



FAMILY AND MEDICAL LEAVE ACT (FMLA) GUIDE

This Guide addresses some of the basic questions relating to the Family and Medical Leave Act (FMLA) and supersedes the 2008 version. It is not a contract. It does not cover all situations nor is it the final authority on FMLA questions. It is not considered a substitute for Federal or State laws, rules, and regulations concerning FMLA. Any and all provisions of this Guide are subject to change at any time without prior notice.

The Guide was prepared by the Office of Personnel Services and Benefits, Department of Budget and Management. Questions regarding this Guide, its application, or provisions of the FMLA generally, should be directed to the Personnel Services Division at 410-767-4976.

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	Notice to Employees of Rights Under FMLA	WH Publication 1420

STATE OF MARYLAND

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I. INTRODUCTION

The federal Family and Medical Leave Act (FMLA or the Act)¹ took effect on August 5, 1993.² The most recent changes to the FMLA became effective January 16, 2009 and October 28, 2009. The Act is intended to balance the demands of the workplace with the needs of families by allowing leave for certain medical reasons, promoting the stability and economic security of families, and promoting national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers and employees. Congress expected the FMLA to benefit employers as well as their employees. Congress found that a direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations; when workers can count on durable links to their workplaces, they are able to make their own full commitments to their jobs.

The Department of Budget and Management (DBM) strongly encourages managers and supervisors to use the provisions of this FMLA Guide to acquaint themselves with the basic provisions and requirements of the FMLA and related State law.

II. WHAT IS THE FAMILY AND MEDICAL LEAVE ACT (FMLA)?

A. REASONS FOR A FMLA ABSENCE

1. The **Family and Medical Leave Act (FMLA)** is a federal law which requires certain employers, including the State of Maryland, to grant job-protected leave to employees who meet FMLA's eligibility requirements. The law entitles eligible employees *to an absence of up to a total of 12 workweeks*

¹ 26 USC §§ 2601 et seq., as amended by the National Defense Authorization Act for Fiscal Year 2008.

²Final regulations implementing the FMLA were issued by the U.S. Department of Labor effective April 6, 1995 (29 C.F.R. Part 825); Revisions were made final by the DOL in November 2008, effective January 16, 2009; Amendments were also effective October 28, 2009.

of *unpaid leave* (a covered employer may allow for paid or unpaid leave) in any 12-month period for any of the following reasons:

- (a) the birth of a child, and to care for the newborn child;
- (b) the placement with the employee of a child for adoption or foster care;
- (c) necessary care for the employee's spouse, child, or parent with a serious health condition, or an adult child who cannot care for himself or herself;
- (d) a serious health condition that makes an employee unable to perform the functions of the employee's job; or
- (e) any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on (or has been notified of an impending call to) "covered active duty" in the Armed Forces. This provision was effective January 16, 2009 and was amended on October 28, 2009.

A "**Qualifying Exigency**" is defined as one or more of the following: 1) short-notice deployment; 2) military events and related activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation; 7) post-deployment activities; 8) additional activities to address other events which arise out of the covered military member's active duty or call to active duty (CFR § 825.126). "**Covered Active Duty**" for members of a **regular** component of the Armed Forces means duty during deployment of the member with the Armed Forces to a foreign country. "Covered active duty" for members of the **reserve** components of the Armed Forces (members of the U.S. National Guard and Reserves) means duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation as defined in section 101(a)(13)(B) of title 10, United States Code.

2. Servicemember Family Leave or Military Caregiver Leave, effective January 28, 2008, entitles an eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member *to an absence of up to a total of 26 workweeks of unpaid leave* (a covered employer may allow for paid or unpaid leave) in a single 12-month period for the following reason:

- (a) To care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, or is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or

illness; or is a **veteran** who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness if the veteran was a member of the Armed Forces at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

- (b) An employee may be entitled to a combined total of 26 work weeks in a single 12-month period when using leave under 1 and 2 of this section.

A “**serious injury or illness**” under this section includes the following: for a current member of the Armed Forces, a serious injury or illness that existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating; for a veteran, a serious injury or illness is defined as a qualifying injury or illness that was incurred by the member in the line of duty on active duty or existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty and that manifested itself before or after the member became a veteran.

