

HR/LR General Memo #2014-6 FMLA Guidance

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Authority	Enterprise Human Resources

GENERAL GUIDANCE AND INFORMATION

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

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

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

I. AMOUNT OF LEAVE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. ELIGIBILITY

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

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

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

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

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

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

4. Can you “re-check” an employee’s eligibility for continuous leave at the start of a new fiscal year?

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

5. When can you “re-check” an employee’s eligibility for intermittent leave?

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

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

6. When can I seek recertification?

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

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

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

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

29 C.F.R. § 825.308.

7. Can an employee work another job (“moonlight”) while on FMLA leave?

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

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

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

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

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

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

9. What is a "key employee"?

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

- a. An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the key employee. If permanent replacement is unavoidable, then the employer may

consider the cost of reinstating the employee in evaluating whether substantial and grievous economic injury will occur from restoring the employee to an equivalent position. 29 C.F.R. § 825.218(b).

- b. If the reinstatement of a key employee threatens the economic viability of the employer, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. 29 C.F.R. § 825.218(c).
- c. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury. 29 C.F.R. § 825.218(c).

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

As soon as the employer makes a good faith determination that restoration will result in substantial and grievous economic injury to its operations, the employer shall provide written notice to the employee of its determination that it cannot deny FMLA leave, and that it intends to deny restoration to employment at the completion of FMLA leave. This notice must be served in person or by certified mail, and must provide the basis for the employer's finding. In lieu of FMLA leave, the employer must provide the key employee reasonable time to return to work. 29 C.F.R. § 825.219(b).

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

III. EMPLOYER NOTICE REQUIREMENTS AND RESPONSIBILITIES

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

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

2. How does an employer collect a medical certification?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An employer may request a fitness-for-duty certification for an FMLA-qualifying continuous leave of absence. An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule. However, an employer may request a certification of fitness to return to duty for absences taken on an intermittent or reduced leave schedule up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. "Reasonable safety concerns" means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. 29 C.F.R. § 825.312(f).

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

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

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

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

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

IV. EMPLOYEE RIGHTS AND RESPONSIBILITIES

1. Can an employee refuse to take FMLA leave?

No. Federal regulations clearly create obligations for employers to begin processing FMLA claims. Once an employer has acquired knowledge that an employee is taking leave for an FMLA-qualifying reason, the employer must designate the leave as FMLA leave. 29 C.F.R. § 825.301(a). Moreover, the State requires the concurrent usage of paid sick leave for conditions which qualify both for sick leave usage and FMLA leave. All paid time counts toward the 12 weeks of FMLA leave. 29 C.F.R. § 825.207.

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

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

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

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

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

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

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

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

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

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

In order for coverage to continue, the employee must continue to pay the employee's portion of required premiums. 29 C.F.R. § 825.210. Because FMLA leave is unpaid and there is no paycheck from which to withdraw the premium, the employee will receive an invoice for the required premiums, unless the employee is also concurrently using paid leave. If the employee concurrently uses paid leave during FMLA leave, the payment will be withdrawn from the paycheck in the usual manner. If a required payment by the employee is not received on time, coverage may be cancelled and the employee will not be eligible to reinstate coverage until returning to work. 29 C.F.R. § 825.212.

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

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

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

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

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

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

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

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

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

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

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

V. COORDINATION WITH STATE LEAVE LAWS

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

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

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

29 C.F.R. § 825.308(c).

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

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

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

FORMS AND SUPPLEMENTS

Contacts MMB Labor Relations Representative

References HR/LR Policy #1409: http://view.ext.cms.oet.mn.gov/mmb/employee-relations/laws-policies-and-rules/statewide_hr_policies/