

LEGAL UPDATE

Interaction Between FMLA and Mental Health Conditions

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The Department of Labor (DOL) has released Fact Sheet 280 (Fact Sheet) and a series of Frequently Asked Questions (FAQs) with regard to the interplay between the Family and Medical Leave Act (FMLA) and mental health conditions. To the extent that a mental health condition allows an employee to qualify for FMLA leave, 401(k) plan administrators and advisors need to be aware of the consequences under a 401(k) plan for a participant on unpaid FMLA leave. If the employee has an outstanding loan under the plan, loan repayments can be suspended, although the suspensions should not cause the period for repayment of the loan to exceed five years. Also, a plan is not required to take into account any unpaid leaves of absence for purposes of eligibility, vesting, or benefit accrual—for example, a 1,000 hour requirement to receive an allocation—although if a plan has a requirement that a participant be employed on the last day of a plan year to receive an allocation, a participant on unpaid FMLA leave on such date will be entitled to a contribution. Finally, during a participant's period of unpaid FMLA absence, his or her ability to make deferrals will be suspended.

Law. Under the FMLA, certain employers must provide eligible employees with up to 12 weeks of unpaid leave during a 12-month period: for their own serious health condition; to care for the serious health condition of a spouse, child under 18, or parent; for childbirth, adoption, or placement of a child; and for military caregiver leave and military exigency leave. A parent may also use FMLA leave to care for a child 18 years of age or older who is in need of care if the child is incapable of self-care because of a mental or physical disability.

The FMLA defines a “serious health condition” as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider. A serious health condition can include a mental health condition.

Fact Sheet 280. The Fact Sheet states that some mental health conditions may satisfy both the definition of “*serious health condition*” and the definition of “*disability*,” even though the statutory tests are different.

DOL recognizes that under the FMLA, a *disability* is a mental or physical impairment that substantially limits one or more of the major life activities of an individual. To define these terms and determine if a condition is a disability, the FMLA uses the Equal Employment Opportunity

Commission's (EEOC) regulations under the Americans with Disabilities Act. According to the EEOC, conditions that “should easily be concluded” to be “substantially limiting” include major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

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.

FAQs. In the FAQs, DOL states that, “A chronic condition whether physical or mental (*e.g.*, rheumatoid arthritis, anxiety, dissociative disorders) that may cause occasional periods when an individual is unable to work is a qualifying serious health condition if it requires treatment by a health care provider at least twice a year and recurs over an extended period of time.” The same criteria would apply to someone being treated for anorexia nervosa.

An example provided in the FAQs confirms that an employee may take FMLA leave when her 24-year-old daughter is released from inpatient care but is unable to go to work or school and needs help with basic household chores.

In another example, an employee is entitled to use FMLA leave to attend a family counseling session for a family member who is in an inpatient treatment program for substance abuse. Care could include participating in the family member's medical treatment program or attending a care conference with health care providers.

Similarly, an employee may use military caregiver leave under the FMLA to care for a relative who is a covered veteran undergoing treatment, recuperation, or therapy for a serious injury, or illness, including a mental health condition. A serious injury or illness is one that was incurred in the line of duty when the veteran was on active duty in the Armed Forces, including any injury or illness that resulted from the aggravation

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of a condition that existed before the veteran's active duty service. The condition may manifest itself during active duty or may develop after the service member becomes a veteran, as may be the case with post-traumatic stress disorder (or PTSD), a traumatic brain injury, or depression, for example.

[Fact Sheet 280 can be found at: www.dol.gov/agencies/whd/fact-sheets/280-mental-health.

The FAQs can be found at: www.dol.gov/agencies/whd/fmla/mental-health.]

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