B. EMPLOYEE ELIGIBILITY

To qualify under FMLA, an employee must have actually worked at least a total of 12 months for the State and at least 1,250-work hours during the preceding 12 months. The employee may be employed in any capacity, including that of a contractual. The required 12 months of employment need not be consecutive months, as long as any break in service is less than 7 years. Previous service prior to a break in service of 7 years or more is only counted toward the 12 months if it relates to Military Service. When calculating the 1,250-hour requirement, overtime hours worked are included; however, any unpaid leave is not included.

The determination of whether an employee has worked the required number of hours must be calculated from the date that the leave is scheduled to begin. For example, if an employee requests a FMLA absence before becoming eligible but will have worked the required number of hours by the time the leave is scheduled to begin, the employee shall be deemed to have satisfied the required number of hours. An employee may be on “non-FMLA leave” at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason **after** the employee meets the eligibility requirement would be “FMLA leave”. Managers and supervisors responding to requests for time off must have the employee's personnel records checked to determine whether these requirements have been met. An appointing authority may not deny the leave unless its records clearly demonstrate that the employee has not worked the

minimum total of 12 months and/or that the employee did not work at least 1,250 hours during the preceding 12 months. The burden is on the appointing authority to demonstrate that the employee does not meet the requirements. If there is no documentation to support these conclusions, the employee is entitled to a FMLA absence.

If both spouses work for the State, each spouse is entitled to up to a total of 12 workweeks for a FMLA absence for: the birth of their child; the placement of a child with them for adoption or foster care; the serious health condition of a child of theirs under age 18; or, an adult child who cannot care for himself or herself. Both spouses are limited to a combined total of 26 workweeks for Servicemember Family Leave.

A FMLA absence taken for the birth of a child or the placement of a child for adoption or foster care must be taken within the 12 months following the date of birth or placement of the child.

State Personnel and Pensions Article, Section 9-505, allows an employee to use up to 30 days of accrued sick leave, without certification of illness or disability, to care for and nurture a child immediately after birth or placement for adoption. If two State employees are responsible for the care and nurturing of a child, immediately following birth or placement for adoption, both employees may use, without certification of illness or disability, up to 30 days of accrued sick leave to care for the child. This State allowance for use of leave runs concurrently with FMLA leave.

C. METHOD OF CALCULATING THE LEAVE YEAR

The FMLA allows an employee to take up to 12 weeks of leave in a 12-month period. Instead of using the calendar year, the State has determined that a different 12-month period shall be used to calculate an employee's FMLA absence entitlement. Under this method, an employee is entitled to 12 weeks of FMLA leave during the 12-month period beginning on the first date FMLA leave is taken. The employee is entitled to an additional 12 weeks of FMLA once the initial 12 months have expired, provided the employee still qualifies for FMLA. The next 12 month period would begin the first time FMLA leave is taken after that point.

The Servicemember Family Leave allows an employee to take up to 26 weeks in a 12-month period. The State applies the same method described above for calculating the 12-month period for Servicemember Family Leave.

D. DEFINITION OF A SERIOUS HEALTH CONDITION

The FMLA permits an employee to use FMLA leave for a serious health condition of the employee, the employee's parent, spouse, or child. A serious health condition is defined as an illness, injury, impairment or physical or mental condition that requires inpatient care (an overnight stay) in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider. An episode of inpatient hospitalization is covered regardless of duration. Otherwise, a period of incapacity must be for more than three consecutive, full calendar days and must also involve one or more of the following:

1. treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist (CFR § 825.115(a)(5)) by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services under orders of or on referral by a health care provider; or
2. treatment by a health care provider at least once which results in a regimen of continuing treatment under the health care provider's supervision.

Note: The requirement in (1) and (2) above for "treatment by a health care provider" means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity

A serious health condition also includes any period of absence or incapacity due to any of the following:

- (a) pregnancy or prenatal care;
- (b) period of incapacity or treatment for a chronic serious health condition (*i.e.*, asthma, diabetes; see definition CFR §825.115 (c));
- (c) a permanent or long-term illness requiring supervision by a health care provider, where treatment may not be effective (*e.g.*, Alzheimer's, a severe stroke, or the terminal stages of a disease); or
- (d) multiple treatments of an illness, or restorative surgery after an 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 or treatment, such as cancer, chemotherapy, severe arthritis (physical therapy), kidney disease (dialysis).

