

**HR/LR Policy #1409**

Family and Medical Leave Act (FMLA)

Issued 12/01/2014  
 Revised 12/16/2015 Supersedes  
 PERSLs #1397, #1406, #1409, and  
 amendments issued on 1/09, 5/10, and  
 6/21/2013.  
 Authority Labor Relations & Enterprise  
 Human Resources

**OVERVIEW**

**Objective** To provide guidelines to agencies on implementation of the federal Family Medical Leave Act of 1993 (FMLA) and the regulations thereunder (Code of Federal Regulations (CFR), Title 29, Chapter V, Part 825).

**Policy Statement** Consistent with the intent of the FMLA, state agencies will endeavor to balance the demands of the workplace with the needs of families in a manner that accommodates both the legitimate interests of the State and those of its employees and employees’ families.

**Scope** This policy applies to all employees of executive branch agencies and classified employees in the Office of Legislative Auditor, Minnesota State Retirement System, Public Employee Retirement System, and Teachers’ Retirement System.

**Definitions** **“COVERED ACTIVE DUTY” or “CALL TO COVERED ACTIVE DUTY STATUS”** 29 U.S.C. § 2611(14); 29 C.F.R. §§ 825.102 and 825.126

- (A) in the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and
- (B) in the case of a member of a Reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to laws which authorize:
  - 1) the ordering to active duty of:
    - (i) Retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service;

- (i) All reserve component members in the case of war or national emergency;
  - (ii) Any unit or unassigned members of the Ready Reserve; or
  - (iii) Any unit or unassigned members of the Select Reserve and certain members of the Individual Ready Reserve; or
- 1) the suspension of promotion, retirement or separation rules for certain Reserve components; or
  - 2) the calling of the National Guard into federal service in certain circumstances (e.g. to repel an invasion of the U.S. by a foreign nation, to suppress rebellion against the U.S. Government, to execute laws of the U.S.); or
  - 3) the calling of the National Guard and state military into federal service in the case of insurrections and national emergencies; or
  - 4) the carrying out of any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation.

The active duty orders of a member of the Reserve components will generally specify if the military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation and will specify that the deployment is to a foreign country.

**“COVERED SERVICEMEMBER” or “COVERED VETERAN”** 29 U.S.C. § 2611(15); 29 C.F.R. §§ 825.102, 825.122, and 825.127

This term is used when describing employee leave to care for a covered service member or covered veteran with a serious injury or illness and includes:

- (A) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status; or is otherwise on the temporary disability retired list for a serious injury or illness. “Outpatient status” means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients;

or

- (B) a covered veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness. "Covered veteran" means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.<sup>1</sup>

**"HEALTH CARE PROVIDER"** 29 C.F.R. §§ 825.102 and 825.125

- (A) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or
- (B) Any other person determined by the Secretary of Labor to be capable of providing health care services, including only:
  - 1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under state law;
  - 2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under state law and who are performing within the scope of their practice as defined under state law;
  - 3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable state or local law or collective bargaining agreement;
  - 4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept

---

<sup>1</sup> For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to March 8, 2013 (the effective date of the Final Rule), the period between October 28, 2009 (the FY 2010 NDAA's enactment date) and March 8, 2013, shall not count towards the determination of the five-year period for covered veteran status. 29 C.F.R. § 825.127(b)(2)(i).

certification of the existence of a serious health condition to substantiate a claim for benefits; and

5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(C) “Authorized to practice in the state” means that the provider must be authorized to diagnose and treat physical or mental health conditions.

**"INCAPABLE OF SELF-CARE"** 29 C.F.R. §§ 825.102 and 825.122

The individual requires active assistance or supervision to provide daily self-care in several of the “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

**"IN LOCO PARENTIS"** 29 C.F.R. § 825.122

Persons with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

**"MILITARY CAREGIVER LEAVE"** 29 C.F.R. §§ 825.102 and 825.127

Leave taken to care for a covered service member with a serious injury or illness under FMLA. In order to care for a covered service member, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered service member.

**"MILITARY MEMBER"** See generally 29 C.F.R. § 825.126 and Public Law 111-84

This term is used when describing employee leave for a qualifying exigency and includes the employee’s spouse, son, daughter, or parent who is on covered active duty or called to covered active duty.

**"NEEDED TO CARE FOR A FAMILY MEMBER OR A COVERED SERVICEMEMBER"** 29 C.F.R. § 825.124

The medical certification provision that an employee is needed to care for a family member or covered service member encompasses both physical and psychological care and includes situations where, for example:

- (A) Because of a serious health condition, the family member or covered service member is unable to care for his or her own basic medical, hygienic, nutritional needs or safety, or is unable to transport himself or herself to the doctor.
- (B) The employee is needed to provide psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.
- (C) The employee may be needed to substitute for others who normally care for the family member or covered service member, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered service member.
- (D) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered service member includes not only a situation where the condition of the family member or covered service member itself is intermittent, but also where the employee is only needed intermittently - such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

**“NEXT OF KIN OF A COVERED SERVICEMEMBER”** 29 C.F.R. §§ 825.102, 825.122, and 825.127

The next of kin of a covered service member is the nearest blood relative, other than the covered service member's spouse, parent, son or daughter, in the following order of priority:

- 1) Blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions;
- 2) Brothers and sisters;
- 3) Grandparents;
- 4) Aunts and uncles;
- 5) First cousins;

unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for the purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered

service member, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member's only next of kin.

**"PARENT"** 29 C.F.R. §§ 825.102 and 825.122

A biological, adoptive, step or foster father or mother or any other individual who stands or stood in loco parentis to an employee when the employee was a son or daughter. This term does not include parents "in law."

**"PARENT OF A COVERED SERVICEMEMBER"** 29 C.F.R. §§ 825.102 and 825.122

A covered service member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. This term does not include parents "in law."

**"PHYSICAL OR MENTAL DISABILITY"** 29 C.F.R. § 825.122

A physical or mental impairment that substantially limits one or more of the major life activities of an individual.

**"QUALIFYING EXIGENCY"** 29 C.F.R. §§ 825.126 and 825.309 and Public Law 111-84

Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

- (A) Short notice deployment – leave to address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment. Leave under this event can be used for a period of seven calendar days beginning on the date the military member is notified of the impending call or order to covered active duty.
- (B) Military events and related activities – leave to attend any official ceremony, program or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member and to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations or the American Red Cross that are related to the covered active duty status of the military member.
- (C) Childcare and school activities – events include:

- 1) Leave to arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status necessitates a change to the existing childcare arrangement.
- 2) Leave to provide childcare for a child of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of the military member.
- 3) Leave to enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member.
- 4) Leave to attend meetings with staff at a school or daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meeting with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member.

For the purposes of leave for childcare and school activities, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time the FMLA leave is to commence.

The military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(D) Financial and legal arrangements – events include:

- 1) Leave to make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust.
- 2) Leave to act as military member's representative before a federal, state or local agency for purposes of obtaining, arranging, or appealing military services benefits while the military member is on covered active duty or call to covered

active duty status, and for a period of 90 days following the termination of the military member's covered active status.

- (E) Counseling – leave to attend counseling provided by someone other than a health care provider, for oneself, for the military member or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call for covered active duty status of the military member
- (F) Rest and recuperation – leave to spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment. Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave.
- (G) Post deployment activities – events include:
  - 1) Leave to attend arrival ceremonies, reintegration briefing and events, and any other official program or ceremony sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status.
  - 2) Leave to address issues that arise from the death of the military member while on covered active duty status such as meeting and recovering of the body of the military member, making funeral arrangements, and attending funeral services.
- (H) Parental care – events include:
  - 1) Leave to arrange for alternative care for the parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status necessitates a change in the existing care arrangement for the parent.
  - 2) Leave to provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member.



- 3) Leave to admit or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member.
- 4) Leave to attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings.

For the purposes of leave for parental care, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. The above definition of "incapable of self-care" applies to parents for purposes of leave for parental care.

The military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

- (I) Additional activities – Leave to address other events that arise out of the military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

**"RESERVE COMPONENTS OF THE ARMED FORCES"** 825.102, 825.126

For purposes of qualifying exigency leave, Reserve components of the Armed Forces include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation.

**"SERIOUS HEALTH CONDITION"** 29 C.F.R. §§ 825.102, 825.113, 825.114, and 825.115

For purposes of the FMLA, serious health condition means an illness, injury, impairment, or physical or mental condition that involves:

- (A) Inpatient care – an overnight stay in a hospital, hospice, or residential care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care; or
- (B) Continuing treatment by a health care provider that includes any one or more of the following:

1) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) 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 order 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.

