

Frequently Asked Questions Regarding NJFLA Leave and FMLA Leave

1. If the staff member’s reason for family leave qualifies under both NJFLA and FMLA do the leaves run concurrently?

Yes. In accordance with N.J.A.C. 13:14-1.6(a):

“Where an employee requests leave for a reason covered by both NJFLA and another law, the leave simultaneously counts against the employee’s entitlement under both laws. For example, FMLA provides leave to care for a seriously ill spouse and NJFLA also provides leave for that reason. Under this example, since the leave is taken for a purpose covered by both the FMLA and NJFLA, the leave simultaneously counts against the employee’s entitlement under both laws.”

2. When a staff member is out on leave how does the school track the days that count toward the period of leave (vacation, summer recess, holidays, etc.)?

The New Jersey statutes and administrative code do not answer this question for NJFLA. Strauss Esmay believes the lack of any type of guidance on this issue for NJFLA means the school is safest following the rule laid out for FMLA below when tracking the days that count toward a period of NJFLA leave.

For FMLA, in accordance with 29 CFR 825.200(h):

“For the purpose of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if for some reason the employer’s business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation), the days the employer’s activities have ceased do not count against the FMLA leave entitlement.”

3. What is the smallest increment of time in which a staff member is entitled to schedule leave under NJFLA or FMLA?

For NJFLA, the smallest increment of time in which a staff member is entitled to schedule leave is one work day. In accordance with N.J.S.A. 43:21-39.2 and 43:21-39.3, when a staff member takes NJFLA leave intermittently or intermittently on a reduced leave schedule, the staff member may take the time in increments as short as one work day.

For FMLA, the smallest increment of time in which a staff member is entitled to schedule leave is one hour. In accordance with 29 CFR 825.205(a), when a staff member takes FMLA leave intermittently or intermittently on a reduced leave schedule, the staff member may take the time in increments as short as one hour.

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4. What is the difference between Intermittent Leave and Reduced Leave for both the NJFLA and FMLA?

Prior to the New Jersey Legislature amending NJFLA in February 2019, there were clear distinctions between both intermittent and reduced leave. Subsequent to the February 2019 amendments the distinctions between intermittent and reduced leave have been revised so substantially that a practical distinction between the two leave types no longer exists.

For the purpose of NJFLA, intermittent leave is any leave period taken in connection with one event that is broken up by periods in which the staff member returns to work. NJFLA leave may be taken intermittently for any reason NJFLA leave may be taken continuously. A staff member may take NJFLA leave intermittently in increments of time ranging from weeks to a single day. Under the amended statutory rules of intermittent leave, reduced leave follows the same rules as intermittent leave with two minor distinctions. A staff member may only take reduced leave when the reason for leave is to care for a family member with a serious health condition. If the leave is for at least one continuous week or more it cannot be classified as a reduced leave schedule.

In almost every situation in which a staff member takes NJFLA leave intermittently or on a reduced leave schedule, there appears to be no operational differences for a school between the two types of leave. Strauss Esmay has decided to refer to reduced leave under NJFLA as “intermittent leave taken on a reduced leave schedule.”

FMLA addresses intermittent leave vs. reduced leave schedule as follows:

“FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. *Intermittent leave* is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.”

Here, as described in NJFLA as well, FMLA's distinction between the two have no practical effect. Both leave types under FMLA (intermittent or reduced) may be taken in as little as one-hour increments; however, if the leave is for at least one continuous week or more it cannot be classified as a reduced leave schedule. Intermittent FMLA leave or reduced FMLA leave may be taken for any reason that continuous FMLA leave may be taken.

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5. What days may a school count in order to calculate a staff member's eligibility requirement of hours worked over the twelve-month period immediately preceding the leave under NJFLA or FMLA?

NJFLA requires that a staff member has worked at least 1,000 "base hours" during the twelve-month period immediately preceding the leave request in order to be eligible to take any period of NJFLA leave. N.J.A.C. 13:14-1.2 defines "base hours" as follows:

"The hours of work for which an employee receives compensation. Base hours shall include hours for which the employee receives workers' compensation benefits. At the option of the employer, base hours may include hours for which the employee receives other types of compensation, such as administrative, personal leave, vacation, or sick leave."

For the purpose of NJFLA leave, a school is not required to count the days a staff member was out due to personal time or sick time the staff member used during the twelve-month period immediately preceding NJFLA leave request. The school is required to count any time in which the school paid the staff member, but the staff member was not scheduled to work (i.e. winter break or holidays). When calculating a staff member's "base hours" in the immediately preceding twelve-month period in order to satisfy the 1,000 base hour eligibility requirement, most schools do not count days in which a staff member used other leave.

FMLA requires that a staff member has been employed for at least 1,250 "hours of service" during the twelve-month period immediately preceding the leave request in order to be eligible to take any period of FMLA leave. "Hours of service" means hours actually worked by the staff member. It does not mean hours paid. Thus, paid non-working time such as, vacations, holidays, furloughs, sick leave, or other time-off (paid or otherwise) does not count for the purpose of calculating FMLA eligibility.

For the purpose of FMLA leave, a school does not have to count any days in which the staff member was paid but did not actually work as time toward the 1,250 hours of service requirement to be eligible for FMLA leave.

6. Can a staff member take more than twelve weeks in a twenty-four month period by using NJFLA and FMLA leave consecutively?