The appropriate FMLA Certification of Health Care Provider (Form 380E or 380F) should be provided to the employee and completed by the health care provider for an absence that may qualify as a FMLA absence. When properly completed by a health care provider, this form should enable the employer to determine whether the health condition satisfies the definition of a serious health condition. "Health care provider" includes the persons listed in the State Personnel and Pensions Article, § 9-504 or defined as such by the FMLA.

E. INTERMITTENT LEAVE

1. Full-time Employees

A FMLA absence taken to care for a covered relative with a serious health condition or for the employee's own serious health condition may be taken intermittently or on a reduced work schedule only when acceptable medical documentation, which supports the medical necessity, is submitted. An employee shall be required to submit proof that intermittent leave is medically necessary. When planning medical treatment, an employee seeking to use intermittent leave *must* make a reasonable effort to schedule the leave so as not to unduly disrupt the employer's operations. This is subject to the approval of the health care provider based upon the medical necessity for a particular treatment time, but not if it is just a matter of scheduling convenience for the employee.

If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken counts towards the 12 weeks of leave to which an employee is entitled. For example, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 week of FMLA leave.

2. Part-time Employees and Employees with Variable Schedules

If an employee works part-time or has variable hours, the amount of leave to which the employee is entitled is determined on a pro-rata basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

NOTE: *1. A FMLA absence for the birth or placement of a child for adoption or foster care may be taken intermittently only if agreed to by the appointing authority.*

2. A Servicemember Family Leave absence may be taken intermittently or on a reduced schedule if medically necessary.

3. A FMLA absence for a Qualifying Exigency may be taken intermittently or reduced leave schedule basis.

4. Absences may be taken in increments no less than 1/10 of an hour.

F. PAID OR UNPAID LEAVE

Generally, FMLA leave is unpaid. The State requires each agency to run available paid leave concurrent with FMLA leave relating to birth, placement of a child for adoption or foster care, care for a spouse, child, or parent who has a serious health condition, the serious health condition that makes an employee unable to perform their job, employee who has a qualifying exigency as a covered military member, or employee caring for a servicemember.³ This includes paid accrued annual, personal, compensatory, or sick leave. Paid sick leave may be used to the extent the circumstances meet the employer's usual requirements for the use of sick leave.

An injury that occurs on the job may meet the FMLA criteria for a serious health condition. In such a situation, the employer will designate the leave as FMLA leave and the employee's 12-week leave entitlement will run

³State Personnel and Pensions Article, §9-1001.

concurrently with a workers' compensation absence or accident leave. If a health care provider treating the employee for an on-the-job injury certifies the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light duty job. Consequently, the employee may lose the right to workers' compensation payments or accident leave, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits or accident leave ceases, the substitution provision applies and the employer shall require the use of accrued paid leave concurrently with the FMLA leave.

If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. Light Duty work does not count against an employee's FMLA leave entitlement.

G. NO LOSS OF ACCRUED BENEFITS DURING LEAVE

An employee on a FMLA absence does not lose any "employment benefits" accrued prior to the FMLA absence. The term "employment benefits" is broadly defined to include all retirement, health, disability, and life insurance benefits as well as sick leave, annual leave, and personal leave benefits. *During an unpaid FMLA absence, the employee shall continue to receive group health coverage on the same terms and conditions as employees not on FMLA leave, unless the employee elects not to continue coverage.*

Group health plans include medical, dental, and other plans covered by the Comprehensive Omnibus Budget Reconciliation Act (COBRA).⁴ A FMLA absence, in itself, is not a "qualifying event" under COBRA. State agencies and employees shall continue to bear their share of health plan costs during a FMLA absence, but the State is entitled to recover costs incurred during the absence if the employee fails to return to work from a FMLA absence for a reason other than as a result of a serious health condition or other circumstances beyond the employee's control. *An employee who returns to work for at least 30 calendar days is considered to have returned to work and is therefore not liable for any health plan costs the employer may have paid during the employee's FMLA absence. Also, an employee who retires directly from a FMLA absence or retires during the first 30 days after the employee returns to work is deemed to have returned to work and is not liable for any*

⁴COMAR 31.11.01 through 31.11.04.

health plan costs the employer may have paid during the employee's FMLA absence.

