MINNESOTA Management & Budget

DATE: June 21, 2013 HR/LR Policy & Procedure #1409

TO: Human Resource Directors/Designees
Labor Relations Directors/Designees

FROM: Carolyn Trevis, Assistant State Negotiator
Labor Relations Division

Ann O'Brien, Assistant Commissioner
Enterprise Human Resources

PHONE: (651) 259-3758

RE: Revised Statewide Policy on FMLA – **REPLACES** policy distributed on 5/13/10, and all amendments thereto

Enclosed is a revised Statewide Policy on FMLA and the Frequently Asked Questions. This revision replaces the policy/questions distributed in May 2010. Please distribute this revision to your staff and to all of your employees in your agency. Please also refer to the MMB web page for a copy of this Policy and the Frequently Asked Questions at http://beta.mmb.state.mn.us/doc/persl/1409.pdf. This policy applies to all state employees, regardless of collective bargaining agreement or pay plan. Please also provide a copy of this policy to all new hires, and maintain a record that each new hire has received a copy.

Earlier this year, the U.S. Department of Labor (DOL) issued a Final Rule to implement statutory amendments to the military family leave provisions of the FMLA. These amendments expanded the Act's military caregiver leave and the qualifying exigency leave provisions.

The most significant changes are highlighted and summarized below:

- Expands qualifying exigency leave to include eligible employees with family members serving in the regular armed forces;
- Adds a foreign country deployment requirement;
- Increases the length of time an eligible family member may take for the qualifying exigency reason of "rest and recuperation" from five (5) days to a maximum of 15 days;
- Creates a new qualifying exigency leave category for parental care;
- Defines what constitutes a serious injury or illness for a current member of the armed forces or a current veteran;
- Expands the definition of serious injury or illness to include preexisting conditions that were aggravated in the line of duty.

Regarding the calculation of intermittent leave, the final rule clarifies that an employer may not require an employee to take more leave than necessary for the circumstances that required the leave and that employers must track FMLA leave using the smallest increment of time used for other forms of leave, subject to a one-hour maximum.

The final rule also removed the FMLA optional-use forms and poster from the regulations and they are no longer available in the appendices. They are now available on the Department of Labor's Wage and Hour Division website, www.dol.gov/whd, as well as at local Wage and Hour district offices. The FMLA notice requirements have not changed, however, and employers are still required to display the updated version of the DOL's FMLA poster in the workplace. You may view posting requirements and print a copy of the poster here: http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf

If you have any questions, please contact your Labor Relations representative or Carolyn.

cc: MMB Labor Relations Staff
MMB Employee Insurance Division Staff
MnSCU Labor Relations
Jill Pettis, Assistant State Negotiator
Liz Houlding, Workers' Compensation Division
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MINNESOTA Management & Budget

HR/LR Policy and Procedure #1409 Revised Policy on Family Medical Leave Act (FMLA)	**Issued**	6/21/2013
	Revised	Replaces PERSLs #1397, #1406, #1409, and amendments issued on 1/09 and 5/10
	Authority	Labor Relations & Enterprise Human Resources

OVERVIEW

Objective	To provide the latest revision of the State Policy on the Administration of the Federal Family Medical Leave Act (FMLA)
Policy Statement	State agencies will administer the FMLA in accordance with the provisions in this policy and procedure
Scope	Applies to all state employees regardless of collective bargaining agreement or pay plan
Definitions	N/A
Exclusions	N/A
Statutory References	Federal Family Medical Leave Act

GENERAL STANDARDS AND EXPECTATIONS

General Information
In March 2013, the U.S. Department of Labor (DOL) issued a Final Rule to implement and interpret statutory amendments to the military family leave provisions of the FMLA made by the National Defense Authorization Act for fiscal year 2010 (FY 2010 NDAA). These amendments expanded the Act's military caregiver leave and the qualifying exigency leave provisions.

The revised "Statewide Policy on FMLA" follows this General Information.