The first (or only) treatment visit to a health care provider must be within seven (7) days of the first day of incapacity.

2) Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care. This absence qualifies for FMLA leave even though the employee does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days.

3) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health care condition. A chronic serious health condition:

- (i) Requires periodic visits (defined as at least twice per year) for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider; and
- (ii) Continues over an extended period of time; and
- (iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

4) Permanent or long-term conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider, (e.g., Alzheimer's, a severe stroke, or the terminal stages of a disease).

- 5) Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention such as cancer (radiation, chemotherapy, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

**“SERIOUS INJURY OR ILLNESS OF A COVERED SERVICEMEMBER”** 29 C.F.R. §§ 825.102, 825.127 and, generally, 825.310, and Public Law 111-84

- (A) in the case of a current member of the Armed Forces (including a member of the National Guard or Reserves), means an injury or illness that was incurred by the covered service member in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member’s office grade, rank or rating; and
- (B) in the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:
  - 1) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the service member unable to perform the duties of the service member’s office, grade, rank, or rating; or
  - 2) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
  - 3) a physical or mental condition that substantially impairs the covered veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

- 4) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

**"SON" OR "DAUGHTER"** 29 C.F.R. §§ 825.102 and 825.122

A biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care" because of a mental or physical disability at the time that FMLA leave is to commence.

**"SON OR DAUGHTER ON COVERED ACTIVE DUTY OR CALL TO COVERED ACTIVE DUTY STATUS"** 29 C.F.R. §§ 825.102, 825.122 and 825.126

The employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty states, and who is of any age.

**"SPOUSE"** 29 U.S.C. § 2611(13); proposed rule June 20, 2014.

A husband or wife.

For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the state in which the marriage was entered into or, in the case of a marriage entered into outside of any state, if the marriage is valid in the place where entered into and could have been entered into in at least one state. This definition includes an individual in a same-sex or common law marriage that either (1) was entered into in a state that recognizes such marriages or, (2) if entered into outside of any state, is valid in the place where entered into and could have been entered into in at least one state.

**"UNABLE TO PERFORM THE FUNCTIONS OF THE POSITION OF THE EMPLOYEE"** 29 C.F.R. § 825.123

An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions during the absence for the treatment.

**Exclusions** N/A

**Statutory**

**References** 29 U.S.C. § 2611, et seq.

## **GENERAL STANDARDS AND EXPECTATIONS**

### **I. AMOUNT OF LEAVE**

- A. Every fiscal year, the State of Minnesota will provide up to 12 weeks of job-protected leave to "eligible" employees for certain family and medical reasons pursuant to the FMLA, relevant state law, and collective bargaining agreements and plans.
- B. In addition, an eligible employee is entitled up to 26 workweeks of leave in a single 12 month period to care for a covered servicemember with a serious injury or illness.
- C. If both spouses work for the state, they may each take 12 weeks of FMLA leave per fiscal year if needed for the following situations:
  1. For the birth of a son or daughter and to care for the newborn child, or for the placement of a child with the employee for adoption or foster care, and to care for the newly placed child.
  2. To care for a newborn, adopted, or foster child with a serious health condition.
- D. If both spouses work for the state, they are both eligible for up to 26 weeks of FMLA leave to care for a covered servicemember with a serious illness or injury.

### **II. ELIGIBILITY**

#### **A. Employee Eligibility**

1. The employee must have worked for the State of Minnesota for at least 12 months as of the date on which FMLA leave is to start. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the state (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment for purposes of calculating whether an employee has worked for the state for at least 12 months. The 12 months need not be consecutive, provided the employee's prior service occurred within the last seven years. If the employee had a break in service longer than seven years and such break in service was due to the employee's fulfillment of his or her covered service obligation under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the period of absence from work due to or necessitated by USERRA-covered service must also be counted in determining whether the employee has been employed for at least 12 months by the agency; and
2. The employee must have worked at least 1,250 hours during the 12 months immediately preceding the start of the leave. Whether an employee satisfies the 1,250 hours of service requirement is determined by counting actual hours worked only. Hours the employee is on leave (paid or unpaid) do not count toward hours of service. An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service.

## B. Reasons For Taking a Qualifying Leave

1. For the birth of the employee's child and to care for such child, or for the placement with an employee of a child for adoption or foster care or to care for newly placed child. Leave for the birth or adoption of a child must begin within 12 months of the birth or placement of a child for adoption.<sup>2</sup> Leave for the placement of a child for foster care must be completed within 12 months of the foster care placement.
2. To care for the employee's spouse, son, daughter, or parent with a serious health condition.
3. Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of an employee's job.
  - a) Routine physical, eye, or dental examinations, cosmetic treatments, and cold, flu, ear aches, etc., without complications, are examples of conditions that do not meet the definition of serious health condition.
  - b) Mental illness or allergies may be included in the definition of a serious health condition if all conditions of the FMLA are met.
  - c) Treatment of substance abuse by a health care provider or by a provider of health care services on referral by a health care provider may be included in the definition of a serious health condition if all conditions of the FMLA are met. Absence due to an employee's use of the substance does not qualify for leave.
4. Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status).
5. To care for a covered service member with a serious injury or illness.
  - a) In order to care for a covered service member, the eligible employee must be the spouse, son, daughter, parent, or next of kin of the covered service member.
  - b) Under this provision, employees are entitled to up to 26 weeks of leave during a single 12-month period.
  - c) The single 12-month period begins on the first day the eligible employee takes FMLA leave to care for the covered service member and ends 12 months after that date, regardless of the method used by the agency to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.
  - d) If the employee does not take the full 26 weeks during the single 12-month period, any remaining part of the 26 weeks of leave to care for the covered service member is forfeited.

---

<sup>2</sup> Following the birth of a child, in cases where the child must remain in the hospital longer than the mother, the leave must begin within 12 months after the child leaves the hospital. Leave for the birth or adoption of a child which continues beyond the 12-month period beginning on the date of the birth or adoption will not be considered FMLA leave, but instead is governed by the provisions of M.S. 181.941, Pregnancy and Parenting Leave.

- e) Leave entitlement is to be applied on a per-covered-service member, per-injury basis, such that an eligible employee may be entitled to take more than one period of leave if the leave is to care for different covered service members or to care for the same service member with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period. An eligible employee may take more than one period of leave to care for a covered service member with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. If the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period.
- f) An eligible employee is entitled to a combined total to 26 weeks of leave for any FMLA-qualifying reason during the single 12-month period, although the employee is entitled to no more than 12 weeks of leave for one or more of the following:
  - i. Birth of a child;
  - ii. Placement of a child with the employee for adoption or foster care;
  - iii. To care for a spouse, son, daughter or parent who has a serious health condition;
  - iv. Because of the employee's own serious health condition; or.
  - v. Because of a qualifying exigency.

### **III. AGENCY NOTICE REQUIREMENTS**

#### **A. Agency's Response to the Employee's Request for FMLA Leave**

1. When an employee requests FMLA-qualifying leave, or when the agency acquires knowledge an employee's leave may be for an FMLA-qualifying reason, the agency must notify the employee of the employee's eligibility to take FMLA leave within five (5) business days, absent extenuating circumstances. If the employee is not eligible for FMLA leave, the agency must provide one of the following reasons why the employee is not eligible: 1) must state the number of months the employee has been employed 2) must state the employee's number of hours of service with the agency during the applicable 12-month period; or 3) must state that the employee has exhausted their FMLA leave entitlement. Notification must be sent by a method in which receipt can be verified.
2. In addition, each time an agency gives an eligibility notice, the agency must provide the employee with a rights and responsibilities notice, which describes the employee's obligations and explains the consequences of failing to meet the obligations. This notice must also include, as appropriate:
  - a) The leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying and the applicable 12-month period for FMLA entitlement.

- b) The employee is required to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency, and the consequences of failing to furnish such certification.
- c) The employee's right to substitute paid leave, whether the agency will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave.
- d) Notice that employee and dependent health insurance coverage is maintained on the same basis as coverage would have been provided if the employee were continuously employed during the leave period, as well as requirements concerning payment of health insurance premiums and the possible consequences of failure to make such payments on a timely basis.
- e) The employee's potential liability for payment of health insurance premiums paid by the agency during the employee's unpaid FMLA leave if the employee fails to return to work after taking the leave.
- f) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave.
- g) The employee's status as a "key employee" and its potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial.

