

## 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.

### 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 to care for a covered servicemember with a serious injury or illness during a "single 12-month period."

### 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 2009.

#### "ACTIVE DUTY" 825.126

"Active duty" is defined as duty under a call or order to active duty (or notification of an impending call or order) in support of a contingency operation and includes,

- 1) Retired members of the Regular Armed Forces and members of retired Reserve who retired after completing 20 years of active service;
- 2) All reserve unit component members in case of war or national emergency;
- 3) Unassigned members of the Ready Reserve; and
- 4) The National Guard and state military during war or cases of national emergency as declared by the President or Congress.

#### "COVERED SERVICEMEMBER" 825.126

This includes the employee's spouse, son, daughter (including employee's biological, adopted, or foster child, step child, legal ward or a child for whom the employee stood in loco parentis), or parent (including employee's biological adoptive, step or foster father or mother or any other individual who stood in loco parentis) on active duty or called to active duty service.

#### "EMPLOYEE IS NEEDED TO CARE FOR A FAMILY MEMBER OR A COVERED SERVICEMEMBER" 825.124 and 825.127

This encompasses both physical and psychological care which include situations where:

- 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 fill in for others who are caring for the family members or covered servicemembers, or to make arrangements for changes in care, such as transfer to a nursing home.
- 4) The employee may be needed to care for a covered servicemember with a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy or in outpatient status, or otherwise on the temporary disability retirement list.

"HEALTH CARE PROVIDER" 825.125

- a) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices.
- b) Others capable of providing health care services including only:
  - 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.
  - Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law.
  - Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.
  - 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, including a foreign physician.

"INCAPABLE OF SELF-CARE" 825.122

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs).

"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.

"NEXT OF KIN" 825.127

The next of kin of a covered service member 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 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 for the purposes of military caregiver leave under the FMLA.

"PARENT" 825.122

A biological, adoptive, step or foster parent or an individual who stands or stood in loco parentis to an employee when the employee was a child. 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

Eligible employees may take FMLA leave while the employee's spouse, son, daughter or parent (the "covered military member") is on active duty or called to active duty for one or more of the following qualifying exigencies:

- 1) **Short notice deployment** – leave to address issues that arise from the fact that a covered servicemember is notified of an impending call or order to active duty seven days or less 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 covered military member is notified of the impending call or order to 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 active duty or call to active duty status of the covered military member or to attend family support or assistance programs and information briefings sponsored or promoted by the military, military service organizations or the American Red Cross that relate to the active duty or call to active duty.
- 3) **Children and school activities** – events include:
  - (a) Leave to arrange for alternative childcare if the call to duty necessitates a change in existing childcare arrangements.
  - (b) Leave to provide childcare on an urgent immediate basis provided such care arises from the call to active duty.
  - (c) Leave to enroll in or transfer to a new school or day care facility when necessitated by the active duty status.

- (d) Leave to attend meetings with staff at a school or daycare facility, such as meeting with school officials regarding disciplinary measures, parent-teacher conferences, or meeting with school counselors when such meetings are necessary due to circumstances arising from the call to active duty.
- 4) **Financial and legal arrangements** – events include:
- (a) Leave to make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, obtaining military identification cards or updating a will or living trust.
  - (b) Leave to act as covered military member's representative before a federal, state or local agency for purposes of obtaining, arranging or appealing military services benefits while the covered servicemember is on active duty and for a period of 90 days following the termination of the covered servicemember's active status.
- 5) **Counseling** – leave to attend counseling provided by someone other than a health care provider for oneself, for the covered military member or for a child, provided that the need for counseling arises out of the active duty or call for active duty.
- 6) **Rest and recuperation** – leave to spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during a period of deployment. Employees may take up to five days for each instance of rest and recuperation.
- 7) **Post deployment activities** – events include:
- (a) Leave to attend ceremonies, reintegration briefing and events or any other official programming or ceremony sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status.
  - (b) Leave to address issues that arise from the death of a covered military member while on active duty status such as meeting and recovering of the body and making funeral arrangements.
- 8) **Additional activities** – Leave to address other events that arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave qualifies as an exigency and both agree to the timing and extent of the leave.

"SERIOUS HEALTH CONDITION" 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 involves:

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 therefor, or recovery therefrom) **of more than three consecutive calendar days; and**
2. 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.

- C. **Pregnancy.** 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
- D. **Chronic serious health condition.** Any period of incapacity or treatment for such incapacity due to a chronic serious health care condition.

**Chronic serious health 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
- E. **Permanent or long term condition.** 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
  - F. **Multiple treatments.** Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or 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 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 SERVICE MEMBER" 825.127**

An injury or illness incurred by a covered service member in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

**"SON" OR "DAUGHTER" 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.

**"SPOUSE" 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.

**"UNABLE TO PERFORM THE FUNCTIONS OF THE POSITION OF THE EMPLOYEE" 825.123**

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. A person who must be absent 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**

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 or, if the break in service was longer than seven years, was due to the employee's duty to fulfill his or her National Guard or Reserve military service obligation.
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 National Guard or Military obligation shall be credited with the hours of service that would have been performed but for the period of military 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 covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.
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 service member.
  - 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 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 to care for the covered servicemember and ends 12 months after that date.
  - d) If the member does not take the full 26 weeks during the single 12-month period, any remaining part of the 26 weeks is forfeited.
  - e) Leave entitlement is to be applied on a per covered servicemember, per injury basis, thus entitling an employee to more than one period of 26 weeks of leave if the leave is to care for same service member with a subsequent injury or illness or if it is to care for a different covered service member, except that no more than 26 workweeks of leave may be taken in a 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. 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 will be counted against the employee's twelve weeks of FMLA leave.
3. Any certification requirements (of a serious health condition, serious injury or illness or qualifying exigency) and the consequences of failing to furnish such certification.
4. Employee's right to use paid leave, whether the employer requires the substitution of paid leaves, and the employee's right to take unpaid leave if the employee does not meet the requirements for paid leave.
5. Requirements concerning payment of health insurance premiums.
6. The employee's potential liability for payment of health insurance premiums paid by the employer during FMLA leave if the employee fails to return to work after taking the leave.
7. The employee's rights to maintenance of benefits 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 consequences.

### 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;
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.
- 2. The records must disclose the following:
  - (a) Basic payroll 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 employee regarding designation of FMLA qualifying leave.
  - (h) Records and documents relating to medical certifications or medical histories of employees or employees' family members, which shall be maintained in separate confidential files.

##### 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.

## 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 covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.
- f) To care for a covered service member who became ill or was injured as a result of active duty service.

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 service member who became ill or was injured as a result of active duty or call to active duty service, 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 service member who became ill or is injured as a result of active duty or call to active duty service?*

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 service member 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;
- c) To care for the employee's parent (not parent-in-law) who has a serious health condition.
- d) Because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

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 service member who becomes ill or is injured as a result of active duty or active duty service?*

Yes. However, a husband and wife can may take only a combined total of 26 weeks of FMLA qualifying leave during a single twelve month period.

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. 5 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, for the serious health condition of the employee's spouse, son, daughter, or parent, 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 prorata 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 doubts 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, however, they may have the coverages reinstated upon return to work, if the return to work is within the allotted twelve weeks of FMLA qualifying leave. If the leave goes beyond twelve weeks, the employee must reapply with evidence of good health. 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.

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.

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.

For more information, contact human resources or your union representative.

## **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 active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation 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 a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.*

### **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 one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.*

### **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;*
- 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***