The most significant changes are highlighted and summarized below:

- Expands qualifying exigency leave to include eligible employees with family members serving in the regular armed forces;
- Adds a foreign country deployment requirement;
- Increases length of time an eligible family member may take for the qualifying exigency reason of "rest and recuperation" from five (5) days to a maximum of 15 days;
- Creates a new qualifying exigency leave category for parental care;
- Defines what constitutes a serious injury or illness for a current member of the armed forces or a current veteran;
- Expands the definition of serious injury or illness to include preexisting conditions that were aggravated in the line of duty;

- Clarifies that an employer may not require an employee to take more leave than necessary for the circumstances that required the leave and that employers must track FMLA leave using the smallest increment of time used for other forms of leave, subject to a one-hour maximum;
- FMLA optional-use forms and poster are removed from the regulations and are instead available on the DOL's Wage and Hour Division website, www.dol.gov/whd, as well as at local Wage and Hour district offices.

The revised Question and Answer information can be found below in "Forms and Instructions" section and in the Resources and Training site at https://extranet.mmb.state.mn.us/hr-labor/hr/FMLA/FMLAFAQforHR.pdf

Copies of this HR/LR Policy and Procedure were sent to MMB Labor Relations Staff; MMB Employee Insurance Division Staff; MnSCU Labor Relations; Liz Houlding, Workers' Compensation Division; Jill Pettis, Assistant State Negotiator; SEMA4; Kristyn Anderson, Attorney General's Office; Gary Cunningham, Attorney General's Office; Laurie Hansen, MMB; Jodi Hebert, MMB.

6/13

STATEWIDE POLICY ON FMLA

Purpose

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

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 consistent with the FMLA, relevant State law, and collective bargaining agreements and plans.

In addition, an eligible employee is entitled to 26 workweeks of leave in a single 12 month period to care for a covered servicemember with a serious injury or illness.

Definitions

Listed below are the definitions of specific words and phrases as used in the Family Medical Leave Act. These definitions are intended to be used solely in relation to the provisions of the Family Medical Leave Act, and should not be expanded to any other situation. Following each heading is a citation number from the regulations published in 2013 (29 CFR Part 825) or Public Law 111-84.

"COVERED ACTIVE DUTY or CALL TO COVERED ACTIVE DUTY STATUS" 825.102, 825.126 and Public Law 111-84

"Covered active duty or call to covered active duty status" is defined, for purposes of qualifying exigency leave, as

(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;

   (ii) All reserve component members in the case of war or national emergency;

   (iii) Any unit or unassigned members of the Ready Reserve; or

   (iv) Any unit or unassigned members of the Select Reserve and certain members of the Individual Ready Reserve; or

2) the suspension of promotion, retirement or separation rules for certain Reserve components; or

3) 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

4) the calling of the National Guard and state military into Federal service in the case of insurrections and national emergencies; or

5) 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" 825.102, 825.122, 825.127 and Public Law 111-84

This term is used when describing employee leave to care for a covered servicemember 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.[1]

[1] 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

"HEALTH CARE PROVIDER" 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:

(i) 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;

(ii) 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;

(iii) 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;

(iv) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) 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" 825.102 and 825.122

Incapable of self-care means that 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" 825.122

Persons who are "in loco parentis" include those 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.

determination of the five-year period for covered veteran status. 825.127(b)(2)(i).

“MILITARY CAREGIVER LEAVE” 825.102 and 825.127

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

“MILITARY MEMBER” See generally 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" 825.124

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

1) Because of a serious health condition, the family member or covered servicemember 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.

2) 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.

3) The employee may be needed to substitute for others who normally care for the family member or covered servicemember, 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 servicemember.

4) An employee’s intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember 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” 825.102, 825.122, 825.127

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

1) Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions;

2) Brothers and sisters;

3) Grandparents;

4) Aunts and uncles;

5) First cousins;

unless the covered servicemember 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 servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin.

"PARENT" 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" 825.102 and 825.122

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

"PHYSICAL OR MENTAL DISABILITY" 825.122

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

"QUALIFYING EXIGENCY" 825.126, 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).[2] An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

1) **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.

2) **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.