## **B. Certification Requirements**

1. An agency will require certification for leave signed by the health care provider:
  - a) Due to the employee's serious health condition, which makes the employee unable to perform one or more essential functions of his or her position;
  - b) To care for the employee's covered family member with a serious health condition;
  - c) Due to a qualifying exigency;<sup>3</sup>
  - d) To care for a covered servicemember with a serious injury or illness.<sup>4</sup>

---

<sup>3</sup> If the qualifying exigency involves Rest and Recuperation leave, a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military which indicates that the military member has been granted Rest and Recuperation leave, and the dates of the military member's Rest and Recuperation leave, may be required. 29 C.F.R § 825.309.

<sup>4</sup> When leave is taken to care for a covered servicemember with a serious injury or illness, any one of the following health care providers may complete a certification:

- 1) A United States Department of Defense ("DOD") health care provider;
- 2) A United States Department of Veterans Affairs ("VA") health care provider;
- 3) A DOD TRICARE network authorized private health care provider;
- 4) A DOD non-network TRICARE authorized private health care provider; or
- 5) Any health care provider as defined in the FMLA regulations.

Second and third opinions are not permitted for leave to care for a covered service member when the certification has



2. In most cases, the agency will request the certification at the time the request for leave is made, or in the case of an unforeseen leave, within five (5) business days after the leave commences. However, the agency may request a re-certification at a later date if it has reason to question whether the leave is appropriate, its duration, or frequency.
3. If the agency finds that any certification is incomplete or insufficient, it will advise the employee and will state what additional information is needed.
4. If the required certification is not provided, the taking of the leave may be denied. In all cases it is the employee's responsibility to provide a complete and sufficient certification.
5. The agency may request a fitness for duty certificate upon the employee's return to work from FMLA leave due to the employee's own serious health condition that made the employee unable to perform the employee's job.
6. When requesting certification from an employee, the agency should provide a Tennessen Warning with the Certification of Health Care Provider form.

### **C. Designating Leave and Required Notices**

When the agency has enough information to determine whether the leave is being taken for an FMLA-qualifying reason (e.g. after receiving a completed certification), the agency must notify the employee of its determination within five (5) business days, absent extenuating circumstances, and must send the notice by a method in which receipt can be verified. If the agency is designating the leave as FMLA-qualifying, this notification should include the following:

1. The amount of the leave counted against the employee's leave entitlement, including, if known, the number of days, hours or weeks that will be counted.
  - a) If it is not possible to provide the amount because the need for the leave is unscheduled, the employee has the right to request this information but not more often than once in a 30-day period and only if leave was taken during that period.
2. If the agency requires paid leave to be substituted for unpaid FMLA leave, or paid leave taken under an existing leave plan be counted as FMLA leave, the agency must inform the employee of this designation at the time of designating the FMLA leave.
3. Whether the agency will require the employee to provide a fitness-for-duty certification upon the employee's return to work from FMLA leave due to the employee's own serious health condition, and whether the fitness-for-duty certification must address the employee's ability to perform the essential functions of the job. If the Appointing Authority requires that the certification specifically address the employee's ability to perform the essential functions of the employee's job, the

employee will be provided with a list of the essential functions of the employee's job with the notice to the employee designating the leave as FMLA-qualifying.

If the agency determines that the leave will not be designated as FMLA-qualifying (e.g. the leave is not for a reason covered by the FMLA or the FMLA leave has been exhausted), the agency must notify the employee of that determination, and must send the notice by a method in which receipt can be verified.

The agency may retroactively designate leave as FMLA with appropriate notice to the employee, provided that its failure to timely designate the leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, the employee and agency may mutually agree that leave be retroactively designated as FMLA leave.

#### **IV. EMPLOYEE RIGHTS AND RESPONSIBILITIES**

##### **A. Use of Leave**

1. An employee may take FMLA-qualifying leave continuously, intermittently, or on a reduced leave schedule.
  - a) Medical Necessity
    - i. FMLA-qualifying leave taken for the employee's own serious health condition, to care for a spouse, son, daughter, or parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness may be taken intermittently or on a reduced schedule if there is a medical need for leave and if that medical need can best be accommodated by an intermittent or reduced leave schedule.
  - b) Leave due to a qualifying exigency may be taken on an intermittent or reduced schedule basis.
  - c) Leave for the birth or placement of a child for adoption or foster care may be taken on an intermittent or reduced schedule basis with the approval of the employer.
2. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the agency's operations.

##### **B. Substitution of Paid Leave for Unpaid Leave**

1. Employees are required to exhaust their accrued sick leave hours for conditions which qualify for sick leave usage under the applicable labor contracts or plans. After exhausting accrued sick leave hours, the employee may choose, and the agency shall grant, the use of accrued vacation or compensatory time while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the terms and conditions of the agency's normal paid leave policies. All paid time counts toward the twelve (12) weeks of FMLA-qualifying leave. Employees who do not meet the requirements for taking paid leave remain entitled to take unpaid FMLA leave.

2. An employee must inform the agency if he or she will receive short-term disability benefits, long-term disability benefits, or workers' compensation benefits while on FMLA leave. Because leave pursuant to a disability benefit plan or workers' compensation absence is not unpaid, the employee is not required to substitute accrued sick leave while on FMLA leave. If the employee is receiving short-term or long-term disability benefits while on FMLA leave, the employee may use accrued paid leave in addition to the disability benefits, or to supplement the disability benefits.

If the employee is receiving workers' compensation benefits while on FMLA leave, the employee may use accrued paid leave to supplement the workers' compensation payments. This supplement must not result in the payment of a total weekly rate of compensation which exceeds the employee's regular weekly wage.

In the event the employee chooses to use accrued paid leave under these circumstances, the employee must comply with the terms and conditions of the agency's normal paid leave policies.

3. As of the date that the disability benefits or workers' compensation benefits cease, the substitution of paid leave provision above becomes applicable, and the employee is required to use accrued sick leave hours for conditions which qualify for sick leave usage under the applicable labor contracts or plans.

#### **C. Employee Notice to Agency**

1. An employee must provide the agency at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. When 30 days' notice is not possible, the employee must provide notice as soon as practicable and generally must comply with the agency's normal call-in procedures.
2. Employees must provide sufficient information for the agency to determine if the leave may qualify for FMLA protection, and the anticipated timing and duration of the leave. Sufficient information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and the reason for the leave; if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known.
3. Employees also must inform the agency if the requested leave is for a reason for which FMLA leave was previously taken or certified.

#### **D. Job Benefits and Protection**

1. During an FMLA-qualifying leave, the employee and dependent health and dental insurance is maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the entire leave period.
2. An eligible employee returning from an FMLA-qualifying leave is entitled to be returned to the same position and shift that the employee held when the FMLA-qualifying leave began, or to an equivalent position and shift with equivalent benefits, pay, and other terms and conditions of employment.
3. Provided the employee returns to work immediately following his/her FMLA-qualifying leave (i.e., does not follow the FMLA-qualifying leave with additional unpaid leave), benefits must be resumed upon the employee's return to work at the same level as were provided when leave began. Any new or additional coverage or changes in health benefits must be made available to an employee while on FMLA-qualifying leave.

#### **V. COORDINATION WITH COLLECTIVE BARGAINING AGREEMENTS/PLANS**

- A. FMLA-qualifying leaves of absence will be identified as those authorized under collective bargaining agreements or plans, i.e., medical leave or personal leave, dependent on which leave is appropriate.
- B. FMLA provides for an unpaid leave under certain circumstances. Employees are required to exhaust their accrued sick leave hours for conditions which qualify for sick leave usage under the applicable labor contracts or plans. After exhausting accrued sick leave hours, the employee may choose, and the agency shall grant, the use of accrued vacation or compensatory time while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the terms and conditions of the agency's normal paid leave policies. All paid time counts toward the twelve (12) weeks of FMLA-qualifying leave. Employees who do not meet the requirements for taking paid leave remain entitled to take unpaid FMLA leave.
- C. An Appointing Authority may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. Failure to comply may result in the delay or the denial of the leave.

#### **VI. COORDINATION WITH STATE SICK LEAVE AND PARENTING LEAVE LAWS**

- A. The FMLA is not intended to supersede state laws which provide for greater family and medical leave rights than those provided by the FMLA. Employees are not required to designate whether the leave they are taking is FMLA-qualifying leave or leave under state law, and the agency must comply with the applicable provisions of both the FMLA and state law. An employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under state law, the leave used counts against the employee's entitlement under both laws.
- B. State law allows employees to use accrued personal sick leave benefits for injury or illness, for safety leave, or for absences due to an illness of or injury to the employee's child, adult child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent, for reasonable periods of time as the employee's attendance

may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness or injury.

