

Family and Medical Leave

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Basic Overview of the FMLA

The Family and Medical Leave Act (FMLA) was passed by Congress to provide workers with job protection and continued health care benefits in cases of family or medical emergency. This topic includes an overview of the requirements outlined in federal regulations. A detailed discussion of the requirements is available in [The Administrator's Guide to Managing Leaves and Absences](#) published by HR Services.

During FMLA leave, districts must maintain employee health care benefits and contributions at the same level provided before leave began. At the end of leave, employees are entitled to return to the position held prior to leave or an equivalent position and retain all benefits in place before leave was taken.

When an employee returns to work, his or her benefits must be reinstated to the same levels that were in place prior to taking leave. This includes family and dependent coverage under group health insurance. An employee cannot be subject to any qualifying period, physical examination, or exclusions of pre-existing conditions.

Concurrent Use of Leave. Family and medical leave (FML) is unpaid leave. However, the district can require the employee to use paid leave concurrently. If this is not defined in policy, it is the employee's choice whether to use paid leave or not. Compensatory time (comp time) used for an FMLA-qualifying event may be counted against an employee's FML entitlement. The use of comp time may be at the employee's request or required by the district.

Employees must comply with the district's paid leave reporting requirements and policies in order to utilize paid leave concurrently with FML. Use of paid leave may be denied if the employee fails to comply. However, the unpaid FML must be granted if the FMLA requirements are met. FML can also run concurrently with other unpaid leave (e.g., temporary disability leave, absence related to a workers' compensation injury).

Family and Medical Leave**Eligibility for Leave**

All school districts regardless of size are required to comply with the FMLA requirements, even districts that do not have any eligible employees. To be eligible for leave under the FMLA, an employee must meet **all** of the following criteria:

- Employed at a site where at least 50 employees work within a 75 mile radius
- Employed by the district for at least 12 months (the 12 months need not be consecutive)
- Worked 1,250 hours in the preceding 12 months

Many district employees do not meet all of these requirements and may never be eligible for FML. This includes employees of small rural districts with less than 50 employees and 10-month employees who work less than seven hours a day.

Qualifying Events

Districts are required to grant eligible employees unpaid, job-protected FML for the following qualifying events:

- An employee's own serious health condition
- To care for a spouse, parent, or child with a serious health condition
- Birth of a child, to care for a healthy newborn, or placement of a child for adoption or foster care
 - Both parents of the child are entitled to use leave to stay home with a healthy newborn or newly placed child.
 - Leave following the birth or placement of a child may be taken only during the first 12 months following the event.
- A qualifying exigency resulting from a covered family member's active military duty or call to active duty status
- To care for a family member who is a covered U.S. service member or veteran who was injured in the line of duty (also referred to as military caregiver leave)

Eligible employees may take up to 12 weeks of unpaid leave for the first four reasons listed above in the 12-month period designated by local policy. Military caregiver leave may be taken for up to 26 weeks in a single 12-month period.

12-Month Periods. The 12-month periods used to determine months employed, hours worked, and when the 12 weeks or 26 weeks of leave entitlement are available are all different. The following summarizes the differences:

- Months Employed—A period totaling 12-months that need not be consecutive or continuous
- Hours Worked—A consecutive 12-month period immediately preceding the first day the employee takes leave

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- Duration of FML—12 weeks during a consecutive 12-month period defined by local policy
- Duration of Military Caregiver Leave—26 weeks during a consecutive 12-month period beginning on the first day of requested leave and ending 12 months later

District Obligations

Districts are required to post notices about the FMLA, advise employees of eligibility for FML coverage, and designate leave time as FMLA qualifying.

General Notice Requirements. All districts—even those with no eligible employees—are required to post a notice in the workplace where it can be easily seen by employees and applicants. When a significant portion of employees in the district are not literate in English, the notice must also be provided in a language in which the employees are literate. (29 C.F.R. § 825.300(a)) The required posting in English and Spanish is included on the HR Services [Work-Site Postings for Texas Public Employers](#) or is available on the Department of Labor (DOL) Web site (<http://www.dol.gov/whd/>).