3) **Childcare and school activities** – events include:

   (a) 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] An employer may require that leave for any qualifying exigency be supported by a certification from the employee. 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. 825.309.

(b) 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.

(c) 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.

(d) 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.

4) **Financial and legal arrangements** – events include:

(a) 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.

(b) 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.

5) **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.

6) **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.

7) **Post deployment activities** – events include:

(a) 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.

(b) 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.

8) **Parental care** – events include:

(a) 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.

(b) 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.

(c) 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.

(d) 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.

9) **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 quality 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" 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**, i.e., 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:

   (a) **Treatment two or more times** within 30 days of the first day of incapacity, unless extenuating circumstances, 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**

   (b) **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; or

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

   Chronic condition is defined as one which:

   (a) 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

   (b) Continues over an extended period of time; and

   (c) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.); or

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); or

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).

Specific Exclusions. Routine physical, eye, or dental examinations, and cosmetic treatments, cold, flu, and earaches without complications are ordinarily excluded.

Specific Inclusions. The following conditions are included in the definition of serious health condition if all the conditions of the FMLA are met:

A. Mental illness

B. Allergies; and

C. Substance abuse. Leave may only be taken for treatment of substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. Absence due to an employee's use of the substance does not qualify for FMLA leave. 825.119

"SERIOUS INJURY OR ILLNESS OF A COVERED SERVICEMEMBER" 825.102, 825.127 and, generally, 825.310, and Public Law 111-84

The term "serious injury or illness"

(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 servicemember 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:

(i) 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 servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) 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

(iii) 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

(iv) 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.

When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. Any one of the following health care providers may complete such 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 servicemember when the certification has been completed by DOD, VA or TRICARE, but may be required by an employer for military caregiver leave certifications that are completed by health care providers as defined in the FMLA regulations.

"SON" OR "DAUGHTER" 825.102 and 825.122

"Son or daughter" means 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. [3]

"SON OR DAUGHTER OF A COVERED SERVICEMEMBER" 825.102, 825.122, 825.127

"Son or daughter of a covered servicemember" means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

"SON OR DAUGHTER ON COVERED ACTIVE DUTY OR CALL TO COVERED ACTIVE DUTY STATUS" 825.102, 825.122, 825.126

"Son or daughter on covered active duty or call to covered active duty status" means 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" 825.102 and 825.122

A spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.[4]

"UNABLE TO PERFORM THE FUNCTIONS OF THE POSITION OF THE EMPLOYEE" 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.

Procedures and Responsibilities

I. Eligibility

A. Employee Eligibility

[3] See also MMB HR/LR Policy and Procedure #1416, FMLA – Department of Labor Clarification of "son or daughter".

[4] However, the federal definitions of "marriage" and "spouse" as set forth in the Defense of Marriage Act (DOMA) apply to the FMLA and therefore FMLA leave may only be taken to care for a spouse of the opposite sex.

1. The employee must have worked for the State of Minnesota for at least 12 months. The 12 months need not be consecutive, provided the employee's prior service occurred within the last seven years. However, 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 employer.

2. In addition, the employee must have worked at least 1,250 hours during the 12 months immediately preceding the request. The Fair Labor Standards Act requires employers to count hours of work only, not paid hours such as vacation, holidays, sick pay, unpaid leave of any kind, or periods of layoff. 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.

2. For the placement with an employee of a child for adoption or foster care.

3. To care for the employee's spouse, son or daughter, or parent with a serious health condition.

4. 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.

5. 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).

6. To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember.

   a) In order to care for a covered servicemember, the eligible employee must be the spouse, son, daughter, parent, or next of kin of the covered servicemember.

   b) Under this provision, employees are entitled 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 servicemember and ends 12 months after that date, regardless of the method used by the employer 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 servicemember is forfeited.

   e) Leave entitlement is to be applied on a per-covered-servicemember, per-injury basis, such that an eligible employee may be entitled to take more than one period of 26 weeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember 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 26 workweeks of leave to care for a covered servicemember with more than one

serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and 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 combine a total to 26 weeks of leave for any FMLA qualifying reason during the single 12-month period provided that the employee is entitled to no more than 12 weeks of leave for one or more of the following:

i. Birth of son or daughter
ii. Placement of son or daughter 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.
v. Because of a qualifying exigency.

