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Under the federal Family and Medical Leave Act (FMLA), covered employers must allow eligible employees to take 12 weeks of unpaid job-protected leave per each 12-month period for qualifying family and medical reasons. FMLA regulations allow employers to choose one of four methods for determining the 12-month period:

1. The calendar year;
2. Any fixed 12-month leave year;
3. The 12-month period measured forward from the date any employee's first FMLA leave begins; or
4. A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

This Compliance Overview explains the different types of FMLA years available to employers, along with the benefits and disadvantages of each.

The FMLA Year

The FMLA requires covered employers to provide eligible employees with up to 12 weeks of unpaid, job-protected time off per 12-month period for various reasons related to the health and well-being of the employee or their spouse, child or parent. The FMLA also allows eligible employees to take up to 26 weeks of unpaid, job-protected leave during a single 12-month period for military caregiver leave. Military caregiver leave permits the eligible employee to care for an ill or injured service member who is the employee's spouse, son, daughter, parent or next of kin.

The FMLA regulations provide that, except for military caregiver leave, employers may select one of four types of 12-month periods, discussed below.

1. Calendar Year

This option is straightforward. It is easy for employers to administer and employees to understand, with employees' 12-week leave entitlement becoming available on Jan. 1. After the 12 weeks of leave are used up, the employee is not entitled to any more FMLA leave until the following Jan. 1.

Despite its clarity, the calendar-year option is somewhat disfavored by employers because it can allow an employee to take as much as six months of continuous leave, depending on the timing of the employee's FMLA absence. This can happen if an employee takes 12 weeks of leave beginning Oct. 1 and then extends the leave for another 12 weeks starting Jan. 1 of the new year. The employee is within their rights to do this under the calendar-year method as long as they continue to experience a qualifying reason for FMLA leave.

This kind of extended leave over two FMLA years is referred to as stacking, and many employers prefer to avoid it despite the administrative ease offered by the calendar-year choice.

2. Fixed, 12-month Year

The second option offered by the regulations is any fixed 12-month leave year, such as:

- A fiscal year;
- A year required by state law; or
- A year starting on an employee's anniversary date.

Like the calendar-year option, this method is easy to administer and understand. It is also similar to the calendar-year option in that it allows employees to stack leave, but here, the stacking would span the end and beginning dates of each particular employee's FMLA year, which may vary depending on what type of "year" the employer chooses.

3. 12-month Period Measured Forward From Start of Leave

Under this method, an employee's 12-month period begins on the first day they take FMLA leave. The next 12-month period begins the first time they take FMLA leave after the completion of their previous 12-month period. This option offers the advantage of aligning with the FMLA year employers must use for military caregiver leave. In that sense, it is easier to administer—at least for employers with employees taking FMLA to care for a service member.

On the other hand, like the first two methods, this method allows for a lengthy leave spanning two 12-month periods. Unlike the first two options, however, the long leave in this instance could not consist of the full 24 weeks of FMLA leave because, with this "measured-forward" choice, 12 months must pass from the date the employee first takes FMLA (the first day of the first leave year) until the first day of the second leave year.

Nonetheless, an employee could take one or two days of FMLA starting Jan. 1, then not take leave again until, say, a few days into October, when they begin an extended leave that carries through until the end of December. At that point, the employee could begin a new FMLA year with a new 12-week FMLA allotment that is available for use for as long as they have a qualifying reason for leave.

4. "Rolling" 12-month Period Measured Backward

The final option employers are permitted to choose for measuring the FMLA year is a "rolling" 12-month period, measured backward from the date an employee uses any FMLA leave. This is also commonly referred to as the "look-back" method. While complicated to understand and track, this method prevents the extended FMLA leaves that are possible under the other alternatives, making it a popular choice among employers.

Under the look-back method, each time an employee uses FMLA leave, the employer "looks back" 12 months from the first day of the leave and measures how much FMLA leave the employee has used in that period. The employer subtracts that amount from the employee's 12-week total annual FMLA allotment, and whatever is left is the employee's available remaining FMLA entitlement.

The U.S. Department of Labor provides an example to show how this works, featuring a hypothetical employee named Patricia, who wants to take FMLA leave beginning Nov. 1:

> *When Patricia begins FMLA leave on Nov. 1, her available FMLA leave is 12 workweeks less any FMLA leave she used in the previous 12 months. [...] Because Patricia's FMLA leave will begin Nov. 1, the 12-month look-back period is from Nov. 2 of the previous year through Nov. 1. During the 12-month look-back period, Patricia used four workweeks of leave beginning Jan. 1, four workweeks beginning March 1, and three workweeks beginning June 1. Therefore, on Nov. 1, she has one week of FMLA leave available. If Patricia uses that week in November, she can next take FMLA leave beginning Jan. 1 as the days of her previous January leave "roll off" the leave year.*

Another way of describing the timeline under the look-back method is that employees regain their FMLA leave one year from the time it was used. In the example above, Patricia regains her Jan. 1 leave on Jan. 1 of the following year, her Jan. 2 leave on Jan. 2 of the following year, and so on. The regulations note that employers using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months.

Additional Requirements

One Method for All Employees

In general, employers must use the same 12-month FMLA period for all their employees. The only exception is when a multistate employer has eligible employees in a state that requires a specific method for the FMLA leave period. In that case, the employer may choose the state-required method for those employees and use a different method for employees in other states. The regulations require employers that fail to select one of the four methods discussed above to use the 12-month period most beneficial to the employee.

Notice

Employers must inform eligible employees of the 12-month period they have chosen in writing in the required FMLA Rights and Responsibilities Notice.

Changing the Method

Employers may change their method of measuring the 12-month period to one of the other permitted alternatives, but they must give employees at least 60 days' notice of the change, and the transition must allow employees to retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to them.

Tips for Employers

In choosing an FMLA year, employers must weigh the pros and cons of each of the four options permitted. Employers that value ease of communication and administration should consider whether their goals are met best by the first two options: the calendar year and the alternative fixed calendar year. Employers that are likely to have employees taking military caregiver leave might consider the period measured from the start of leave. Finally, employers concerned by the potential of employees taking lengthy, continuous FMLA leave will probably be most satisfied with the fourth option, the rolling 12-month period measured backward.

Regardless of which option they choose, employers should ensure they apply the same method consistently and uniformly to all employees, and they should remember to include their chosen method in the FMLA Rights and Responsibilities Notice. Employers should also be aware that if they fail to establish a method of choice, they must use whichever method is most beneficial to employees.

LINKS AND RESOURCES

- FMLA regulations on the 12-month period
- U.S. Department of Labor Fact Sheet about the FMLA 12-month period
- FMLA Rights and Responsibilities Notice

Provided to you by Salus Group

This information is not meant to be legal advice and is for consultative purposes only. Please contact Valerie Bruce Hovland, Salus Group's V.P. of Compliance at vbrucehovland@thesalusgroup.com if you need additional information.