Districts with eligible employees must also provide the notice to each employee by including it in the employee handbook or other written documents describing employee benefits or leave rights. If a handbook or other leave benefit document does not exist, the notice must be distributed to each new employee upon hire. A sample form, [Employee Rights & Responsibilities Under the FMLA](#) is available in the *HR Library*.

Notice of Eligibility and Rights & Responsibilities. A district is required to notify an employee of his or her eligibility for FML within five business days of the date the district first becomes aware of the employee's need for leave. (29 C.F.R. § 825.300(b)) The notice must state whether or not the employee is eligible. If the employee is not eligible, at least one reason, as indicated on the form, must be given. The district is required to include the [Rights & Responsibilities](#) notice each time the [notice of eligibility](#) is provided to the employee. (29 C.F.R. § 825.300(c))

All absences for the same qualifying reason in the applicable 12-month period are considered a single leave, and it is unnecessary to requalify the employee or send additional notices unless the employee's eligibility status changes. If the employee requests leave in the same 12-month period for a different qualifying reason, eligibility must be newly determined and the notice sent. Districts that use a fixed family and medical leave year as defined in district policy, will need to requalify and send notices to employees who remain out on FML when the year ends and another begins, even if the reason for leave remains the same.

If the information originally included in the [Notice of Eligibility and Rights & Responsibilities](#) changes during the period of leave, an updated notice which references the prior notice must be sent to the employee within five business days of the change. For example, if the initial period of leave was paid and the new leave period would be unpaid, the district may need to notify the employee about making arrangements for paying his or her share of health insurance premiums.

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A sample [*Notice of Eligibility and Rights & Responsibilities*](#) form is available in the *HR Library* or on the Department of Labor (DOL) Web site (<http://www.dol.gov/whd/fmla/index.htm>).

Designation Notice. The district, not the employee, must designate leave as FML. The district is required to send a designation notice to the employee within five business days of receiving sufficient information to determine whether the absence qualifies as FML (e.g., medical certification or other requested documentation). However, if the district has sufficient information to designate the leave as FML at the time the request is made, the notice can be provided simultaneously with the [*Notice of Eligibility and Rights & Responsibilities*](#).

If fitness-for-duty certification addressing the employee's ability to perform the essential functions of the job is required, the district must include notification at the time leave is designated and provide the employee with a copy of the essential job functions (e.g., current job description).

Should changes to the employee's circumstances impact the information included on the designation notice, an updated notice must be sent to the employee within five business days of learning of the change. For example, if the original notice states that six weeks will be counted against the employee's leave time and complications extend that to eight weeks, the designation notice will need to be updated accordingly.

A sample [*Designation Notice*](#) is included in the *HR Library* and is also available on the Department of Labor (DOL) Web site (<http://www.dol.gov/whd/forms/WH-382.pdf>).

Retroactive Designation of Leave. A district may retroactively designate leave as FML as long as doing so does not cause harm to the employee. An employee and the district may also mutually agree to retroactively designate an absence as FMLA-protected. The same procedures used to provide notice to the employee under standard circumstances apply when leave is designated retroactively.

Return to Work Requirements. Employees returning to work following FML must be able to perform the essential functions of their job. It is important to distinguish between an employee who is unable to perform the essential functions of the job and an employee who is released to come back to work on a part-time basis.

If the employee is released to come back to work on a part-time basis and is able to perform all of the essential functions of the job, the FMLA requires the district to reinstate the employee until the employee's 12-week entitlement is exhausted. Leave during this period is counted as intermittent or reduced-schedule leave. For example, an employee who has been out for eight weeks submits a medical certification stating that the employee is able to perform all of the essential job functions and can return to work on a half-day basis for two weeks. The employee would need to be reinstated to a half-day schedule for two weeks. If the employee returns to a full-time schedule at the end of the two weeks, the employee would have used a total of nine weeks of FML.

Family and Medical Leave**Employee Obligations**

Employees are responsible for notifying the district of the need for leave and explaining the reasons for leave, so the district can determine if the request qualifies under the FMLA. If the employee fails to do so, leave can be delayed or denied. Employees are also expected to provide sufficient information regarding the anticipated duration of the leave, respond to the employer's questions to determine if the absence is FMLA qualifying, and provide required certification.

