

THE FEDERAL FAMILY & MEDICAL LEAVE ACT OF 1993 (AS REVISED)

The following policies have been developed by the Office of State Employment Relations (OSER) to ensure statewide compliance with the federal Family and Medical Leave Act of 1993 (FMLA) as revised in January 2008 and in accordance with revised Department of Labor regulations effective January 16, 2009.

1. Employee Eligibility. State employees (including limited term and project employees) are eligible for unpaid leave under FMLA if they:
 - a. Have been employed by the state for at least 12 months; *and*
 - b. Have worked for the state at least 1,250 hours in the 12 month period immediately preceding the beginning of the requested leave under FMLA; *and*
 - c. Are employed at a worksite where there are at least 50 state employees employed within 75 miles of the worksite.
2. Reasons for Leave. Eligible employees are entitled to use unpaid leave under FMLA when taken for the following purposes:
 - a. For the birth of the employee's child *and* to care for the newborn child (leave must be concluded within 12 months following birth); or
 - b. For placement of a child with the employee for adoption or foster care (leave must be concluded within 12 months following placement); or
 - c. To care for the employee's child, spouse, or parent with a serious health condition (caring for a parent "in-law" is not covered under the FMLA; however caring for a parent "in-law" is covered under the WFMLA); or
 - d. For the serious health condition of the employee that makes the employee unable to perform the functions of the employee's position, including incapacity due to pregnancy, prenatal medical care or child birth; or
 - e. To care for a current member of the Armed Forces, including a member of the National Guard or Reserves, with 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. The employee must be the spouse, son, daughter, parent, or next of kin of the servicemember; or
 - f. Because of any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is a member of the National Guard or Reserves on active duty or call to active duty status in support of a contingency operation. Examples of qualifying exigencies include short-notice deployment, attending certain military events, arranging for alternative childcare, certain school activities, making financial and legal arrangements, counseling, rest and recuperation leave of the military member, and post-deployment reintegration briefings.

3. 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 3 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.

4. Length of Leave:

Eligible employees are entitled to use 12 workweeks of unpaid leave for FMLA-qualifying purposes during each calendar year.

In the special case of leave to care for a military servicemember with a serious injury or illness, eligible employees are entitled to use up to 26 workweeks of FMLA leave in a single 12-month period that begins on the first day of leave to care for the servicemember and ends 12 months after that date. The 26 weeks of FMLA leave permissible during this single 12-month period includes leave for all FMLA-qualifying reasons; however, no more than 12 workweeks of leave may be taken for FMLA-qualifying reasons other than to care of a servicemember.

5. Employee Responsibilities When Requesting Leave:

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 comply with normal call-in procedures when possible.

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 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 agency if the requested leave is for a reason for which FMLA leave was previously taken or certified.

Employees may request FMLA leave by completing a "Family and Medical Leave--Employee Request Form" which can be obtained from the agency personnel office. Failure to provide timely notice as required may result in an employee's request for leave being denied for up to 30 days after the date notice is provided, depending on the amount of notice that could reasonably have been provided.

Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

6. Substitution of Paid Leave for Unpaid FMLA Leave:

Employees may substitute unused accumulated paid leave, i.e., annual leave, personal/legal holiday, compensatory time, or a combination thereof, for portions of unpaid FMLA leave for the birth of a child or for placement of a child for adoption or foster care. **The substitution of such paid vacation leave during FMLA leave is not an absolute right and is subject to the usual workplace policies and procedures for the request and approval of vacation leave.** Employees may elect to substitute sick leave, in addition to vacation leave noted previously, for unpaid FMLA leave to care for a family member with a serious health condition or for the employee's own serious health condition. **Sick leave may only be substituted under those circumstances for which sick leave is otherwise provided under the applicable collective bargaining agreement or administrative rules.**

Note. The restrictions on the substitution of paid leave in the preceding paragraph apply only if the FMLA leave is not simultaneously covered under the Wisconsin Family & Medical Leave Act (WFMLA). The employee may substitute any type of accrued paid leave during any leave that qualifies under the WFMLA.

If the use of paid vacation leave or paid sick leave can not be approved for use during the period of FMLA leave, the employee remains entitled to unpaid FMLA leave.

Any leave, with or without pay, which is designated as leave under FMLA will count against the employee's FMLA entitlement. The substitution of paid vacation or sick leave during FMLA leave does not extend the employee's FMLA entitlement.

