

HR/LR Policy #1409

Family and Medical Leave Act (FMLA)

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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 (M.S. 43A.02, subds. 2 & 22) and
- classified employees in the Office of the Legislative Auditor, Minnesota State Retirement System, Public Employees Retirement Association, and Teachers Retirement Association (M.S. 43A.04, subd. 1(a)).

Definitions and Key Terms

“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;
- (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
 - (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.¹

"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 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.

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 determination of the five-year period for covered veteran status. 29 C.F.R. § 825.127(b)(2)(i).

"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.² 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.

² 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.

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.
 - 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;³
 - d) To care for a covered servicemember with a serious injury or illness.⁴
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.

³ 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.

⁴ 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 been completed by DOD, VA or TRICARE, but may be required by an agency for military caregiver leave certifications that are completed by health care providers as defined in the FMLA regulations.

6. When requesting certification from an employee, the agency should provide a Tennessean 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 PROVISION

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 the request:

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 INSTRUCTIONS

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 (Tennessee)
- Authorization for a Release of Medical Information.

REFERENCES

For additional information, please visit <https://www.dol.gov/WHD/fmla/index.htm>, or call the federal Department of Labor at (TTY: 1-877-889-5627).

CONTACTS

Labor Relations Representative

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