It is important to note that the employee does not have to specifically mention family and medical leave or complete a form requesting FML to receive protection under the law. The employee must only notify the district of the need for leave. (29 C.F.R. § 825.301 (b)) Telling a supervisor of the need and reason for the absence is considered providing the district with notice.

Notice of Leave. The amount of advance notice that an employee must give the district depends on whether or not leave is foreseeable. For example, if leave is for the birth of a child or planned medical treatment, it is considered foreseeable and employees must provide the district with notice 30 days before the leave is scheduled to begin. (29 C.F.R. § 825.302)

In the event of a medical emergency or circumstance where it is not possible to anticipate the need for leave, the employee must notify the district as soon as possible and practical. Employees are expected to follow the district's standard policy for reporting absences except in unusual circumstances (e.g., the employee is unable to call due to his or her medical condition). Notice from a spokesperson representing the employee is acceptable when the employee's health condition prevents him or her from providing notice personally. (29 C.F.R. § 825.303)

If the employee fails to follow standard procedures for notifying the district of an absence, such as calling in sick, FML can be delayed. The length of the delay would be determined on a case by case basis. (29 C.F.R. § 825.304)

Using Family and Medical Leave

Eligible employees are entitled to up to 12 weeks of family and medical leave per year as defined by local policy or in the case of military caregiver leave, 26 weeks in a single 12-month period. Leave may be taken in the following ways:

- All at once (continuous)
- Intermittently (i.e., in blocks of time)
- On a reduced schedule (i.e., reduced number of hours per week or day)

The length of leave or the manner in which it is taken is dependent on the reason the leave is needed. The counting of leave against an employee's entitlement must reflect the time that he or she is absent from the job.

Continuous Basis. When leave is taken in a continuous block of time (e.g., weeks), the entire week that includes a brief holiday break such as Labor Day or Thanksgiving can be counted against the employee's FML entitlement. However, when district activities temporarily cease or

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close down for one or more weeks, the time during the break does not count against the employee's FML entitlement (i.e., winter break, spring break, summer).

Intermittent and Reduced Schedule Leave. The reason for the leave determines whether the district is required to grant the request for intermittent or reduced-schedule leave. The district is required to grant intermittent leave or leave taken on a reduced schedule in the following situations:

- When there is a need for continuing medical treatment
- For recovery from medical treatment or a serious health condition
- To provide care or psychological comfort to an immediate family member with a serious health condition
- To provide care for a family member who is a covered service member with a serious injury or illness that resulted from active military duty
- For a qualifying exigency resulting from a family member's covered active military duty or call to covered active military duty

Intermittent leave for the birth or placement of a child for adoption or foster care is optional. The district's option to allow intermittent leave following the birth or placement of a child is specified in local policy.

Intermittent leave may include leave of periods from an hour to several weeks. During intermittent leave, the leave must be counted based on the smallest time increment a district uses to record other forms of leave, as long as it is one hour or less. Districts that require employees to use leave in half- or whole-day increments are prohibited from reducing FML entitlement by more than the actual time needed when intermittent family and medical leave is used. The district cannot require the employee to take more FML than necessary.

