 weeks of unpaid, job-protected leave per year. It also requires that their group health insurance benefits be maintained during the leave. SMACNA contractors with 50 or more employees are subject to FMLA’s provisions.

However, because SMACNA’s contractors are also signatory to collective bargaining agreements, questions often arise as to what their obligations are under the law. The following is a brief overview of FMLA’s provisions as well as information on the two most common questions that arise in our industry over FMLA rights: the obligation to continue health coverage; and the right of the employee to be reinstated to their previous position or an equivalent position. It is important to note that the collective bargaining agreement may have additional obligations to those required by FMLA.

Additionally, as with many federal laws, your state or locality may have leave laws that will also need to be considered when developing policies and procedures. It is therefore recommended that contractors consult local legal counsel in developing their companies’ policies.

Overview of FMLA Provisions

**FMLA applies to all companies with 50 or more employees.** These employers must provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons:

- for the birth and care of the newborn child of an employee;
- for placement with the employee of a child for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.

**Employees are eligible for leave if** they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles. Whether an employee has worked the minimum 1,250 hours is determined according to Fair Labor Standards Act (FLSA) principles for determining compensable hours or work. Practically, this requirement means an employee has to have actually had 1250 “on-the-clock hours” not compensated hours such as vacation.

FMLA has special rules for employees who have no fixed worksite, such as construction workers. In those situations, the worksite is the site to which the employee is assigned as their home base, from which their work is assigned, or to which they report. The FMLA regulations provide the following example to illustrate this concept:
If a construction company headquartered in New Jersey opened a construction site in Ohio and set up a mobile trailer on the construction site as the company’s on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their worksite. The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey.

29 C.F.R. § 825.111(a)(2)

Workers can take all 12 weeks at once, in a block or intermittently (an hour here and there) for any of the reasons outlined above. When an employee gives notice that he or she needs medical or family care leave, the employer has the duty to determine (generally within 5 days) if the leave qualifies for FMLA protection. The leave cannot be denied for production needs, a busy operating schedule, or because the employer considers the job too important to allow time off.

Workers must be granted a part-time work schedule if necessary, because of their own health condition or that of a family member. FMLA absences cannot be used as a basis for imposing discipline, giving poor evaluations, or denying advancement. During FMLA leave, group health plan benefits must be maintained as if the worker had continued to work. When the worker returns to work, he or she must be restored to their former position or to an equivalent one with no loss to seniority, salary, or benefits.

FMLA allows employers to designate a paid leave (sick, vacation, workers’ compensation) as an FMLA leave if the leave qualifies under FMLA. When the employee requests FMLA leave or provides notice of an unexpected FMLA absence, the employer must give or mail the employee a written notice designating the leave under FMLA and detailing the employee’s specific rights and obligations.

In 2009, FMLA regulations were updated to implement new military family leave entitlements enacted under the National Defense Authorization Act of 2008. These new requirements obligate a covered employer to grant an eligible employee up to 12 workweeks of unpaid, job-protected leave during any 12-month period for qualifying exigencies that arise when the employee’s spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call or order to covered active duty.

Additionally, a covered employer must grant an eligible employee up to a total of 26 workweeks of unpaid, job-protected leave during a “single 12-month period” to care for a covered servicemember with a serious injury or illness. The employee must be the spouse, son, daughter, parent, or next of kin of the covered servicemember.
The U.S. Department of Labor has an Employer’s Guide to FMLA coverage available on its website with additional details on when FMLA leave is required and the steps an employer should take in approving and/or denying FMLA designated leave.

Continuation of Health Coverage

An employee is entitled to the continuation of group health coverage during FMLA leave on the same terms as if he or she had continued working. An employee cannot be required to use their hour bank to maintain coverage during their leave. Rather, the employer must continue to make adequate premium payments, in the case of an employee covered by a company sponsored plan, or contributions to a multiemployer health and welfare fund, for an employee covered by a collective bargaining agreement whose coverage is provided by a multiemployer health and welfare fund, so as to maintain coverage. This is the case whether employer has properly designed the qualifying leave as FMLA leave or not. The contributions must continue until, the earlier of, the FMLA leave is exhausted, the employer can demonstrate the employee would have been laid off or the employee provides unequivocal notice of intent not to return to work.

For employees covered by a multiemployer health and welfare fund, SMACNA recommends contacting the local health and welfare fund to ascertain the required monthly premium to maintain coverage for your individual plan. This will often be the same hours or monthly contribution as required for owner-operators. It also may be the case that the plan has adopted a provision to continue coverage through pooled contributions, in which case no contributions are required.

If your bargaining unit employees share in the cost of their health and welfare coverage, the employee must continue to make all normal contributions to the cost to those premiums. 29 CFR § 825.211. If an employee’s premium payment is more than 30 days late, the employee’s coverage may be dropped, unless the Fund, or employer, has a policy providing for a longer grace period. 29 CFR § 825.212(a)(1).

An employer’s obligation to maintain health insurance coverage for an employee ceases under FMLA if an employee’s premium payment is more than 30 days late. If coverage lapses because the employee has not made the required premium payments, upon the employee’s return from FMLA leave, the employer must still restore the employee to coverage equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed. 29 CFR §§ 825.212(a)(3), 825.212(c). In such a case, the employee may not be required to meet any qualification requirements imposed by the plan, including any new pre-existing condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement coverage. 29 CFR § 825.212(c). If an employer fails to reinstate the employee’s health insurance coverage upon the employee’s return to work, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained.
as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

To ensure that the employer can meet its responsibilities to provide equivalent group health insurance coverage upon an employee’s return to work from unpaid FMLA leave, it may be necessary that premiums be paid continuously to the Fund in order avoid a lapse of coverage. If the employee fails to pay his or her contributions and the employer elects to maintain such benefits during the leave, at the conclusion of the leave, the employer is entitled to recover the costs incurred for paying the employee’s share of the premiums during that time. These recovery provisions under FMLA permit employers to maintain health insurance coverage at no greater cost than what an employer would otherwise pay if an employee was continuously employed during the entire leave period and ensures that the employee will be reinstated to equivalent benefits upon return to work.

Reinstatement to Equivalent Position

When an employee returns from FMLA protected leave, an employer is required to return the employee to the same job as when they left, or one that is “equivalent” with equivalent pay, benefits, and other terms and conditions of employment.

To be equivalent, the new position generally must:

- involve the same or substantially similar duties, responsibilities, and status;
- include the same general level of skill, effort, responsibility and authority;
- offer identical pay, including equivalent premium pay, overtime and bonus opportunities;
- offer identical benefits (such as life insurance, health insurance, disability insurance, sick leave, vacation, educational benefits, pensions, etc.); and
- offer the same general work schedule and be at the same (or nearby) location.

For field employees, determining an equivalent position may be challenging. Contractors may need to consult with foreman and project managers regarding the type of work being performed at the time leave commenced and the available projects as of the date leave ends.

There are a few situations in which an employee does not have to be reinstated:

1. The employee would have lost their job regardless of taking leave (this may include lay-offs following a project’s completion but contractors should tread carefully when asserting this basis for failing to reinstate to ensure they can demonstrate that this individual was among the class of employees who would certainly been laid off.)
2. The employee cannot perform the essential functions of the job any longer (However, the employee may be able to request reasonable accommodation under the American’s with Disabilities Act (“ADA”) and legal counsel should be consulted before acting.)
3. The employee took FMLA leave based on a fraudulent or fake certification, or
4. The employee was among the highest paid 10% of the company’s employees, called a “key employee,” and reinstatement would cause grievous economic harm to the company.