- C. State parenting leave law allows unpaid leaves of absence for an employee who is a biological or adoptive parent in conjunction with the birth or adoption of a child, or for a female employee for prenatal care, or incapacity due to pregnancy, childbirth, or related health conditions. The leave shall not exceed 12 weeks, unless agreed to by the employer. In the case of leave taken for the birth or adoption of a child, the leave must commence within 12 months of the birth or adoption or within 12 months of the time the child leaves the hospital.
- D. Under state law, "Employee" means a person who is employed for at least 12 months preceding the request for leave, and who, during the 12-month period immediately preceding the leave, worked an average number of hours per week equal to  $\frac{1}{2}$  of the full-time equivalent position in the employee's job classification.
- E. Agencies and employees should review state sick leave and parenting leave policies and statutes to ensure compliance with both state and federal law.

## **VII. GENERAL PROVISIONS**

### **A. Recordkeeping**

- 1. FMLA provides that the Appointing Authority shall make, keep, and preserve records pertaining to the obligations under the Act in accordance with the recordkeeping requirements of the Fair Labor Standards Act (FLSA) and the FMLA regulations, 29 C.F.R. Part 825.
- 2. The records must disclose the following:
  - a) Basic payroll and identifying employee data - name; address; occupation; rate of pay; hours worked per pay period; additions and deductions from wages; total compensation paid.
  - b) Dates FMLA-qualifying leave is taken.
  - c) If FMLA-qualifying leave is taken in increments of less than one full day, the number of hours taken.
  - d) Copies of employee notices of leave provided to the agency under FMLA; copies of all general and specific notices given to employees by the agency under FMLA.
  - e) Any documents describing employee benefits or agency policies or practices regarding taking of paid or unpaid leave.
  - f) Premium payments of employee benefits.
  - g) Records of any disputes between the agency and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the agency or employee of the reasons for the designation and for the disagreement.

3. Records and documents relating to certifications, re-certifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. As applicable, records and documents created for purposes of FMLA containing family medical history or genetic information shall be maintained in accordance with the confidentiality requirements of state and federal law.

## **B. Posting Requirements**

1. Appointing Authorities must post a notice describing the Act's provisions. The notice must be posted in all areas where employees and applicants for employment would normally expect to find official notices, and may also be posted electronically, provided that it is in a conspicuous place on the Appointing Authority's website and is accessible to both applicants and current employees.
2. If an Appointing Authority publishes and distributes an employee handbook, information on employee entitlements and obligations under the FMLA must be included.
3. If the Appointing Authority does not publish or distribute a handbook, it must provide written guidance to employees when they request FMLA-qualifying leave and to each new employee upon hire.

## **C. Appeal Process**

If an employee believes that their rights under the FMLA have been violated, he/she may:

1. Internal
  - a) Contact their Human Resources office, or;
  - b) Contact their Labor Union/Association.
2. External
  - a) File or have another person file on his/her behalf, a complaint with the Secretary of Labor.
    - i. The complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U. S. Department of Labor. The complaint may be filed at any local office of the Wage and Hour Division; the address may be found in telephone directories or on the Department of Labor's website.
    - ii. A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his/her FMLA rights have been violated, but not more than two (2) years from the date the alleged violation occurred, or three (3) years for a willful violation.

- iii. No particular form is required to make a complaint, however the complaint must be reduced to writing and include a statement detailing the facts of the alleged violation.

or;

- b) File a private lawsuit pursuant to Section 107 of the FMLA.
  - i. If the employee files a private lawsuit, it must be filed within two (2) years of the alleged violation of the Act, or three (3) years if the violation was willful.

#### **D. Unlawful Acts by Agencies**

1. It is unlawful for any agency to interfere with, restrain, or deny the exercise of any right provided under FMLA.
2. It is unlawful for any agency to discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.
3. FMLA does not affect any federal or state law prohibiting discrimination, or supersede any state or local law or collective bargaining agreement which provides greater family or medical leave rights.

#### **RESPONSIBILITIES**

**Agencies are responsible for:** To distribute this policy to agency staff and all employees. To provide a copy of this policy to all new hires, and maintain a record that each new hire has received a copy.

**MMB is responsible for:** Updating this policy as necessary.

#### **FORMS AND SUPPLEMENTS**

Agencies are encouraged to rely on available federal forms and notices when administering FMLA leave. To obtain copies of federal Department of Labor forms for certification of serious health conditions or qualifying exigencies, as well as notification forms, please visit:

<http://www.dol.gov/WHD/fmla/index.htm>.

Additionally, the following forms are available on the [MMB website](#):

- Notice of Intent to Collect Private Data (Tennessen)
- Authorization for a Release of Medical Information.

**Contacts** Labor Relations Representative

**References** For additional information, please visit [www.dol.gov/whd/fmla](http://www.dol.gov/whd/fmla), or call the federal Department of Labor at 1-866-4-USWAGE (TTY: 1-877-889-5627).

# HR/LR Procedure #1409P

## Family and Medical Leave Act

<b>Issued</b>	January 9, 2015
<b>Revised</b>	N/A
<b>Authority</b>	Enterprise Human Resources

### GENERAL PROCEDURES AND INSTRUCTIONS

This is a general outline of the process for administering FMLA leave. This procedure should be reviewed with our statewide policy, HR/LR Policy #1409, "Family and Medical Leave Act." This procedure is not intended to be comprehensive, and additional action may be necessary to properly process an FMLA claim. Additional requirements may also apply under the Americans with Disabilities Act (ADA), workers' compensation laws, and the Minnesota Human Rights Act (MHRA). Contact Enterprise Human Resources or your Labor Relations Representative with any questions.

The steps below refer to relevant sections of HR/LR Policy #1409, "Family and Medical Leave Act" and General Memo #2014-6, "FMLA Guidance." Please review these materials for additional information.

**1) Employee provides notice of need for leave.** See HR/LR Policy #1409, Section IV(C).

*Employee:* Provide notice to make the employer aware of the need for FMLA-qualifying leave, and the anticipated timing and length of leave. It is not necessary to specifically mention the FMLA, but the employee must sufficiently explain the reasons for the needed leave to allow the employer to reasonably determine whether the FMLA may apply to the leave request. 29 C.F.R. §§ 825.301, 825.302, 825.303.

*Manager/Supervisor:* If an employee requests time off and you believe that FMLA leave may be necessary, notify human resources (HR) that the employee may need FMLA leave.

Timeline: An employee must provide an employer notice at least 30 days prior to leave for expected leave, or as soon as is practicable.

**2) Assess whether the employee is eligible for FMLA leave.** See HR/LR Policy #1409, Section II.

*HR:*

- Confirm whether the employee has worked for the State for at least 12 months as of the date the leave will start,<sup>5</sup> and whether the employee has worked at least 1,250 hours during the 12 months immediately preceding the leave, as required to be eligible for FMLA leave;<sup>6</sup>
- Identify whether the employee's reason for leave qualifies under the FMLA; and,



- Send a completed Notice of Eligibility Rights and Responsibilities Form to the employee. 29 C.F.R. §§ 825.110; 825.300.

Timeline: Send the Notice of Eligibility and Rights and Responsibilities Form within 5 business days of the request.

- If the employee is not eligible for FMLA leave or if the reason for leave does not qualify under the FMLA, state the reason for non-eligibility.
- If the employee is eligible for FMLA leave, use the form to request any additional missing information, request certification if applicable (see below), or indicate that no additional information is needed.

Relevant form(s):

- Federal Form WH-381, Notice of Eligibility and Rights and Responsibilities: <http://www.dol.gov/whd/forms/WH-381.pdf>.

**3) If necessary, request certification.** See *HR/LR Policy #1409, Section III(B)*.

*HR:* Request certification from an employee seeking FMLA leave due to the employee's own serious health condition; to care for the employee's covered family member with a serious health condition; due to a qualifying exigency; or to care for a covered servicemember with a serious illness or injury. Provide the employee with a Tennessean Warning with the certification request. Provisionally grant FMLA leave pending completion of the certification process.

Timeline: Request a certification when sending the employee the Notice of Eligibility Rights and Responsibilities Form. Give the employee at least 15 calendar days (or more if not practicable under the particular circumstances despite the employee's diligent good faith efforts) to provide the required certification. 29 C.F.R. § 825.305.