Rules for Instructional Employees

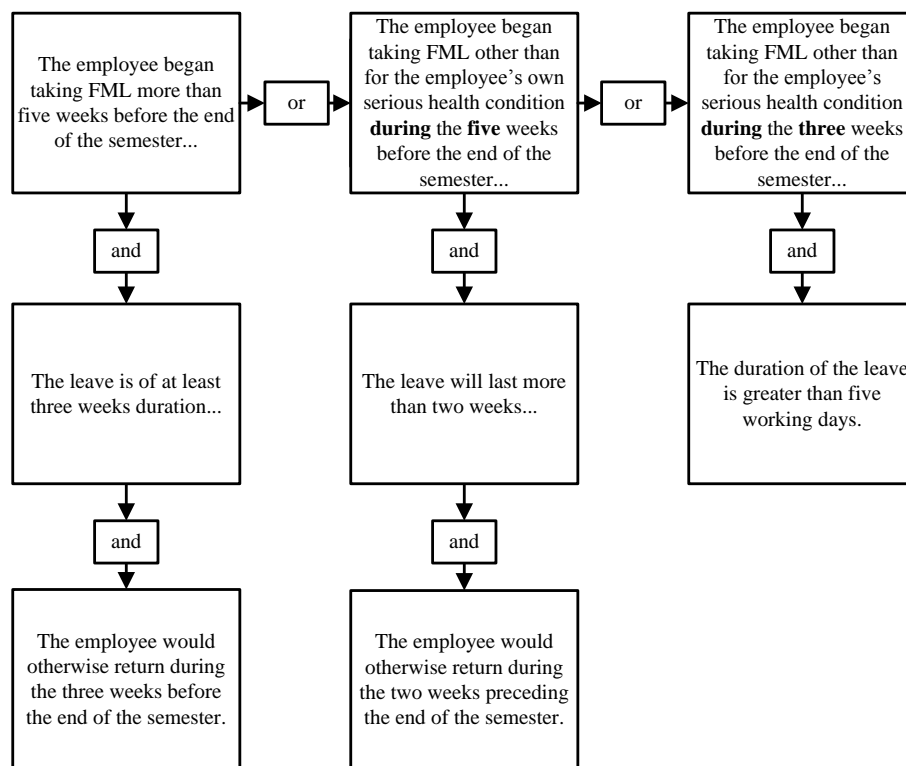
Employees who provide direct instruction to students can be subject to certain restrictions that affect the use of intermittent leave, leave on a reduced schedule, and leave near the end of a semester. Instructional employees are defined as any employee whose primary job is to teach and instruct students in a class, small group, or individual setting. The definition includes teachers, athletic coaches, driving instructors, and special education assistants such as interpreters. It does not include teacher assistants or aides whose primary duty is not teaching, counselors, psychologists, curriculum specialists, or other professional support personnel.

Intermittent or Reduced-Schedule Leave. Instructional employees who request leave on an intermittent or reduced-schedule basis for their own care or medical treatment or that of a family member who would be absent at least 20 percent of the days over the period of the leave, can be required to choose between the following:

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- Taking leave for the duration of the planned treatment or care (i.e., a block of time)
- Temporarily transferring to an alternative position that better accommodates the intermittent or reduced-schedule leave
 - When a transfer is chosen, it must be to a position for which the employee is qualified and provides the employee with equivalent pay and benefits.
 - Instructional employees who would be absent 20 percent or less during the leave period cannot be subject to transfer

Leave at the End of the Semester. In certain circumstances, instructional employees can be required to continue on family and medical leave until the end of the semester. Additional time off required by the district is not counted against his or her FML entitlement, but the district must maintain the employee’s group health insurance and reinstate the employee at the end of the leave. The chart below illustrates the applicability of these provisions:



Key Employees

A key employee can be denied FMLA reinstatement rights if restoration to employment will cause substantial and grievous economic injury to the district. However, the employee would still be entitled to all other FMLA rights, including payment of health insurance premiums. Other FMLA rights would continue until the key employee gives notice that he or she no longer wishes

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to return to work or the district actually denies reinstatement at the end of the leave period. It is important to note that any cost to the district because of the absence of the employee cannot be considered in determining “grievous economic injury.” (29 C.F.R. § 825.218)

A key employee is an employee who is eligible for FML, and who is among the highest paid 10 percent of all district employees. A determination should be made whether or not an employee is a key employee at the time FML is requested. Once the determination is made, the district must notify the employee, either in person or by certified mail, and explain the basis for making the determination. (29 C.F.R. § 825.217)

A key employee is still entitled to request reinstatement at the end of the leave period. Should he or she do so, the district must reevaluate whether there will be “substantial and grievous economic injury,” and once again, notify the employee in writing. The district cannot recover any costs for its share of health insurance premiums paid during the time the key employee was on family and medical leave.