7. Intermittent Leave. Intermittent leave or leave on a reduced work schedule:

- a. Must be given when there is a medical need for such leave *and* the medical need can best be accommodated through an intermittent or reduced leave schedule; *and* the leave is being used for the employee's own serious health condition, or to care for a family member with a serious health condition or a covered servicemember with a serious injury or illness;
- b. Must be given for a qualifying exigency related to a military call to active duty (see 2.f., above);
- c. May be given, at the discretion of the appointing authority, when taken for the birth of the employee's child, or placement of a child with the employee for adoption or foster care. *Note. If an employee is simultaneously covered under WFMLA, the employee may take family leave intermittently provided that any such intermittent leave begins with 16 weeks before or after the birth or placement of the child.*

8. Medical Certification. If requested, employees must provide medical certification for leave under FMLA when taken for the serious health condition of the employee or the employee's family member or to care for a military servicemember. Failure to provide timely medical certification as requested may result in the denial of FMLA leave until the required certification is provided.

9. Certification of Qualifying Exigency. If requested, employees must provide a copy of the active duty orders or other military documentation to establish the nature and dates of such active duty. Also, if requested, employees must provide certification of any particular "qualifying exigency" for which leave is requested.

10. Benefit Continuation:

- a. Group Health Insurance: For employees on leave without pay under FMLA, agencies must maintain the employee's group health insurance coverage on the same conditions and continuing agency contributions as would have been provided if the employee had been continuously employed.

The agency will advise employees of their individual eligibility for continuation of group health insurance under the provisions of FMLA. Employees are required to pay the employee portion of health insurance premiums during unpaid leave under FMLA. The agency will advise employees as to the cost of coverage and when and where to send the premium payments, if any. ***Coverage may be terminated for employees who do not pay their portion of the cost of coverage.***

If the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, the agency will collect from the employee the employer portion of premiums paid during the leave *unless* the reason the employee does not return is due to:

- 1) The continuation, recurrence, or onset of a serious health condition which would qualify as leave under FMLA; or
 - 2) Other circumstances beyond the employee's control (e.g., an individual other than an immediate family member has a serious health condition and the employee is needed to provide care, or the employee is laid off while on leave).
- b. Benefits Accrued Prior to Leave: While employees will not accrue additional benefits during leave without pay under FMLA, benefits accrued prior to leave will be retained at the same levels upon return to work. For example, paid annual leave, sick leave, or personal holidays which are not substituted for FMLA leave will be available to the employee upon return from leave.
 - c. Continuous Service:
 - 1) State Seniority: Employees will continue to accrue continuous service for seniority purposes while on leave under FMLA.
 - 2) Retirement System: The time an employee is on FMLA leave (either paid or unpaid) will be treated as continuous service for purposes of vesting and eligibility to participate in the retirement plan. However, the time an employee is on unpaid FMLA leave will *not* be counted as creditable service.

11. Return from FMLA Leave:

Upon return from FMLA leave, an employee must normally be restored to his/her original or equivalent position with equivalent pay, benefits, and other terms and conditions of employment. Examples of exceptions would be layoff, the expiration of a project or fixed-term appointment, or incapacity to perform an essential function of the position. If state law or a collective bargaining agreement governs an employee's return to work, those provisions shall be applied.

Fitness-for-duty certification may be required prior to returning to work from FMLA leave taken for the employee's own serious health condition. Failure to provide fitness-for-duty certification as requested may result in denial of reinstatement until the required certification is provided.

12. Agency Responsibilities:

The agency 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 agency must provide a reason for the ineligibility.

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

13. FMLA and Other Leave Benefit Provisions. FMLA entitlement is coordinated with the provisions of the WFMLA, as well as leave benefits provided under administrative rules of the OSER Director, or the applicable collective bargaining agreements. Employees may *not* use benefits provided under FMLA *in addition* to benefits provided under the WFMLA, administrative rule, or applicable collective bargaining agreement. Leave qualifying under both laws will be counted against the employee's entitlement under both the federal and state laws, as well as toward the employee's entitlement under administrative rule or the applicable collective bargaining agreement.

14. Unlawful Acts by Agencies. FMLA makes it unlawful for any agency to:

- a. Interfere with, restrain, or deny the exercise of any right provided under FMLA; or
- b. 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.

15. 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.

16. For More Information:

More information on the federal FMLA may be obtained through the Department of Labor at:

Telephone: 1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627

Online: WWW.WAGEHOUR.DOL.GOV

Questions regarding the Family and Medical Leave Act and its interaction with WFMLA, labor agreements, and state and agency policies should be referred to the agency human resources office.