Relevant form(s):

- Federal Form WH-380-E, Certification of Health Care Provider for Employee's Serious Health Condition: <http://www.dol.gov/whd/forms/WH-380-E.pdf>.
- Federal Form WH-380-F, Certification of Health Care Provider for Family Member's Serious Health Condition: <http://www.dol.gov/whd/forms/WH-380-F.pdf>.
- Federal Form WH-384, Certification of Qualifying Exigency for Military Family Leave: <http://www.dol.gov/whd/forms/WH-384.pdf>.
- Federal Form WH-385, Certification for Serious Injury or Illness of Current Servicemember— for Military Family Leave: <http://www.dol.gov/whd/forms/WH-385.pdf>.
- Federal Form WH-385-V, Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave: <http://www.dol.gov/whd/forms/wh385V.pdf>.

**4) Determine whether the employee has provided complete and sufficient certification<sup>7</sup> (if applicable).** See *HR/LR Policy #1409, Section III(B)*.

*Employee:* Provide a complete and sufficient certification within the applicable deadline.

*HR:* Review the certification to ensure that it is complete and sufficient. If the certification is deemed complete and sufficient, skip to Step (8) discussing Designation Notices.

If the certification is incomplete or insufficient, provide the employee a statement in writing explaining what additional information is necessary to make the certification complete and sufficient, and the deadline (at least 7 calendar days) for submitting the additional information. If the certification is not returned, the employer may deny the taking of FMLA leave until the required certification is provided. 29 C.F.R. § 825.305; 825.313.

Timeline: The employer must provide the employee with at least 7 calendar days (or more if not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any deficiency.

**5) Review the re-submitted certification form to determine if it is now complete and sufficient (if applicable).** *See HR/LR Policy #1409, Section III(B).*

*Employee:* Provide a complete and sufficient certification within the applicable deadline.

*HR:* Review the re-submitted certification form to determine if it is complete and sufficient. If the deficiencies specified by the employer are not cured, the employer may deny the taking of FMLA leave until the required certification is provided. 29 C.F.R. § 825.305; 825.313. If the certification process is now complete, skip to Step (8) regarding Designation Notices.

**6) If necessary, contact the employee's health care provider for clarification and authentication<sup>8</sup> of certification for leave taken because of employee's own serious health condition or the serious health condition of a family member.** *See HR/LR Policy #1409, Section III(B).*

*HR:* If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider.

However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification after the employer has given the employee an opportunity to cure any deficiencies, as described above. In this circumstance, request written authorization by the employee, and then contact the employee's health care provider for clarification and authentication of the certification. You may not ask the health care provider for additional information beyond that required by the certification form. 29 C.F.R. § 825.307(a).

Under no circumstances may the employee's direct supervisor contact the employee's health care provider.

---

For leave taken for a qualifying exigency, see 29 C.F.R. § 825.309. For leave taken to care for a covered servicemember, see 29 C.F.R. § 825.310.

If the certification process is now complete, skip to Step (8) regarding Designation Notices.

**7) If necessary, request a second (or third) opinion for leave taken because of employee's own serious health condition or the serious health condition of a family member. See General Memo 2014-6, Section III, Questions 2 and 3.**

*Employee:* If requested by HR, obtain a second opinion, at the employer's expense, from a health care provider designated by the employer. If requested by HR, obtain a third opinion, at the employer's expense, from a health care provider jointly chosen with the employer.

*HR:* If there is reason to doubt the validity of a medical certification for leave taken due to the employee's own serious health condition or the serious health condition of a family member, the employer may request a second (or third) opinion at the employer's expense. 29 C.F.R. §§ 825.307(b), (c). Pending the receipt of the second (or third) medical opinion, provisionally designate the leave as FMLA leave. 29 C.F.R. § 825.307(b).

**8) Provide the employee with a Designation Notice. See HR/LR Policy #1409, Section III(C).**

*HR:* After gathering enough information to determine whether the leave is FMLA-qualifying, provide the employee with a Designation Notice. If a fitness-for-duty certification will be required in order for the employee to return to work, provide notice of the fitness-for-duty certification requirement with the Designation Notice. If the fitness-for-duty certification must address the employee's ability to perform the essential functions of the job, provide the employee with a list of the essential functions of the job with the Designation Notice. 29 C.F.R. §§ 825.300(d); 825.312.

Timeline: After determining that the employee is eligible for FMLA leave and that the reason for leave is FMLA qualifying, and after completing the certification process if applicable, provide the employee with a Designation Notice within 5 business days, absent extenuating circumstances.

Relevant form(s):

- Federal Form WH-382, Designation Notice: <http://www.dol.gov/whd/forms/WH-382.pdf>.

**9) Track the employee's leave of absence.**

*Employee:* If using FMLA leave concurrent with sick leave, vacation leave, or other accrued paid leave, use proper payroll earn codes to record FMLA usage. If using FMLA leave on an intermittent or reduced-schedule basis, use proper payroll earn codes to record FMLA usage.

*Manager/Supervisor:* Monitor employee's use of FMLA leave to ensure compliance with designated FMLA leave.

*HR:* Notify payroll of the number of hours of FMLA leave the employee is entitled to for the fiscal year. Monitor employees' FMLA usage and be aware of scheduled dates to return to work. Notify

managers/supervisors of return dates, and alert employees, managers, and supervisors if employees are close to using up their FMLA leave.

**10) If necessary, request recertification from employee for leave taken because of an employee's own serious health condition or the serious health condition of a family member. See General Memo 2014-6, Section II, Question 6.**

*HR:* Medical recertification may be requested to monitor an employee's leave and ensure continued compliance with the FMLA. The employee is required to provide a complete and sufficient recertification. Employers are not permitted to require second or third opinions on recertification. 29 C.F.R. § 825.308.

*Manager/Supervisor:* Monitor an employee's use of FMLA leave, and alert HR if recertification is necessary to ensure the employee's continued compliance with FMLA.

Timeline: In general, you may request recertification no more than every 30 days for leave taken because of an employee's own serious health condition or the serious health condition of a family member. If the medical certification indicates that the minimum duration of the condition is more than 30 days, wait the minimum duration of the condition before requesting recertification. In all cases, the employer may request recertification of a medical condition every 6 months. You may request recertification in less than 30 days if: the employee requests an extension of leave; circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications); or the employer receives information that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification.

Give the employee at least 15 calendar days (or more if not practicable under the particular circumstances despite the employee's diligent good faith efforts) to provide the requested recertification.

**11) Consider requests from the employee to use less/more FMLA leave.**

*Employee:* Provide reasonable notice (i.e. within two business days) if you expect to need to take more leave than originally anticipated, or if less leave is necessary than originally requested.

*Manager/Supervisor:* If an employee requests additional FMLA leave or gives notice of the need for less FMLA leave, forward the information to human resources.

*HR:* If the employee requests an extension of leave, you may request a recertification from an employee taking leave because of the employee's own serious health condition or the serious health condition of a family member.

If the amount of leave originally anticipated is no longer necessary or sufficient, the employer can require that the employee provide reasonable notice (i.e., within two business days) of the changed circumstances where the employee has knowledge in advance of the change in circumstances. 29 C.F.R. § 825.311(c). Employees may not be required to take more FMLA leave than is necessary. 29 C.F.R. § 825.311(c).

**12. If previously requested with the Designation Notice, obtain a fitness-for-duty certification from an employee on FMLA leave for a serious health condition that made the employee unable to perform the employee's job. See General Memo 2014-6, Section III, Question 7.**

*Employee:* Return a complete and sufficient fitness-for-duty certification to human resources prior to returning to work.

*HR:* Upon return of the fitness-for-duty certification, review the form to ensure that it is complete and sufficient. If necessary, contact the employee's health care provider for clarification or authentication of the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions may be required. 29 C.F.R. § 825.312.

Timeline: Employees who are required in the Designation Notice to provide a fitness-for-duty certification must provide a complete and sufficient certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition. An employer may delay restoration to employment until the employee submits the required fitness-for-duty certification. An employee who does not provide the requested fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. 29 C.F.R. §§ 825.312(e); 825.313(d).

Generally, an employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took leave. In those circumstances, if an employer chooses to require a fitness-for-duty certification for absences taken on an intermittent or reduced leave schedule, the employer shall notify the employee in the Designation Notice that the employee will be required to submit a fitness-for-duty certification once every 30 days. An employer may set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. 29 C.F.R. § 825.312(f).

**13. Prepare for the employee to return to work. See HR/LR Policy #1409, Section IV(D).**

*Employee:* Notify your manager/supervisor of your intent to return to work.

*Manager/Supervisor:* Ensure employee's return to work; contact human resources if the employee does not return to work on the scheduled day. An employee is entitled to return to the same or an equivalent position at the end of FMLA leave, including equivalent pay, benefits, and terms and conditions of employment. After the employee has returned to work, ensure continued compliance with the ADA, workers' compensation, or MHRA, as applicable.