Qualifying Exigency Leave

Eligible employees may take up to 12 weeks of leave to address certain urgent situations that result from a qualifying military member’s covered active duty or call to covered active duty status. Qualifying military members include the employee’s spouse, son, daughter, or parent. Covered active duty for members of the Regular Armed Forces means duty during the deployment to a foreign country. In the case of the reserve components of the armed forces (Reserves, National Guard, or Retired Armed Forces or Reserves), covered active duty means duty during the service member’s deployment to a foreign country under a federal call or order to active duty in support of a contingency operation.

Employees must meet the same eligibility tests used for all other reasons for family and medical leave (i.e., 12 months employed, 1,250 hours worked, and 50 employees). Leave for a qualifying exigency is counted against the 12 workweeks of leave available for other FML-qualifying reasons and falls within the FMLA year established by district policy. Leave is tracked in hours or days in the same manner used for tracking other forms of intermittent leave.

For purposes of qualifying exigency leave, the FMLA uses the following definitions:

- Spouse—Husband or wife as recognized under state law. This definition includes an employee in a same-sex marriage or a common law marriage if the marriage was entered into in a state that recognizes such marriage or, if entered into outside any state, is valid in the place where entered into and could have been entered into in at least one state.
- Parent—Biological, adoptive, step or foster parent, or individual who stood in loco parentis to the employee.
- Son or Daughter on Covered Active Duty or Call to Covered Active Duty Status—Biological, adopted, foster child, stepchild, legal ward, or child for whom the employee stood loco parentis and who is of any age.

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- Child of a Covered Military Member—Biological, adopted, foster child, stepchild, legal ward, or child for whom the covered military member stands in loco parentis who is under the age of 18 or 18 or older and incapable of self-care because of a mental or physical disability at the time that leave begins.

Qualifying Reasons for Leave. Except in the cases of financial and legal arrangements and post-deployment activities, leave for qualifying exigencies may only be taken while the employee's family member is on active duty or call to active duty status. The reason for qualifying exigency leave must result from the deployment of the covered military member. Employees may take leave for the following qualifying exigencies:

- Short-notice deployment
- Military events and related activities
- Child care and school activities
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities
- Parental care
- Additional activities that the district and employee agree qualify as an exigency

Certification. A district may require the employee to provide documentation to prove family relationship and to certify the need for qualifying exigency leave. An employee may be required to provide the following:

- [*Certification of Qualifying Exigency for Military Family Leave \(Family and Medical Leave Act\)*](#)
- Copy of the covered military member's active duty orders or other documentation issued by the military
 - The documentation presented to certify the first request for leave remains valid for subsequent requests until the document(s) expire. New documentation can be required only if new orders are issued or if leave is requested for a qualifying exigency because of a different covered military member's deployment.
- Notice identifying the type of qualifying exigency and supporting documentation for each need for leave.

If the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting to verify the meeting or appointment schedule and the nature of the meeting. A copy of the military member's rest and recuperation orders or other documentation may be requested when the qualifying exigency is rest and recuperation leave. The district may also contact an appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or call to active

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duty status. Additional information may not be requested and the employee's permission is not required.

Military Caregiver Leave

Entitlement. An eligible employee is entitled to take up to 26 weeks of leave in a single 12-month period to care for a covered service member with a serious injury or illness sustained or aggravated by service in the line of duty while on active duty. If the family member is a veteran, the injury or illness must manifest itself before or within five years after the individual leaves service. For the purpose of military caregiver leave, the employee must be the spouse, son or daughter, parent, or next of kin of the covered service member.

Eligibility. Employees must meet the same eligibility tests (i.e., 12 months of employment, 1,250 hours of work, 50 employees) used for all other reasons for family and medical leave. In addition, employees must have a qualifying family member who meets one of the following criteria:

- Be current member of the Armed Forces including National Guard or Reserves and who is undergoing medical treatment, recuperation, or therapy for a serious illness or injury; is in outpatient status; or on the temporary disability retired list.
- Be a covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious illness or injury.