An employee using paid leave concurrently with a FMLA absence is entitled to the accrual of any seniority or employment benefits that the employee who remained continuously at work would have received (*e.g.*, earning of annual and sick leave, payment of holiday leave when it occurs, earning of seniority credit, etc.).

If the FMLA absence is unpaid, the employee is *NOT* entitled to the accrual of leave benefits that an employee who remained continuously at work would have received. An employee who is on unpaid FMLA leave does not receive payment for a holiday.

An employee on paid or unpaid leave during a FMLA absence is not entitled to any greater rights than an employee who remained continuously at work (*e.g.*, personal leave accrued during a calendar year will be lost if not used in accordance with Section 9-403 of the State Personnel and Pensions Article; annual leave in excess of the 75-day maximum accrual will be lost if not used in accordance with Section 9-304 of the State Personnel and Pensions Article, etc.).

When an employer is making determinations regarding **commendations, bonuses, and awards for perfect attendance, FMLA absences may be taken into consideration if other non-FMLA qualifying employee absences are considered as disqualifying. A FMLA absence may not be counted against an employee as a leave occurrence for attendance control purposes.**

H. JOB RESTORATION UPON RETURN FROM A FMLA ABSENCE

An employee who is returning from an approved FMLA absence must be restored to the same or an equivalent position. An "equivalent" position is one with equivalent benefits, pay, and other terms and conditions of employment. An equivalent position must ordinarily be on the same shift or work schedule as the position held by the employee prior to the FMLA absence and must be located in a geographically proximate work site.

The appointing authority is obligated to place the employee in the same or equivalent position even if the appointing authority has hired a replacement worker during the FMLA absence. An appointing authority who eliminates the

position of an employee who takes a FMLA absence (*e.g.*, by redistributing the work to other employees or by eliminating a shift) must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

It is the State policy that following a FMLA absence for the employee's own serious health condition, prior to returning to work, the employee is required to provide medical certification from a health care provider indicating that the employee is fit to resume work. This policy must be uniformly applied to all similarly situated employees, and the certification may be required only with regard to the particular medical condition that caused the need for the FMLA absence. The appointing authority may also require that the certification specifically address the employee's ability to perform the essential functions of the employee's job, subject to the requirements of 29 CFR 825.312(b). The employee must be notified of these certification requirements in the FMLA designation notice (Form MS 382) at the time the leave is designated as FMLA qualifying. The "Return to Work Medical Certification Form" MS 413 should be given to each employee who requests leave for the employee's own serious health condition. Any appointing authority requirement for a fitness for work certification must be job-related, consistent with business necessity. An appointing authority is not permitted to require second or third fitness for duty certifications.

I. KEY EMPLOYEES

The FMLA provides that key employees (those compensated within the top ten percent) do not have to be returned to their jobs after using FMLA leave if their absence would cause substantial and grievous economic injury to the employer's operations. *The State does not distinguish between regular and key employees. It grants all employees the right to be returned to the same or an equivalent position.*

J. UNLAWFUL ACTS BY EMPLOYERS

The FMLA provides protections primarily to those who request leave or assert FMLA rights. The law prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. The law contains the following protections:

1. An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the FMLA.
2. An employer may not discharge or in any other way discriminate against a person (including non-employees) for opposing or complaining about any unlawful practice under the Act.
3. All persons (whether or not an employer) are prohibited from discharging or in any other way discriminating against any person (including non-employees) because that person: has filed a charge of a violation of the FMLA; has given or is about to give any information in connection with an inquiry or proceeding relating to a right under the FMLA; or has testified, or is about to testify, in a proceeding relating to a right under the FMLA.

Violations of the FMLA include denying the exercise of rights provided by the Act, as well as interfering with the exercise of an employee's rights under the FMLA. **Discouraging an employee from using FMLA leave, or manipulating circumstances relating to eligibility under the Act are forms of interference and are prohibited.**

III. EMPLOYEE RESPONSIBILITIES

A. NOTICE REQUIREMENTS

Whenever the necessity for a FMLA absence is foreseeable, the FMLA requires that the employee provide not less than 30 days notice before the absence is to begin. As a general rule, 30 days notice shall be required in cases involving the birth, foster care, or adoption of a child or planned medical treatment for an employee or an employee's family member's serious health condition, or the planned medical treatment for a serious injury or illness of a covered servicemember. In those cases where 30 days notice is not practicable, or the foreseeable leave is due to a qualifying exigency, an employee, or (in situations where the employee cannot reasonably be expected to request the leave personally) a representative of the employee, is required to give notice as soon as both possible and practical, which should normally be either the same day or the next business day. Absent unusual circumstances, employees must also follow the usual and customary call-in procedure for

reporting an absence, including any requirement to contact a specific individual.

