

## Can FMLA Leave Ever Be Used for the Flu?

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### Working Together

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The flu season has begun. According to the [Connecticut Department of Public Health's weekly updates](#), influenza activity is rapidly increasing in Connecticut and throughout the region. Since the flu is contagious, employees should be encouraged to stay home if they come down with the virus, but did you know that leave for the flu (and other common ailments) may sometimes be protected under the Family and Medical Leave Act (FMLA)?

Keep the following in mind if your company is subject to the [federal FMLA](#) and/or the [Connecticut FMLA](#):

#### ***The FMLA and "Serious Health Conditions"***

Under both the federal and Connecticut FMLA, eligible employees are entitled to unpaid, job-protected leave for certain reasons, including when the employee is unable to work because of his or her own serious health condition or because the employee must care for a close family member with a serious health condition.

What is a "serious health condition"? Since neither the federal nor Connecticut FMLA includes a list of illnesses that qualify as "serious health conditions," employers may be under the impression that the term refers only to chronic or life-threatening illnesses. In fact, both laws acknowledge that "ordinarily" the flu, ear aches and other common conditions do not qualify for leave unless complications arise. However, a close reading of the definition of "serious health condition" reveals that minor illnesses like the flu may sometimes qualify for FMLA leave-- even in the absence of complications.

#### ***When is the Flu a "Serious Health Condition"?***

Under both the federal and Connecticut FMLA, a "serious health condition" is an illness, injury, impairment or physical or mental condition that involves **inpatient care**.

The term "serious health condition" also includes conditions that involve **continuing treatment** by a health care provider. "Continuing treatment," in turn, is defined as incapacity (the inability to work, go to school or perform other regular daily activities) of more than three consecutive calendar days that also involves either:

- Two or more in-person visits to a health care provider for treatment (generally, these visits must occur within 30 days of the first day of incapacity, with the first visit taking place within seven days of the first day of incapacity); or

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- An in-person visit to a health care provider for treatment on at least one occasion (generally within seven days after the start of the period of incapacity) that results in a regimen of continuing treatment under the supervision of a health care provider. A “regimen of continuing treatment” might include a course of prescription medicine, but would not, by itself, include activities that can be initiated without a visit to a healthcare provider, such as taking over-the-counter medications, bed rest or fluids.

The definition of “continuing treatment” may lead to some surprising results. For example, an employee who visits a doctor, is prescribed an antiviral drug for the flu and cannot work for four days has a “serious health condition” under both the federal and Connecticut FMLA. If, however, the employee is incapacitated for only three days, or if the health care provider advises rest and aspirin but not prescription medication, the employee would not be entitled to leave under the FMLA.

### ***Traps for the Unwary Employer***

Employers subject to the federal and/or Connecticut FMLA must avoid potential pitfalls, such as when an eligible employee:

- **Requests leave to care for a close family member with the flu.** While employers are not likely to balk at providing unpaid leave to an *employee* who cannot work because of his or her own bout of the flu, both the federal and Connecticut FMLA require an employer to provide time off to an employee to care for a *close family member* (a spouse, child or parent) whose ailment qualifies as a serious health condition. And the Connecticut FMLA also allows leave to care for a *parent-in-law* with a serious health condition.
- **Has exhausted his or her paid sick days and then requests FMLA leave.** Employees who have used all of their paid sick leave for non-FMLA qualifying reasons are still entitled to unpaid leave under the federal and Connecticut FMLA if the need for leave qualifies under one or both laws.
- **Has poor attendance.** Employers cannot interfere with an employee’s rights under the federal or Connecticut FMLA. Before imposing discipline on an employee who is frequently absent or consistently tardy, an employer should ensure that the employee is not using the time away from the office for an FMLA-qualifying reason.

### ***The Bottom Line***

While the flu and other common illnesses usually do not qualify as serious health conditions, employers should keep in mind that in some circumstances they can trigger a right to leave under both the federal and Connecticut FMLA, whether the leave is needed for the employee’s own illness or to care for the employee’s spouse, child, parent or (in Connecticut) parent-in-law. In short, employers subject to the federal and/or Connecticut FMLA must be prepared to grant their employees leave for serious health conditions that may not be all that serious.

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