Definition of Family. The following definitions of family members for military caregiver leave purposes are different than those used for standard FMLA:

- Spouse—Husband or wife as recognized under state law. This definition includes an employee in a same-sex marriage or a common law marriage if the marriage was entered into in a state that recognizes such marriage or, if entered into outside any state, is valid in the place where entered into and could have been entered into in at least one state.
- Parent—Biological, adoptive, step or foster parent, or individual who stood in loco parentis to the employee.
- Son or Daughter—Biological, adopted, foster child, stepchild, legal ward, or child for whom the covered service member stood in loco parentis. The child may be of any age.
- Next of Kin—Nearest blood relative other than the service member's spouse, parent, or child in the following priority order:
 - Blood relative with a court decree or statutory legal custody of the service member
 - Blood relative designated by the service member as a caregiver under the FMLA
 - Brothers and sisters
 - Grandparents
 - Aunts and uncles



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- First cousins

Single 12-month Period. The definition of a single 12-month period is unique to military caregiver leave. It begins on the first day the eligible employee takes FML to care for a covered service member and ends 12 months after that date, regardless of the method used by the district to determine the 12 weeks of leave entitlement for other FMLA-qualifying reasons. If an employee doesn't use all of the 26 workweeks of leave entitlement to care for the covered service member in the single 12-month period, any remaining time is forfeited.

An eligible employee may be entitled to more than one period of 26 weeks of leave if the leave is to care for a different covered service member or to care for the same service member with a subsequent serious injury or illness.

No more than a total of 26 weeks of leave, including the combination of military caregiver leave and any leave for other FMLA-qualifying reasons, may be taken within any single 12 month period. When both spouses work for the district, leave may be limited to a combined total of 26 weeks during the single 12-month period.

FMLA and Other Laws

It is important to evaluate each occurrence of employee leave to determine if an individual is entitled to protection or rights under more than one law. In some cases, there is overlap between FMLA, ADA, and the Texas Workers' Compensation Act (TWCA), temporary disability leave, and assault leave.

ADA and FMLA. Serious health conditions that qualify for leave under FMLA may also be considered a disability under ADA. When this occurs, the district may be required to consider reasonable accommodation. Reasonable accommodation may include providing additional unpaid leave or reassignment to a vacant position for which the employee is qualified upon return to work (see "[Reasonable Accommodations](#)" in the *HR Library*). It is important to note that the ADA generally does not cover health conditions that are temporary.

Workers' Compensation and FMLA. Employees absent because of work-related injuries or illnesses who receive workers' compensation benefits may also be eligible for family and medical leave. These may run concurrently as required by district policy. Proper eligibility notice and district designation of FML must be provided.

Employees who are on FML as a result of a work-related injury and receiving workers' compensation benefits may choose to use accumulated sick or personal leave. See [Administration of Leave Benefits](#) for additional information on workers' compensation benefits and use of paid leave.

The FMLA does not prohibit an employer from offering or an employee from accepting a modified assignment while recovering from a serious health condition. Acceptance must be voluntary and uncoerced and cannot be a condition of employment. The time spent performing

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the modified assignment does not count toward the employee's FML entitlement, and the employee's right to restoration to the same or equivalent position remains in effect as long as the employee is in the modified assignment. If the employee's assignment is not limited in duration, the employee's right to restoration expires at the end of the 12-month applicable leave.

The district may impose time limits as part of the offer of a modified duty assignment. If the employee is unable to return to the same or equivalent position at the conclusion of that period of time, the employee may use the remainder of his or her FML. If the employee is unable to resume work after exhausting his or her 12 weeks of leave, the employer's obligation to restore the employee to the original or equivalent position ceases.