*HR:* An employee is entitled to return to the same or an equivalent position at the end of FMLA leave, including equivalent pay, benefits, and terms and conditions of employment. After the

employee has returned to work, ensure continued compliance with the ADA, workers' compensation, or MHRA, as applicable.

### FORMS AND SUPPLEMENTS

No forms or supplements.

#### **Contacts**

MMB Enterprise Human Resources/Labor Relations Representative

#### **References**

HR/LR Policy #1409, Family and Medical Leave Act

HR/LR General Memo #2014-6, FMLA Guidance



<b>HR/LR General Memo #2014-6</b>	Issued	12/01/2014
	Revised	12/16/2015 Replaces PERSLs #1341, 1360, 1380, 1391, 1416
FMLA Guidance	Authority	Enterprise Human Resources

**GENERAL GUIDANCE AND INFORMATION**

The Family and Medical Leave Act (FMLA) provides up to 12 weeks of job-protected leave to eligible employees for certain family and medical reasons. Employees are entitled to up to 26 weeks of job-protected leave to care for a covered service member with a serious injury or illness.

This general memo should be reviewed with our statewide policy, HR/LR Policy #1409, “Family and Medical Leave Act.” This general memo provides guidance and answers to frequently asked questions relating to the implementation of the statewide FMLA policy. The information presented below is organized within the following sections:

- I.Amount of Leave
- II.Eligibility
- III.Employer Notice Requirements and Responsibilities
- IV.Employee Rights and Responsibilities
- V.Coordination with State Leave Laws

**Amount of Leave**

- 1. If an employee uses 12 weeks of FMLA-qualifying leave in one fiscal year, can the employee use another 12 weeks the following fiscal year for the same condition?**

Yes, provided that the employee still meets all eligibility criteria.

- 2. Can an employee “stack” two different sets of leave and, in effect, take 24 weeks of leave?**

An employee is entitled to take up to 12 weeks of leave at any time within the 12-month fiscal year, if the employee is eligible. Under the regulations, an employee could, therefore, take 12 weeks of leave at the end of a fiscal year, and 12 weeks of leave at the beginning of the following fiscal year if the employee meets all eligibility requirements. 29 C.F.R. § 825.200.

- 3. If both spouses are state employees, what amount of FMLA leave may be taken for the birth of their child or placement of a child with them for adoption or foster care?**

They may each take 12 weeks of FMLA leave per fiscal year if needed for the following situations:

- a. For the birth of a son or daughter and to care for the newborn child, or for the placement of a child with the employee for adoption or foster care, and to care for the newly placed child.
- b. To care for a newborn, adopted, or foster child with a serious health condition.

**4. If FMLA-qualifying leave is taken for the birth of a child, or for the placement of a child for adoption or foster care, must the leave be completed within a specific period of time?**

*FMLA qualifying leaves must begin within 12 months of the birth or placement of a child. In cases where the child must remain in the hospital longer than the mother, the leave must begin within 12 months after the child leaves the hospital.*

**5. How do I calculate the increments for intermittent leave?**

FMLA leave can be taken intermittently or on a reduced leave schedule under certain circumstances. Intermittent leave is leave taken in separate blocks of time for a single reason; a reduced leave schedule is a leave schedule in which an employee works a reduced number of hours per workweek. 29 C.F.R. § 825.202.

When an employee takes FMLA leave on an intermittent or reduced schedule basis, the employer must calculate the leave using an increment which is no larger than the increment used to calculate other forms of leave. This increment must not be larger than one hour. If an employer uses different increments for different types of leave, the employer must account for FMLA leave in the smallest increment used to account for any other type of leave. For example, if an employer accounts for the use of vacation leave in increments of one hour and the use of sick leave in increments of one-half hour, then FMLA leave use must be accounted for using increments no larger than one-half hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. 29 C.F.R. § 825.205.

Only the amount of leave actually taken may be counted toward the employee's leave entitlement. The workweek is the basis of leave entitlement. For example, if an employee who would otherwise work 40 hours per week takes off 8 hours for FMLA leave, the employee would use one-fifth (1/5) of a week of FMLA leave. For an employee who works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. Therefore, if an employee regularly works a 30-hour week, but only works 20 hours per week under a reduced leave schedule, then the 10 hours of leave constitute a 1/3 of a week of FMLA leave for each week the employee uses a reduced leave schedule. Fractions may be converted to the hourly equivalent, as long as the conversion equitably reflects the employee's total normally scheduled hours. 29 C.F.R. § 825.205.

**6. How do I calculate intermittent leave entitlement for an employee whose schedule varies or has recently changed?**

If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 months prior to the beginning of leave would be used to calculate the employee's leave entitlement. 29 C.F.R. § 825.205.

If an employer has made a long-term or permanent change to an employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used when calculating intermittent leave. 29 C.F.R. § 825.205.

**Eligibility**

**1. How can an Appointing Authority determine if a request for leave is FMLA-qualifying?**

An employee giving notice of the need for FMLA leave shall explain the reasons for the needed leave so as to allow the Appointing Authority to determine whether it is qualifying. Human



Resources (HR) for the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. 29 C.F.R. § 825.302. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying. 29 C.F.R. § 825.302.

## **2. Is FMLA leave available to an employee with a same-sex spouse?**

Yes. HR/LR Policy #1409 defines "spouse" as a "husband or wife," which includes a same-sex spouse as long as the same-sex marriage was (1) entered into in a state that recognizes such marriages or, (2) if entered into outside of any state, is valid in the place that it was entered into and could have been entered into in at least one state.

## **3. When can I grant a provisional designation of FMLA leave?**

After establishing that the employee has worked at least 1250 hours in the prior 12 months, and therefore is eligible for FMLA leave, provisional FMLA leave may be granted while waiting to receive completed medical certification forms, second opinions, or third opinions.

## **4. Can you "re-check" an employee's eligibility for continuous leave at the start of a new fiscal year?**

At the time the leave is to start, the employer should determine whether the employee meets the hours of service requirement and has been employed for a total of at least 12 months. When continuous FMLA-qualifying leave crosses over into a new fiscal year, you should not determine eligibility at the beginning of the new fiscal year. 29 C.F.R. § 825.110(d).

## **5. When can you "re-check" an employee's eligibility for intermittent leave?**

When an employee takes FMLA leave on an intermittent basis, she is taking leave in separate blocks of time for a single qualifying condition. 29 C.F.R. § 825.202(a). As long as the separate absences are taken for the same reason over the course of the same fiscal year, eligibility only needs to be established once, at the beginning of the series of leave. Eligibility should be "re-checked" for each new qualifying condition.

When an employee's intermittent leave crosses over into a new fiscal year, an employer can "re-check" an employee's 1,250 hours eligibility criteria at the start of the new fiscal year (i.e., July 1), even if it is for the same condition.

## **6. When can I seek recertification?**

When an employee takes leave for the employee's own serious health condition or for the serious health condition of a family member, the employee must provide medical certification. Generally, an employer may request recertification of the qualifying serious health condition no more often than every 30 days.

An employer must wait more than 30 days to seek recertification if the medical certification indicates that the minimum duration of the condition is more than 30 days. In this case, the employer must wait until that minimum duration expires to request recertification. Regardless, an employer may request recertification every 6 months in connection with an absence by an

employee, even if the medical certification states that the minimum duration of the condition is more than 6 months.

An employer may request recertification in less than 30 days if:

- a. The employee requests an extension of leave;
- b. Circumstances described by the previous certification have changed significantly; or,
- c. The employer receives information that casts doubt on the employee's stated reason for absence or the continuing validity of the certification (for example, if an employee is on FMLA leave for four weeks due to knee surgery, but plays on the office softball team during the FMLA leave).

29 C.F.R. § 825.308.

#### **7. Can an employee work another job ("moonlight") while on FMLA leave?**

If an employer has a uniformly-applied policy against outside or supplemental employment, then that policy may continue to apply to the employee while on FMLA leave. An employer which does not have such a policy may not deny FMLA benefits to an employee who continues to work a second job while on FMLA leave. If, however, the circumstances surrounding the second job cast doubt on the employee's need for FMLA leave, the employer may pursue the recourses available to the employer when fraud is suspected, including recertification. 29 C.F.R. § 825.216.

