

Does flu (either seasonal or H1N1) qualify as a “serious health condition” that would trigger FMLA leave?

Flu would be considered a serious health condition under the FMLA only if it requires “inpatient care” or “incapacity” and “continuing treatment by a health care provider.”

- 1) **Inpatient care** means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined above, or any subsequent treatment in connection with such inpatient care.
- 2) A **serious health condition involving continuing treatment by a health care provider** includes any one or more of the following:
 - a. Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
 - i. Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; **or**
 - ii. Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
 - b. Treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity. Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.
- 3) **Incapacity** means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.
- 4) The term **treatment** includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.
- 5) A **regimen of continuing treatment** includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.
- 6) The term “**extenuating circumstances**” above means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

Can an employee use FMLA leave if the employee’s child has been diagnosed with the H1N1 or seasonal flu?

FMLA would apply if the above conditions are met. If the child is not ill, but the child’s school has been closed and the parent is needed to provide childcare, the leave would not be covered by the FMLA.