

## Can FMLA Be Taken for Infertility?



To a large degree, using FMLA to take leave for issues surrounding infertility is a matter of interpretation. One of the provisions of FMLA is that an employee can use it if the employee suffers from a serious medical condition. Typically, infertility is seldom viewed as a serious medical condition and is not listed as a serious condition under the Department of Labor's definition of what is a serious health condition.

This doesn't necessarily preclude an employee from using FMLA for infertility related treatments, because while infertility may not be seen as a serious health condition, the problems causing it may be.

### Frequently Asked Questions

**Q:** Do infertility treatments qualify for employee protection under the FMLA? If an employee needs to take time off, arrive late for work or refuse to go on business trips because of treatments, must an employer accept that? How much notice is required?

**A:** Maybe. FMLA provides leave for an employee's own "serious health condition" that makes the employee unable to perform one or more of the essential functions of his/her job. Under FMLA regulations, continuing treatment by a health-care provider following a period of incapacity of more than three consecutive days, and any subsequent, related regimen of treatment under the care of a health-care provider, satisfies the definition of a "serious health condition."

Thus, if the infertility treatment (and the employee's reaction to the treatment) causes more than three consecutive days of incapacity, then that period of time, as well as other lateness or absence from work occasioned by continuing infertility treatment, will be covered by FMLA.

To the extent that infertility treatment falls within this category of covered leave, the employer would be entitled to at least 30 days' advance notice of the intended leave (unless the need for leave was unforeseeable). To address scheduling conflicts, the employee must also consult with the employer when planning medical treatment and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health-care provider. This would include, for example, scheduling infertility treatment so as not to conflict with business trips or other important meetings or deadlines.

### Infertility and FMLA

To take leave for infertility treatments under FMLA, it is essential that the treatment the employee receives is for a serious medical condition. This applies even if the main purpose of the surgery is to enable the employee to become pregnant.

A key requirement for taking advantage of FMLA, for infertility treatments, is that the employee must be under the care of a health care provider who certifies that the treatment is medically necessary. The provider must also fill out a Medical Certificate certifying that the employee's condition is 'serious.'

If the employer does not feel that the employee's reasons for applying for leave through FMLA are valid, the employer has the right to request that the employee seek a second opinion, from a doctor of the company's choosing.

Infertility itself may be a "serious health condition" that can qualify you for FMLA leave when you are unable to work because you need treatment -- including having diagnostic tests or undergoing assisted reproductive technologies (such as in vitro fertilization). A certification from your physician stating that your treatment is medically necessary may be required. Note: The courts have not yet ruled on this question.

**Q:** One of my employees has informed me that she is about to begin undergoing in vitro fertilization (IVF) treatments. She requested some intermittent time off from work. Am I required to grant her request?

**A:** While it is up in the air whether FMLA requires time off for IVF or other fertility treatments, other laws and related court cases, offer more concrete answers. For example, one court case held that an employee terminated because she took time off to receive IVF treatments could pursue a Title VII sex discrimination claim. In sum, the court held that the employee was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity.

In addition, recent amendments to the ADA may make it easier for employees suffering from infertility to qualify for disability discrimination protections.

**Q:** Can an employee schedule infertility treatments only during work time. Is the employer required to give the employee leave for them?

**A:** Yes, FMLA allows employees to use leave in blocks of time shorter than a full day (i.e., intermittent leave) if the employee's health care provider certifies that the employee has a medical need for such leave.

**Q:** Can an employer transfer the employee to another position if the employee requests to work part-time so she can undergo infertility treatment?

**A:** Yes. The employer is required to let the employee work part-time (i.e., a reduced leave schedule) if the employee's doctor certifies that it is medically necessary. However, the employer can transfer the employee to a position that is better suited to an employee's part-time schedule only if the leave is for planned (rather than unforeseeable) medical treatment and if the temporary position offers the same pay and benefits.

**Q:** Can an employee take time off to go with his/her spouse to the spouses' infertility treatments?

**A:** Yes. The employee may take leave if he/she is needed to care for the spouse while their spouse receives treatment for a serious health condition.

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## Infertility Treatments and FMLA

Even if infertility itself does not qualify, many of its treatments can still meet the requirements for FMLA leave. For example, surgery to treat endometriosis, to remove a tumor or cyst, to repair damaged reproductive organs, or to assist with sperm flow, qualifies for FMLA leave if it involves inpatient care or continuing treatment as defined by FMLA. If an employee has a history of miscarriage and becomes pregnant, doctor-recommended bed rest entitles the employee to FMLA leave because pregnancy-related incapacitation is a serious health condition.

Another example is the treatment of depression which is brought on by infertility can qualify for FMLA leave if the employee is receiving continuing treatment by a health care provider and the depression makes the employee unable to work. Tests such as blood hormone analysis, semen analysis, or post-coital tests may also qualify for leave if they are necessary to diagnose a potential serious health condition.

Employers must review the specific circumstances related to the infertility and why the time off is needed to determine whether it is FMLA qualifying or not.

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