#### **8. Can employees use FMLA leave to care for an adult son or daughter?**

Yes, if the adult son or daughter meets certain requirements. In order for an adult child (i.e., a child 18 years of age or older) to meet the FMLA definition of "son or daughter," the adult child must have a physical or mental disability and be unable to care for himself or herself because of that disability. 29 C.F.R. §§ 825.102, 825.122. The FMLA regulations adopt the ADA definition of "disability," as a physical or mental impairment which substantially limits a major life activity. 29 C.F.R. §§ 825.102, 825.122. A parent is entitled to take FMLA leave to care for an adult son or daughter if the adult son or daughter:

- a. Has a disability as defined by the ADA;
- b. Is incapable of self-care because of the disability;
- c. Has a serious health condition; and,
- d. Is in need of care due to the serious health condition.

The age of an employee's son or daughter at the onset of a disability is not relevant when determining the employee's eligibility for FMLA leave. An employee may take FMLA leave to care for an adult son or daughter regardless of when the disability commenced. Moreover, there is no minimum duration required for an impairment to qualify as a disability; the effect of an impairment lasting or expected to last fewer than six months may fall within the definition of "substantially limiting" under the ADA. The adult child's qualifying disability may be—but does not necessarily need to be—related to the same "serious health condition" that requires the parent employee's care. For practical purposes, there may be impairments that will satisfy both the expanded definition of "disability" and the definition of "serious health condition," even though the statutory tests are different.

The definition of a disability under the ADA, as well as the clarification that when an adult son or daughter's disability commences is not determinative of whether he or she qualifies as a "son or daughter" under the FMLA, may allow parents of adult children who have been wounded or sustained an injury or illness in military service to take FMLA leave beyond that provided under the special military caregiver leave provision of the statute. Under the military caregiver provision, a parent of a covered servicemember who sustained a serious injury or illness is entitled to up to 26 workweeks of FMLA leave in a single 12-month period if all other requirements are met. The servicemember's injury, however, may have an impact that lasts beyond the single 12-month period covered by the military caregiver leave entitlement. Thus, the servicemember's parent can take FMLA leave to care for a son or daughter in subsequent years due to the adult child's serious health condition, as long as all other FMLA requirements are met. DOL Administrator's Interpretation, No. 2013-1.

### **9. What is a "key employee"?**

A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10% of all employees working for the employer. The key employee must be among the high paid 10% of all employees, both salaried and non-salaried. 29 C.F.R. § 825.217. Employers may be able to deny reinstatement to a key employee following FMLA leave. In order to deny restoration to a key employee, the employer must determine that restoration will cause substantial and grievous economic injury to the operations of the employer. It is not sufficient for the employer to find that the absence of the key employee will cause such substantial and grievous injury. 29 C.F.R. § 825.218(a). The regulations do not create a precise test to determine the level of hardship. They do note the following, however:

- a. An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the key employee. If permanent replacement is unavoidable, then the employer may consider the cost of reinstating the employee in evaluating whether substantial and grievous economic injury will occur from restoring the employee to an equivalent position. 29 C.F.R. § 825.218(b).
- b. If the reinstatement of a key employee threatens the economic viability of the employer, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. 29 C.F.R. § 825.218(c).
- c. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury. 29 C.F.R. § 825.218(c).

If an employer believes that reinstatement may be denied to a key employee, the employer must provide written notice to the employee at the time that the employee gives notice of the need for FMLA, or the employee commences FMLA leave, whichever is earlier, that he or she is a key employee. The employer must fully inform the employee of the potential consequences. 29 C.F.R. § 825.219(a).

As soon as the employer makes a good faith determination that restoration will result in substantial and grievous economic injury to its operations, the employer shall provide written notice to the employee of its determination that it cannot deny FMLA leave, and that it intends to deny restoration to employment at the completion of FMLA leave. This notice must be served in person or by certified mail, and must provide the basis for the employer's finding. In lieu of FMLA

leave, the employer must provide the key employee reasonable time to return to work. 29 C.F.R. § 825.219(b).

After providing notice that restoration will result in substantial and grievous economic harm to the employer, the employee is still entitled to request reinstatement at the end of FMLA leave, and the employer must make a new determination regarding whether the key employee can be reinstated. This new determination must be made based on the facts at that time. If it is again determined that substantial and grievous economic injury will result, the employer shall provide written notice in person or via certified mail of the denial of restoration. 29 C.F.R. § 825.219(d).

### **Employer Notice Requirements and Responsibilities**

#### **1. Is an employer required to grant intermittent parenthood leave?**

No. Under current regulations, an employee may take intermittent leave for reasons of medical necessity or serious health conditions. 29 C.F.R. § 825.202(b). However, an employee may take intermittent leave following the birth/adoption only if the employer agrees to such leave. 29 C.F.R. § 825.202(c). Therefore, an employer may exercise discretion when deciding to grant intermittent parenthood leave, and is not required to do so.

#### **2. How does an employer collect a medical certification?**

Only medical practitioners, and not HR staff or supervisors, are able to make determinations of a serious health condition. This determination must be made via the Certification of Health Care Provider form. The form must be returned to the HR office, and not an individual's supervisor, in order to prevent a supervisor from inadvertently obtaining any confidential medical information. If the certification form indicates a serious health condition, the employer may accept the information or obtain a second opinion from a health care provider. The employer may choose the health care provider for the second opinion, but cannot regularly do business with that health care provider.

#### **3. When should I seek a second or third opinion?**

An employer may seek a second opinion, at the employer's own expense, when the employer has reason to doubt the validity of a medical certification. 29 C.F.R. § 825.307(b). An employer may seek a third opinion, also at the employer's own expense, if the opinions of the employee's and the employer's designated health care provider differ. This third opinion shall be final and binding. 29 C.F.R. § 825.307(c).

While waiting for receipt of the second or third opinions, the employee is entitled to provisional FMLA leave.

For additional information regarding seeking a second opinion, please contact your representative at the Attorney General's Office or MMB.

#### **4. Do I need to provide a Tennessen Warning with the Certification of Health Care Provider form?**

Yes. Provide a Tennessen Warning to any employee to whom you provide a Certification of Health Care Provider form.

#### **5. What documents am I required to retain and for how long?**

Employers with eligible employees must maintain for at least 3 years records that disclose the following:

- a. Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.
- b. Dates FMLA leave is taken by FMLA-eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave.
- c. If FMLA leave is taken by an employee in increments of less than one full day, the hours of the leave.
- d. Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees as required by FMLA. Copies may be maintained in personnel files.
- e. Any documents (including written and electronic) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.
- f. Premium payments of employee benefits.
- g. Records of any dispute between the employer and employee regarding designation of leave as FMLA leave, including written statements of the reasons for the designation and for the disagreement.
- h. Records and documents related to certifications, recertifications, or medical histories of employees or employees' family members.

29 C.F.R. § 825.500. These documents may be required to be maintained for longer periods of time under your agency's record retention policy.

#### **6. Must all new employees be notified of their FMLA rights?**

Yes. Employers must post in a conspicuous place a general notice explaining the FMLA's provisions and providing information regarding procedures for filing a claim. This notice must be posted where it can be readily seen by employees and applicants. 29 C.F.R. § 825.300(a)(1).

Employers must also include the information from the general notice in any employee handbook or other written policies or manuals describing employee benefits and leave provisions. If an employer does not have a handbook or written guidance, the employer is required to provide this general notice to new employees upon hiring. 29 C.F.R. 825.300(a)(3).

#### **7. When can I request a fitness-for-duty certification?**

As a condition of restoring to employment an employee whose FMLA leave was due to his or her own serious health condition that made the employee unable to perform his or her job, an employer may require the employee to provide a fitness-for-duty certification. 29 C.F.R. § 825.312(a). An employer who requests a fitness-for-duty certification must have a uniformly applied policy that applies to all similarly-situated employees (i.e., same occupation, same serious health condition). 29 C.F.R. § 825.312(a). An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. 29 C.F.R. § 825.312(b).

An employer may request a fitness-for-duty certification for an FMLA-qualifying continuous leave of absence. An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule. However, an employer may request a certification

of fitness to return to duty for absences taken on an intermittent or reduced leave schedule up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. "Reasonable safety concerns" means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. 29 C.F.R. § 825.312(f).

In all instances, the designation notice shall advise the employee if the employer will require a fitness-for-duty certification to return to work, and whether that certification must address the employee's ability to perform essential functions of the job. 29 C.F.R. § 825.312(d). If the employer requires that the certification address the employee's ability to perform the essential functions of his or her job, the employer must provide the employee with a list of the essential functions with the designation notice. 29 C.F.R. § 825.312(b).

If an employer chooses to require a fitness-for-duty certification for absences taken on an intermittent or reduced leave schedule, the employer shall notify the employee in the designation notice that the employee will be required to submit a fitness-for-duty certification every 30 days. An employer may set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in the designation notice. 29 C.F.R. § 825.312(f).

