

# Stacking of FMLA Can Occur with Birth or Adoption Late in the Calendar Year



Birth or adoption late in the year can complicate FMLA administration, especially for employers using a calendar year. While overall FMLA tracking is made easier with a calendar FMLA year, using a calendar year could result in employees taking two 12-week periods of leave consecutively (up to 24 weeks of FMLA in 12 months).

How do employees taking leave for birth or adoption (bonding leave) get up to 24 weeks of leave? In the case of birth or adoption late in the calendar year, an employee could use up to 12-weeks of leave through December 31st of that calendar year, and then on or after January 1st start a new 12-week period of FMLA. This is sometimes referred to as “stacking” FMLA, and is allowed by federal regulations.

Were an employee incapacitated due to a serious health condition (other than the birth of a child example above) near the end of the FMLA year, the employee would still be able to exhaust their available FMLA and then start a new 12-week period in the new FMLA year. The fact that the serious health condition started in a prior FMLA year does not prevent the employee from using FMLA in the subsequent calendar year, provided that the employee still qualifies for leave (in other words, the serious health condition still exists and incapacitates the employee).

Employers using a calendar FMLA year need not advertise that employees can stack leave nor does HR have an obligation to help employees maximize their leave duration. Employers do, however, have an obligation to provide employees with accurate and truthful information about FMLA.

Keep in mind that employers are also permitted to change their FMLA year under federal regulations and could use a rolling backwards year to avoid employees stacking leave. Before changing to a different method of calculating the 12-month period, an employer must first give all employees at least 60 days notice of the change. Any employee on FMLA at that time must be transitioned in a way that provides that employee with the full benefit of their leave entitlement. The regulations caution that employers cannot change their FMLA year to avoid giving employees their leave entitlement under FMLA.


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### Leave Examples:

1. Employer uses a calendar FMLA year. Dad-to be has a baby born in November. Dad-to be requests and is granted 4 weeks of leave in November. In January, Dad requests 12 weeks of leave. This request should be granted.
2. Employer uses a calendar FMLA year. Mom has baby in October. Mom starts leave on her delivery date and uses 10 weeks of leave, which carries her through the calendar year. In January, Mom may use up to 12 additional weeks of leave.

**NOTE:** This article addresses federal FMLA. Employers should check state leave requirements, if any, for any obligations. For example, employers in Wisconsin who have to comply with the state family and medical leave law must use calendar year as the specific method for determining leave under that state law.

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