When the need for leave is not foreseeable, an employee must provide notice as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice within the time prescribed by the usual and customary notice requirements applicable to such leave.

B. FOSTER CARE REQUESTS

If an employee requests leave to provide foster care for a child, the employee shall demonstrate that he or she is doing so under an official agreement with the State or pursuant to a judicial determination. However, an individual who stands in "loco parentis" (is acting as a parent) may provide care to a child who has a serious health condition, regardless of formal adoptive or biological ties.

C. DEFINITION OF SPOUSE AND FAMILY MEMBERS

An employee, who seeks to use FMLA leave in connection with a serious health condition of the employee's spouse, must be married within the meaning of that term in the jurisdiction in which the employee resides. If the employee is a resident of Maryland, common-law marriages are not recognized.

For purposes of confirming the existence of a qualifying family relationship, an employee shall provide reasonable documentation (*i.e.*, child's birth certificate, court document and/or a statement of a qualifying family relationship) within one pay period following the employee's request for leave. The appointing authority must request this documentation.

Notwithstanding Servicemember Leave, the FMLA does not authorize leave to care for any family member other than the employee's child, spouse, or parent. The Servicemember Family Leave does not authorize leave to care for any family member other than the employee's child, spouse, parent, or next of kin.

D. MEDICAL CERTIFICATION REQUIRED

When requested by the appointing authority, the employee is responsible for providing the appointing authority with complete and sufficient medical certification of a serious health condition by having the health care provider complete the appropriate sections of the applicable FMLA Form (Form 380E, 380F or 385). An employee may provide a medical certification from any of the health care providers enumerated in State Personnel and Pensions Article, Section 9-504. The employee must provide the requested FMLA Health Care Provider information within 15 calendar days after the request, unless it is not practicable. Additional information regarding requirements for a complete Certification of Health Care Provider is contained in Section IV.C.1. An employee may be required to report periodically to the appointing authority on his or her status and intention to return to work. In situations where an employee is covered by a collective bargaining agreement and has an identified chronic or permanent disabling condition, an appointing authority may not require certification and follow-up reports from a health care provider more than once every six months.

Regardless of the FMLA leave designation, medical documentation for the use of paid sick leave is required after the employee is absent for a period that enters into the 5th consecutive workday, in accordance with State Personnel and Pensions Art., § 9-504.

E. NOTICE OF CHANGED CIRCUMSTANCES

If the employee needs to extend the length of the requested FMLA absence, or if the absence as originally requested is no longer necessary, an employee shall, if the changed circumstances are foreseeable, provide notice within two business days of the changed circumstances.

IV. MANAGEMENT RESPONSIBILITIES

A. RESPONSIBILITIES OF MANAGERS AND SUPERVISORS

The appointing authority is responsible for obtaining and evaluating information to determine whether a FMLA absence can be used. **In all circumstances, it is the employer’s responsibility to designate leave as “FMLA qualifying,” and to give prompt notice of the designation to the employee.** Managers and supervisors are the persons who must secure the information from employees necessary to render a determination that the leave is or is not “FMLA qualifying.” With certain exceptions, the appointing authority's determination must be rendered within five business days of learning the reasons for the request. Although employees are required to provide enough information to establish their FMLA absence eligibility, their requests for time off do not have to specifically request FMLA leave. Each agency must obtain the required information and decide whether a FMLA absence is appropriate.

As the persons with daily contact with employees, managers and supervisors will be the individuals most often approached by employees seeking to take time off. To ensure compliance, managers and supervisors must act quickly to inquire further and gather required information to respond appropriately to these requests. This FMLA Guide has been developed to ensure that when an employee makes a request for time off, a manager or supervisor will:

1. ask appropriate questions about the reasons for the employee's time off;
2. recognize that the requested time off, whether paid or unpaid, can be counted as a FMLA absence;
3. comply with applicable agency policies regarding forwarding information about the absence to the agency Human Resources Office ;
4. promptly inform the employee regarding whether the requested time off, whether paid or unpaid, can be counted as an FMLA absence;
5. inform the employee of his/her rights and obligations while the employee is on a FMLA absence; and
6. preserve management’s right to provide only as much leave as is required by law.