The only scenario in which a staff member could take one twelve week leave immediately followed by another twelve week leave (stacking) without any return to work is if the staff member first uses their twelve week leave allotment under FMLA to care for themselves due to serious health condition and then immediately uses their twelve week allotment of NJFLA leave to care for a family member with a serious health condition. This situation will only arise if the staff member meets all the eligibility requirements for NJFLA including the 1,000 "base hours" worked eligibility requirement.

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7. What certification/verification can a school require a staff member to provide before approving a period of leave under either NJFLA or FMLA?

When a staff member requests any period of NJFLA leave, the staff member must sign a form of certification (developed by the school) attesting they are taking the NJFLA leave for the reason they are claiming.

For NJFLA leave, the staff member must also provide certification for any reason they are taking NJFLA leave which must provide details describing the reason for leave. If NJFLA leave is being taken for child bonding, the certification is sufficient if it provides the date of birth or placement whichever is appropriate.

If NJFLA leave is being taken to care for a family member with a serious health condition, the certification must state the date the condition commenced, the probable duration of the condition, any pertinent medical facts, a statement explaining why it is necessary the staff member participates in the care of the family member, and an estimate of the time needed to provide care to the family member. If NJFLA leave to care for a family member with a serious health condition is taken intermittently, the staff member must provide certification showing the medical necessity for the intermittent dates of treatment or care.

If NJFLA leave is taken in relation to a state of emergency declared due to an epidemic of a contagious disease, the certification must state one of the following three things, whichever is appropriate: the date and reason for closure of the school or childcare center; the date and duration of the determination that the staff member must quarantine or isolate; or the date and duration of the condition (related to the contagious disease) of a family member for which the staff member must provide care.

When a staff member takes FMLA leave to care for a family member or themselves due to a serious health condition, the staff member must provide verification for the leave. The verification must be supported by a certification issued by the staff member's or family member's health care provider, whichever is appropriate. The health care provider's certification must include several areas of information regarding the serious health condition. The specific information required is outlined in the law and Policy Guide 1643.

8. How far in advance of the requested leave period does a staff member need to give notice to the employer of that leave period for both NJFLA and FMLA?

All notice of leave should be provided to the employer in writing. If the leave notice is provided orally, it should be provided in writing as soon as practical following the oral notice.

A staff member must give written notice of NJFLA leave, for any reason, no later than thirty days prior to commencement of the leave if the period of NJFLA leave is continuous, unless emergent circumstances warrant shorter notice. If NJFLA leave is intermittent for child bonding or to care for a family member with a serious health condition the staff member must provide notice no later than fifteen calendar days prior to the commencement

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of the leave unless emergent circumstances warrant shorter notice. If NJFLA leave is for an epidemic of a communicable disease related reasons, or going to be taken on a reduced leave schedule, the staff member must provide notice as soon as is practicable.

A staff member must give written notice for FMLA leave, for any reason, at least thirty days prior to the commencement of the leave regardless if the leave is continuous, intermittent, or on a reduced leave schedule. If thirty days prior to the commencement is not practical then staff member must provide leave “as soon as practicable”, at least one to two days prior to the commencement of the leave. If FMLA leave is unforeseeable the staff member must provide notice of the leave as soon as practicable, but no more than one or two business days after learning of the need for the leave.

9. Why does Strauss Esmay recommend a “rolling” twenty-four month period NJFLA leave or “rolling” twelve month period FMLA leave measured backward from the date the staff member commences any NJFLA or FMLA leave (whichever is applicable) when determining the amount of family leave for which a staff member is eligible?

The “rolling” method instructs the school to “look back” over the twenty-four month period immediately preceding NJFLA or the twelve month period immediately preceding FMLA and add up all NJFLA time or FMLA time (whichever is applicable) the staff member had used. The school then takes NJFLA leave time or FMLA leave time (whichever is applicable) the staff member used over the twenty-four month period NJFLA the twelve month period FMLA immediately preceding and subtracts that total from the staff member’s twelve week leave allotment for whichever type of leave NJFLA or FMLA the calculation is being made for.

Strauss Esmay recommends a school use the “rolling” twenty-four month period when determining a staff member’s leave eligibility for both NJFLA leave and FMLA leave because it is the only method that ensures a staff member will not take a block of NJFLA or FMLA leave for more than twelve consecutive weeks by stacking two, twelve-week NJFLA or two, twelve-week FMLA leaves on top of one another at the end of one, twelve month period and the beginning of the next twelve month period. This method saves costs and prevents leave abuse.

The following example of the “rolling” method is laid out in the FMLA regulations:

“For example, if an employee has taken eight weeks of leave during the past twelve months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2021, four weeks beginning June 1, 2021, and four weeks beginning December 1, 2021, the employee would not be entitled to any additional leave until February 1, 2022. However, beginning on February 1, 2022, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one

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additional day of FMLA leave each day for four weeks, commencing February 1, 2022. The employee would also begin to recoup additional days beginning on June 1, 2022, and additional days beginning on December 1, 2022. If the employee needs six weeks of leave for a serious health condition commencing February 1, 2022, only the first four weeks of the leave would be FMLA protected.”

10. When can a staff member take NJFLA leave or FMLA leave to care for themselves?

A staff member is never eligible to take leave to care for themselves under NJFLA.

A staff member may take leave to care for themselves under FMLA “for a serious health condition that makes a staff member unable to perform the functions of the position of such staff member.” The staff member would still have to satisfy the other requirements of the law such as having worked 1,250 hours over the twelve month period immediately preceding the leave and provide medical certification for the leave.