When an employee submits a completed fitness-for-duty certification, the employer may contact the employee's health care provider for clarification and/or authentication. 29 C.F.R. § 825.312(b). "Clarification" means contacting the health care provider to understand the handwriting or to understand the meaning of a response. "Authentication" means providing the health care provider with a copy of the certification and requesting verification that the information provided was completed by and signed by the health care provider. No additional medical information may be requested. 29 C.F.R. § 825.307(a). The employer may not delay the employee's return to work while seeking clarification/authentication. Employers may not require second or third opinions on a fitness-for-duty certification. 29 C.F.R. § 825.312(b).

An employer may delay restoration to employment until the employee submits the required fitness-for-duty certification. An employee who does not provide the requested fitness-for-duty certification or request additional leave is not entitled to reinstatement under the FMLA. 29 C.F.R. § 825.312(e). If the amount of leave originally anticipated is no longer necessary or sufficient, the employer can require that the employee provide reasonable notice (i.e., two business days) of the changed circumstances where foreseeable. 29 C.F.R. § 825.311(c).

After an employee has returned from FMLA leave, an employer may conduct medical examinations and inquiries to the extent they are permitted by the ADA and Minnesota Human Rights Act. 29 C.F.R. § 825.312(h).

## **Employee Rights and Responsibilities**

### **1. Can an employee refuse to take FMLA leave?**

No. Federal regulations clearly create obligations for employers to begin processing FMLA claims. Once an employer has acquired knowledge that an employee is taking leave for an FMLA-qualifying reason, the employer must designate the leave as FMLA leave. 29 C.F.R. § 825.301(a). Moreover, the State requires the concurrent usage of paid sick leave for conditions which qualify

both for sick leave usage and FMLA leave. All paid time counts toward the 12 weeks of FMLA leave. 29 C.F.R. § 825.207.

**2. Is an employee required to use accrued paid sick leave or accrued paid vacation hours while on unpaid FMLA-qualifying leave?**

When employees are on unpaid FMLA leave, they are required to exhaust their accrued sick leave hours for conditions which qualify for sick leave usage under the applicable labor contract or compensation plan.

After exhausting their accrued sick leave hours, employees may choose to use accrued vacation or compensatory time while using FMLA leave.

The employee must comply with normal employer paid leave policies, and all paid time will count toward the twelve (12) weeks of FMLA-qualifying leave. 29 C.F.R. § 825.207. Review HR/LR Policy #1409 for additional information.

**3. If an employee is receiving disability benefits or workers' compensation benefits while on FMLA leave, can the employee also be required to use accrued paid sick leave during FMLA leave?**

While an employee is receiving long-term disability benefits, short-term disability benefits, or workers' compensation benefits on FMLA leave, the leave is no longer unpaid. For this reason, the employee cannot be required to concurrently use accrued sick leave hours. 29 C.F.R. § 825.207(d),(e). However, the employee may choose to use accrued paid leave hours in the following manner:

- If the employee is receiving short-term or long-term disability benefits while on FMLA leave, the employee may use accrued paid leave in addition to the disability benefits, or to supplement the disability benefits.
- If the employee is receiving workers' compensation benefits while on FMLA leave, the employee may use accrued paid leave to supplement the workers' compensation payments. This supplement shall not result in the payment of a total weekly rate of compensation which exceeds the employee's regular weekly wage. See [SEMA4Help](#) for additional information.

If the employee is still on FMLA leave as of the date that the disability benefits or workers' compensation payments cease, the employee will again be required to use his or her accrued sick leave hours for conditions which qualify for sick leave usage under the applicable labor contract or compensation plan. After exhausting the accrued sick leave hours, the employee may choose to use accrued vacation or compensatory time.

**4. Do employees remain eligible for insurance coverage during FMLA leave?**

Yes. When an employee takes FMLA leave, he or she may continue all coverage which the employee had prior to FMLA leave, including: medical and dental insurance; basic, optional, spouse, and child life insurance; and short-term and long-term disability insurance coverage. 29 C.F.R. § 825.209.

In order for coverage to continue, the employee must continue to pay the employee's portion of required premiums. 29 C.F.R. § 825.210. Because FMLA leave is unpaid and there is no paycheck

from which to withdraw the premium, the employee will receive an invoice for the required premiums, unless the employee is also concurrently using paid leave. If the employee concurrently uses paid leave during FMLA leave, the payment will be withdrawn from the paycheck in the usual manner. If a required payment by the employee is not received on time, coverage may be cancelled and the employee will not be eligible to reinstate coverage until returning to work. 29 C.F.R. § 825.212.

If an employee takes leave due to a work-related disability for which the employee receives workers' compensation payments, the employee will not be eligible to also receive short-term disability payments.

**5. May an employee choose not to retain health and dental coverages while on FMLA-qualifying leave?**

An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave. 29 C.F.R. § 825.209(e).

**6. May an employee choose not to retain optional coverages while on FMLA-qualifying leave?**

Yes, an employee may choose not to retain optional coverages while off the payroll during FMLA-qualifying leave. The optional coverages will be reinstated upon return to work if the return to work is within the allotted twelve weeks of FMLA of FMLA-qualifying leave. If an employee chooses not to retain optional coverages, they will not be covered for any claims that may have occurred while they were on leave. Coverage reinstatement limits may apply if subsequent unpaid leave time is taken.

**7. If an employee terminates employment during the FMLA-qualifying leave, may the employer recoup the costs of the premiums paid?**

Under some defined circumstances, an employer may recover its share of health/dental insurance premiums paid during a period of unpaid FMLA qualifying leave from an employee if the employee fails to return to work for at least thirty (30) calendar days after the leave. Please contact MMB for guidance regarding situations under which recoupment of premium costs can occur.

**8. Are employees on FMLA-qualifying leaves allowed to earn holiday pay during their leave?**

Employees on FMLA-qualifying leave may earn holiday pay only if they are in a paid status on the normal work day before and after the holiday.

**9. Does workers' compensation leave count against an employee's FMLA leave entitlement?**

FMLA-qualifying leave and workers' compensation leave may run concurrently, provided the reason for the absence is due to a qualifying serious illness or injury and the employee is eligible for FMLA leave. The employer must properly designate the leave as FMLA leave and notify the employee that the leave will be counted as FMLA leave.

**Coordination with State Leave Laws**

**1. If abuse of leave is suspected, when should I request a doctor's note and when should I require an FMLA recertification?**



Agencies may require employees to provide a doctor’s statement when sick leave abuse is suspected that is not FMLA-related. Agencies must use the FMLA recertification process—and not request a doctor’s note—when FMLA abuse is suspected. Agencies that suspect FMLA abuse can request FMLA recertification every 30 days or less if:

- a. The employee’s claimed absences deviate from their certification; or,
- b. The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification.

29 C.F.R. § 825.308(c).

## **2. Does parenting leave provided under M.S. 181.941 run concurrently with parenting leave under the FMLA?**

Yes. M.S. 181.941 allows for twelve weeks of unpaid leave for biological or adoptive parents in conjunction with the birth or adoption of a child, or for prenatal care or incapacity due to pregnancy, childbirth, or related health conditions. The length of leave provided under M.S. 181.941 may be reduced by leave taken for the same purpose by the employee under the FMLA, or by any period of paid parental, disability, personal, medical, sick leave, or accrued vacation so that the total leave does not exceed twelve weeks, unless agreed to the by the employer. M.S. 181.943.

However, there is one important difference between the FMLA and state law regarding leave for the birth or adoption of a child. FMLA leave time must be taken during the 12-month period beginning on the date of the child’s birth or the date of the child’s placement for adoption, and expires at the end of this 12-month period. 29 C.F.R. §825.120(a)(2); 29 C.F.R. 825.121(a)(2). Any parenting leave taken beyond this 12-month period will not qualify as FMLA leave. 29 C.F.R. § 825.120(a)(2); 29 C.F.R. § 825.121(a)(2). In contrast, under M.S. 181.941, leave must simply begin within 12 months of the birth or adoption (exceptions apply if the child must stay in the hospital longer than the mother). As a result, under state law, although the leave must start within 12 months of the birth or adoption, the leave may extend beyond the 12-month period after the birth or adoption.

### **FORMS AND SUPPLEMENTS**

<b>Contacts</b>	MMB Labor Relations Representative
<b>References</b>	HR/LR Policy #1409: <a href="http://view.ext.cms.oet.mn.gov/mmb/employee-relations/laws-policies-and-rules/statewide_hr_policies/">http://view.ext.cms.oet.mn.gov/mmb/employee-relations/laws-policies-and-rules/statewide_hr_policies/</a>