

## BLOG

# FMLA and Mental Health Conditions: Recent DOL Guidance

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**Jun 1, 2022**

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Just in time for the close of May, which is Mental Health Awareness month, the Department of Labor (DOL) released guidance in the form of a [Fact Sheet](#) and [FAQs](#) detailing certain FMLA-covered situations when an employee's or their family member's mental health condition prevents them from working.

The DOL released this guidance to remind employees that they may take job-protected leave under the Family Medical Leave Act (FMLA) for serious mental health conditions.

## Background

FMLA leave is available to:

- **Eligible Employees:** Employees are eligible if they work for a covered employer for at least 12 months, have at least 1,250 hours of service for the employer during the 12 months before the leave, and work at a location where the employer has at least 50 employees within 75 miles.
- **Covered Employers:** Private employers are covered employers under the FMLA if they employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers or successors in interest to another covered employer.

An eligible employee may take FMLA leave for their own serious health condition or to care for a spouse, child or parent because of their serious health condition. A serious health condition can include a mental health condition.

Mental and physical health conditions are considered serious health conditions under the FMLA if they require inpatient care or continuing treatment by a healthcare provider, such as an overnight stay in a treatment center for addiction or continuing treatment by a clinical psychologist.

A serious mental health condition that requires continuing treatment by a health care provider includes:

- Conditions that incapacitate an individual for more than three consecutive days and require ongoing medical treatment, either multiple appointments with a health care provider, including a psychiatrist, clinical psychologist, or clinical social worker, or a single appointment and follow-up care (e.g., prescription medication, outpatient rehabilitation counseling, or behavioral therapy); and
- Chronic conditions (e.g., anxiety, depression, or dissociative disorders) that cause occasional periods

when an individual is incapacitated and require treatment by a health care provider at least twice a year.

### **Recent DOL Guidance**

The DOL's Wage and Hour Division issued guidance by way of a Fact Sheet and FAQs on May 25, 2022 to provide clarification to eligible employees and covered employers with respect to FMLA leave for serious mental health conditions.

This recent guidance provides several examples of FMLA-triggering circumstances including:

- *Employee's mental health condition* - Monthly treatment visits and therapy sessions to manage symptoms of an employee's serious mental health condition, such as severe anxiety or anorexia nervosa.
- *Family member with a mental health condition* - Traveling to an inpatient facility and attending a care meeting for an employee's spouse completing an inpatient substance abuse treatment program.
- *Adult child with a mental health condition* - Caring for an adult child recently released from an inpatient treatment program for a mental health condition, provided that the adult child is unable to work or go to school and needs help with routine daily activities as a result of the condition.
- *Military caregiver leave for a mental health condition* - Caring for a servicemember with a mental health condition incurred in the line of duty, such as post-traumatic stress disorder or a traumatic brain injury, or a pre-existing mental health condition aggravated while on active duty.

### **Retaliation**

Employers are prohibited from discriminating or retaliating against employees for taking FMLA leave. Examples include refusing to grant FMLA leave, disclosing or threatening to disclose information about an employee's or an employee's family member's mental health condition in order to discourage them from taking FMLA leave, treating an employee's use of FMLA leave as a negative factor in employment actions (e.g., hiring, promotions, or disciplinary actions), and counting FMLA leave against employees in points-based attendance policies.

### **Confidentiality**

Under the FMLA, employers must keep employee medical records confidential and maintain them in separate files from other employment records. Employers must also maintain an employee's records with confidentiality as required under other laws, such as the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA), to the extent those laws also apply.

Supervisors and managers may be informed of an employee's need to be away from work, or if an employee needs work duty restrictions or accommodations.

As the last two years of pandemic life compelled employers to rethink their approach to mental health

issues among their workforces, this recent DOL guidance underscores the importance of complying with the FMLA when eligible employees take leave for serious mental health conditions.

Reach out to your Risk Strategies account team with any additional questions.

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