C. Employer's Response to the Employee's Request for FMLA Leave

When an employee requests FMLA qualifying leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. In addition, each time an eligibility notice is given, the employer must provide the employee with the following:

1. Notice describing the employee's obligations and explaining the consequences of a failure to meet the obligations.

2. 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.

3. Any certification requirements (of a serious health condition, serious injury or illness or qualifying exigency arising out of covered active duty or call to covered active duty status) and the consequences of failing to furnish such certification.

4. Employee's right to substitute paid leave, whether the employer 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 requirements for paid leave.

5. Requirements concerning payment of health insurance premiums to maintain health benefits and the arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse).

6. The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking the leave.

7. 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.

8. 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.

D. Certification Requirements

1. In most cases, the Appointing Authority will request that an employee furnish certification where the requested leave is to care for a covered family member with a serious health condition or due to the employee's own serious health condition.

2. The Appointing Authority may require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification (e.g., active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to covered active duty status, in the case of a qualifying exigency, or information from an authorized health care provider of a covered servicemember, in the case of leave taken to care for a covered servicemember).

3. In most cases, the Appointing Authority 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 Appointing Authority may request a certification at some later date if it has reason to question whether the leave is appropriate or its duration.

4. If the Appointing Authority finds that any certification is incomplete or insufficient, it will advise the employee, and will state what additional information is needed.

5. 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.

6. The Appointing Authority may request a fitness for duty certificate upon the employee's return to work.

E. Designating Leave and Required Notices

When the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason (e.g. after receiving a completed certification), the employer must notify the employee of its determination within five (5) business days absent extenuating circumstances. If the employer 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. Whether the employer will require paid leave to be substituted for unpaid leave, and that paid leave taken will be counted as FMLA leave.

3. Whether the employer will require the employee to provide a fitness-for-duty certification, and whether the fitness-for-duty certification must address the employee's ability to perform the essential functions of the job.

If the employer 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 employer must notify the employee of that determination.

Retroactive Designation: The employer 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, the employee and employer may mutually agree that leave be retroactively designated as FMLA leave.

II. 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. The FMLA provides for an unpaid leave under certain circumstances. The employer shall require an employee to use sick leave for situations required by the collective bargaining agreements (e.g., for the employee's own serious health condition). The employer shall only require an employee to use vacation in specific instances allowed by the collective bargaining agreements. However, the employee may request and the employer shall grant vacation or compensatory time. **All paid time counts toward the twelve (12) weeks of FMLA qualifying leave.**

C. Complying with notice/call-in policies of the Appointing Authority. 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.

III. Job Benefits and Protection

A. 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.

B. An eligible employee returning from a 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.

C. 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.

IV. 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 CFR 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 employer; copies of all general and specific notices given to employees by the employer.

(e) Any documents describing employee benefits or employer policies or practices regarding taking of paid or unpaid leave.

(f) Premium payments of employee benefits.

(g) Records of any disputes between the employer and an eligible employee regarding designation of FMLA qualifying leave.

3. Records and documents relating to certifications, recertifications 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 the Genetic Information Nondiscrimination Act of 2008 (GINA) and in conformance with the confidentiality requirements of the Americans with Disabilities Act (ADA).

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 a 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.

(1) 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.

(2) 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 in no event more than two (2) years from the date the alleged violation occurred, or three (3) years for a willful violation.

(3) 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.

(1) 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.

EMPLOYEE RIGHTS AND RESPONSIBILITIES
UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement
FMLA requires covered employers to provide up to 12 weeks of unpaid job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements
Eligible employees with a spouse, son, daughter, or parent on covered active duty or call to covered active duty status may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is: (1) 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*, or (2) a veteran who 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, and who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.*

*The FMLA definitions of "serious injury or illness" for current servicemembers and veterans are distinct from the FMLA definition of "serious health condition".