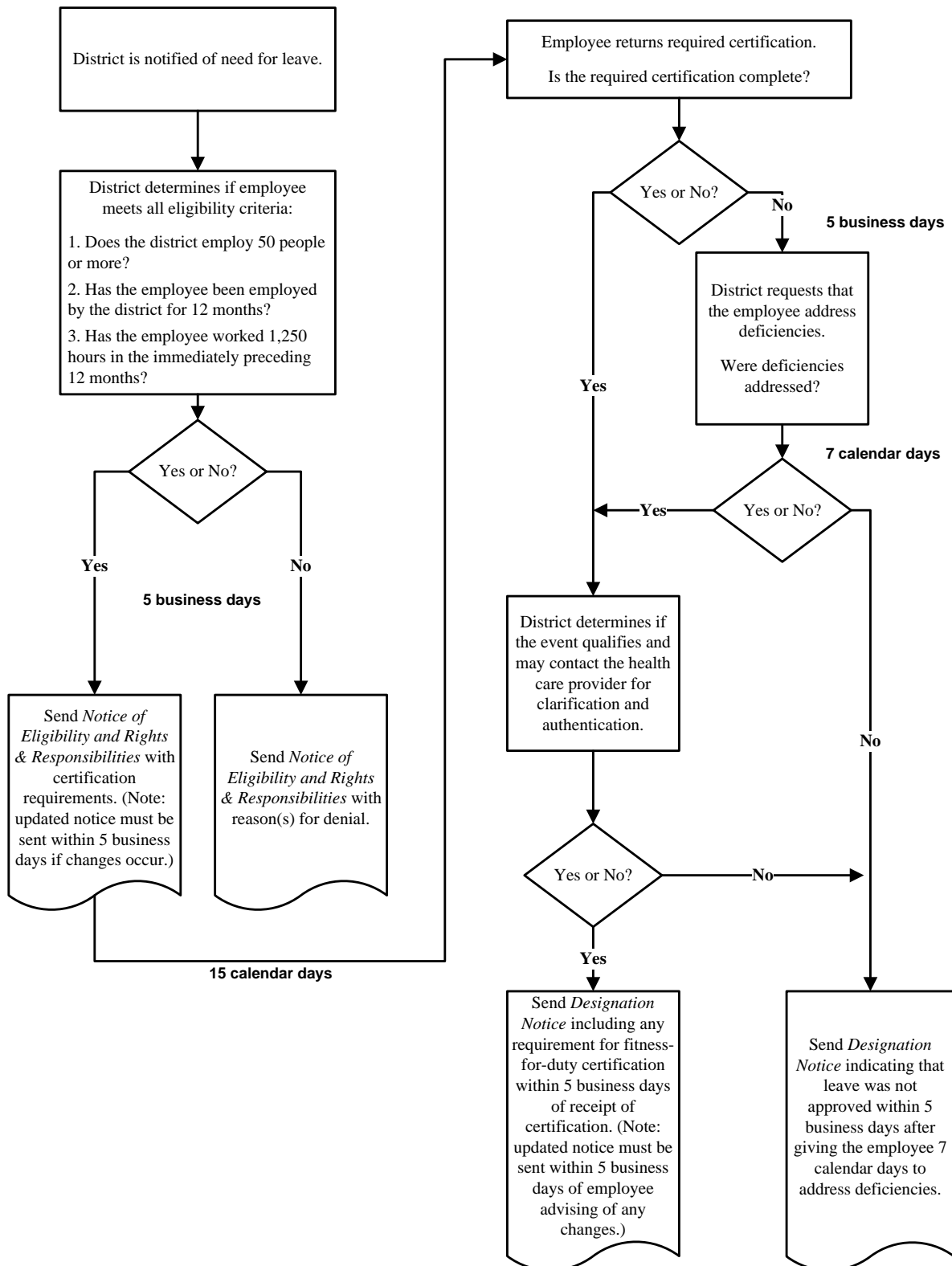
Districts that do not have modified duty program are not required to allow an employee to return to work following leave (e.g., temporary disability leave or family and medical leave) until they are able to perform all of the essential functions of their job.

If the district gave the appropriate notice of fitness-for-duty certification requirements and the doctor's certification indicates that the employee is unable to perform the essential functions of the job, the employee is not entitled to reinstatement under the Family and Medical Leave Act (FMLA). However, if the employee has a disability, the district may be required to provide additional leave or other reasonable accommodations under the Americans with Disabilities Act.

Processing Family and Medical Leave

The chart on the following page illustrates the process and timelines that districts must follow to determine eligibility and designate leave as FML.

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