Benefits and Protections
During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements
Employees are eligible if they have worked for a covered employer for at least 12 months have 1,250 hours of service in the previous 12 months*, and if at least 50 employees are employed by the employer within 75 miles.

*Special hours of service eligibility requirements apply to airline flight crew employees.

Definition of Serious Health Condition
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than three consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave
An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave
Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities
Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities
Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers
FMLA makes it unlawful for any employer to:
- Interfere with, restrain, or deny the exercise of any right provided under FMLA; and
- 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.

Enforcement
An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

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.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

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:	

FORMS AND INSTRUCTIONS

6/13

FREQUENTLY ASKED QUESTIONS

1. *Which employees are eligible for an FMLA qualifying leave?*

   An "eligible employee" is a State employee who:

   a) Has been employed by the State for at least 12 months, and
   b) Has worked and been compensated for at least 1,250 hours during the 12-month period immediately preceding the leave (this does not include vacation, sick leave, other paid leave, or compensatory time - this does include overtime worked).

2. *Are only permanent employees eligible for FMLA qualifying leave?*

   No, non-permanent employees are eligible if they meet the requirements stated under question number one above. If employees are not in insurance eligible status, they are only eligible for unpaid time off and not the insurance benefits.

3. *Under what circumstances are employees eligible to take a FMLA qualifying leave?*

   a) For birth of the employee's child, and to care for the newborn child;
   b) For placement with the employee of a child for adoption or foster care;
   c) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and
   d) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.
   e) Because of a 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).
   f) To care for a covered servicemember (including a covered veteran) with a serious injury or illness if

the employee is the spouse, son, daughter, parent or next of kin of the covered servicemember.

4. *How much time may an employee take as FMLA qualifying leave?*

Eligible employees may take up to twelve work weeks of leave during each fiscal year with the following exceptions:

Exceptions:

If the leave is to care for a covered servicemember (including covered veteran) with a serious injury or illness, refer to question No. 5.

If a husband and wife both work for the State, refer to Question Nos. 6 and 7.

If the leave is taken for the birth of a child or the placement of a child for adoption or foster care, refer to Question No. 9.

5. *How much time may an employee take as FMLA qualifying leave to care for a covered servicemember (including a covered veteran) with a serious injury or illness?*

Eligible employees may take up to 26 weeks within a single 12-month period. The 12 month period begins on the date the employee first takes FMLA leave to care for the covered servicemember and ends 12 months after that date.

6. *If both husband and wife are State employees, are they both eligible for twelve weeks of FMLA qualifying leave during the fiscal year?*

Yes. However, a husband and wife may take only a combined total of twelve weeks of FMLA qualifying leave per fiscal year under the following situations:

a) For the birth of a son or daughter and to care for the newborn child;
b) For placement of a child with the employee for adoption or foster care, and to care for the newly placed child; and
c) To care for the employee's parent (not parent-in-law) who has a serious health condition.

A husband and wife may each take 12 weeks of FMLA leave if needed to care for a newborn child with a serious health condition, or an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

7. *If both husband and wife are State employees, are they both eligible for 26 weeks of FMLA qualifying leave to care for a covered servicemember with a serious illness or injury?*

Yes. However, a husband and wife who are eligible for FMLA leave and are employed by the same covered employer are limited to a combined total of 26 weeks of FMLA qualifying leave during a single twelve month period if the leave is taken for the following reasons:

a) For birth of the employee's son or daughter or to care for the child after birth;
b) For placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement;
c) To care for the employee's parent with a serious health condition; or
d) To care for a covered servicemember with a serious illness or injury.

8. *If an employee uses 12 weeks of FMLA qualifying leave in one fiscal year, are they allowed another 12 weeks the following fiscal year for the same condition?*

   Yes, provided the employee still meets all the eligibility criteria (including 1250 hours worked in the year preceding the request).

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

   Although it is possible that an employee could qualify for two separate FMLA qualifying leaves for the birth or placement of a child (under the condition explained in Question No. 8 above), all FMLA qualifying leaves must be completed within 12 months of the birth or placement of a child. The 12-month period begins on the date of birth or placement.

10. *Does FMLA leave have to be taken all at once, or can it be taken intermittently?*

    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 "medically necessary" and if that medical need can best be accommodated by an intermittent schedule. If the need for intermittent leave or a reduced schedule is documented by the employee's or family member's health care provider as "medically necessary", such leave shall be granted. Intermittent leave for the birth/placement of a child may be granted at the discretion of the Appointing Authority. The Appointing Authority's agreement is not necessary if the mother has a serious health condition in connection with the birth or if the newborn child has a serious health condition.

    Leave due to a qualifying exigency may be taken on an intermittent or reduced schedule basis.

11. *Is an employee required to use paid sick leave for certain FMLA qualifying leaves?*

    Yes. FMLA allows an employer to require the use of paid leave for certain qualifying events as stated under the terms of the collective bargaining agreements and compensation plans. Employees must use sick leave for the reasons authorized by the bargaining agreement/plan provisions. The FMLA does not require an employer to expand the use of paid leave.

12. *Are there circumstances under which an employee may request to receive paid vacation or compensatory time in conjunction with FMLA?*

    An employee may request and receive paid vacation or compensatory time. Granting of vacation or compensatory time is not subject to any other employer requirements such as seniority or staffing needs.

    However, the employee must make a reasonable effort to schedule foreseeable qualifying leave so as not to unduly disrupt the employer's operation. If the employee is unable to provide sufficient documentation to determine FMLA eligibility, the employee shall be placed on unpaid leave until such documentation is made available to the employer.

13. *How do you determine the amount of FMLA qualifying leave used if an employee works a fixed part-time schedule or the employee's schedule varies from week to week?*

    The amount of FMLA qualifying leave is determined on a pro rata or proportional basis by comparing the requested schedule with the employee's normal schedule.

    Where the schedule varies from week to week to such an extent that the employer is unable to

determine with any certainty the number of hours the employee would have worked, a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period is used to calculate the employee's leave entitlement.

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

    a) An employee requesting leave shall be asked the question, "Is the request for paid or unpaid time off for the purpose of an FMLA qualifying event (yes) (no)?" An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the Appointing Authority to determine whether it is qualifying.

    b) If an employee requests a leave prior to completing a request for leave slip, a supervisor may ask the reason for the leave. The supervisor will ask for this information solely for the purpose of determining whether the leave is FMLA qualifying and/or if under the terms of the State's contracts or compensation plans an employee is eligible for paid or unpaid time off.

    c) If the employee fails to explain the reason, leave may be denied.

15. *How can an employee determine if his or her request for time off qualifies under FMLA?*

    a) Notices explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act shall be posted in conspicuous places at the worksite.

    b) An employee may ask his or her supervisor, contact the personnel office or their union to ask questions concerning the employee's rights and responsibilities under the FMLA.

16. *Can an FMLA qualifying leave extend an employee's period of employment?*

    No.

17. *What are an employee's job protection rights upon return from an unpaid FMLA qualifying leave?*

    An eligible employee shall be restored to the same position that the employee held when the FMLA qualifying leave began, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment such as same shift, equivalent hours, etc.

18. *How does an FMLA qualifying leave coordinate with the Statewide Sick Leave Policy?*

    The Act prohibits an employer from discriminating against employees who use FMLA qualifying leave. Therefore, the FMLA qualifying leave cannot be referred to in any employment actions including but not limited to discipline and selection.

19. *Can employees choose whether or not they want to use FMLA qualifying leave?*

    No. It is the employer’s responsibility to designate leave as qualifying under FMLA. An employee may not choose whether leave shall be counted as FMLA qualifying leave.

20. *How can an employer verify an employee’s need for leave because of a “serious health condition”?*

    The Appointing Authority’s FMLA designation decision must be based only on information received from the employee or the employee’s spokesperson.

    An employer may also require an employee to obtain certification of a “serious health condition” from the

employee's health care provider. The employer can pay for a second opinion if it has reason to doubt the validity of the original certification. If the second opinion conflicts with the first, the employer may pay for a third opinion. The provider of the third opinion must be jointly approved by the employer and employee. The third opinion will be final.

If a leave request is for the serious health condition of a family member, the employer can require the employee to provide certification from the family member's health care provider.

21. *Is an employee eligible to continue health insurance benefits during a FMLA qualifying leave?*

During an FMLA qualifying leave, the employee and dependent health and dental insurance coverage is maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the entire leave period.

Employees who receive the partial employer contribution must continue to pay their portion of the premium in order to retain this coverage. If the employee fails to make their premium payments, they will lose the coverage and may not be covered for any claims which may have occurred while on FMLA qualifying leave.

22. *What other insurance coverage may an employee continue during a FMLA qualifying leave?*

An employee may continue all coverage which they had prior to going on the FMLA qualifying leave, by paying the full cost of the premium. This includes, but is not limited to, basic, optional, spouse, child life insurance and short term and long term disability insurance. If the employee takes leave due to a work-related disability, short term disability may not be continued. It may be reinstated upon the employee's return to work.

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

Yes, an employee may choose not to retain these coverages. The coverages will be reinstated upon the employee's return to work.

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

Yes, an employee may choose not to retain optional coverages while off the payroll during an FMLA leave. The optional coverages will be reinstated upon return to work if the return to work is within the allotted twelve weeks 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.

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

Yes, 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 unless the employee does not return due to the continuation, recurrence or onset of the serious health condition, or due to other circumstances beyond the employee's control.

26. *What are an employee's COBRA rights in relation to an FMLA qualifying leave?*

As it relates to FMLA qualifying leave, the COBRA qualifying event is termination of employment, or the end of the leave - whichever comes first. Once the COBRA qualifying event occurs, the employee may

choose to “continue” health and dental by paying the entire cost of coverage - even though the employee did not pay their share of the premium during the FMLA qualifying leave.

27. *What can employees do if they believe that their rights under FMLA have been violated?*

The employee has the choice of:

a) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or
b) Filing a private lawsuit pursuant to section 107 of FMLA.

28. *How are employees protected who request leave or otherwise assert FMLA rights?*

The FMLA prohibits an employer from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act and prohibits the employer from discharging or in any other way discriminating against any person for opposing or complaining about any unlawful practice under the Act. All persons, whether or not employers, are prohibited from discharging or in any other way discriminating against any person because that person has:

i. Filed any charge, or has instituted any proceeding under or related to FMLA;
ii. Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under FMLA; or
iii. Testified, or is about to testify, in any inquiry or proceeding relating to a right under FMLA.

29. *Do State laws providing family and medical leave still apply?*

Nothing in FMLA supersedes any provision of State law. However, if leave qualifies for FMLA and for leave under State law, the leave used counts against the employee’s entitlement under both laws.

30. *If an employee is on a non-medical leave of absence that also qualifies as an FMLA-protected leave, should that employee's leave accrual date be adjusted?*

No. Accrual dates shall not be adjusted for employees on FMLA-qualifying leaves whether medical or not.

31. *Do employees earn sick and vacation accruals when they are on unpaid FMLA-qualifying leaves?*

No. Employees only earn sick and vacation accruals when they are in a paid status. In addition, an employee being paid less than eighty (80) hours in a pay period due to an FMLA-qualifying unpaid leave will have his/her sick/vacation accruals prorated.

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

Only if they are in a paid status on the normal work day before and after the holiday.

33. *Does workers’ compensation leave count against an employee’s FMLA leave entitlement?*

It can. 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 employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

34. *Can an employer count missed overtime hours against the employee’s FMLA entitlement?*

Yes, if an employee would normally be required to work overtime, but is unable to do so because of an

FMLA-qualifying reason that limits his/her ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's entitlement (e.g., employee normally would be required to work 48 hours, but due to a serious health condition, can only work 40 hours. The employee would use 8 hours of FMLA-protected leave). Voluntary overtime hours that an employee does not work due to the FMLA reason may not be so counted.	
Contacts	Labor Relations Representative
References	This policy along with forms and additional resources can be found at http://www.beta.mmb.state.mn.us/lr