B. NOTICE REQUIREMENTS

1. POSTING OF NOTICES

Agencies are required to post and keep posted a notice, approved by the Secretary of the U.S. Department of Labor, explaining rights and responsibilities under the FMLA. The notice must be posted in a conspicuous place where it can be readily seen by employees and applicants for employment. A copy of the Notice to Employees of Rights Under FMLA (WH Publication 1420) is attached and may be duplicated for posting, or copies of the required notice may be obtained from local offices of the Wage and Hour Division, U.S. Department of Labor. The poster and text must be large enough to be easily read and contain fully legible text. General notice must also be provided to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if these materials exist, or by distributing a copy of the general notice to each new employee upon hiring. This distribution may be accomplished electronically by the agency, only if all employees have access to a computer.

Violation of the posting requirement may result in a civil monetary penalty. Furthermore, an employer who fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

2. ELIGIBILITY AND RIGHTS & RESPONSIBILITIES NOTICE

Within five (5) business days of an employee request for FMLA leave, or when management acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employee must be given the *Notice of Eligibility and Rights & Responsibilities* (Form MS 381), absent extenuating circumstances. The notice must state whether the employee is eligible for FMLA leave, and, if not, state at least one reason why (*see* 29 CFR 825.300(b) for specific requirements). The notice must also detail the specific expectations and obligations of the employee and explain any consequences of a failure to meet those obligations (*cf.*: Form MS 381 and 29 CFR 825.300(c)). These include:

- (a) notification that all eligible leave shall be counted against the employee's 12 or 26 workweek entitlement;
- (b) the requirements for medical certification to document a serious health condition, serious injury or illness, or qualifying exigency arising out

of active duty or a call to active duty status, and any consequences for failing to do so;

- (c) any requirement for the employee to pay health insurance premiums, including how to make payments and the consequences of failing to make payments;
- (d) any requirement that the employee present a fitness for duty certificate upon returning to work, and if the certification is to specifically address the essential duties, must include a list of the essential functions; and where reasonable job safety concerns exist, may require certification before the return from intermittent FMLA leave;
- (e) the employee's right to receive the same or an equivalent position after returning from the FMLA absence;
- (f) the employee's potential obligation to pay health insurance premiums that the employer paid during an unpaid FMLA absence if the employee fails to return to work after such absence;
- (g) the requirement to run FMLA leave concurrent with the employee's available and appropriate paid leave⁵; and
- (h) the employee's status as a "key employee" and the potential consequence that restoration may be denied, explaining the conditions required for such a denial.

3. Designation Notice

The appointing authority is responsible in all circumstances for designating leave as FMLA-qualifying. Within five (5) business days of obtaining enough information to determine whether leave is being taken for a FMLA-qualifying reason, the appointing authority or designee must notify the employee of the determination regarding designation. The *Designation Notice* (Form 382) should be used for this purpose. The designation need only be made once for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave will be taken in a continuous block or intermittently. If the leave is not designated as FMLA-qualifying because it

⁵State Personnel and Pensions Article, §9-1001(b).

does not meet the legal requirements, the form need not be used, and may be in the form of a simple written statement; which must include notice:

- (a) that paid leave will be substituted for unpaid FMLA leave;
- (b) that the employee will be required to present a fitness-for-duty certification, which must include the employee's ability to perform the essential functions of the position; and
- (c) of the amount of leave counted against the employee's FMLA leave entitlement. If it is not possible to provide the amount of time (such as in the case of unforeseeable intermittent leave), the agency must provide notice of the amount of leave counted, upon the request of the employee, but no more frequently than once in 30 days, and only if FMLA leave was taken during that time.

C. MEDICAL CERTIFICATION

1. CERTIFICATION OF HEALTH CARE PROVIDER

An employee requesting a FMLA absence for the serious health condition of a family member or the employee's own serious health condition shall be provided a Certification of Health Care Provider Form (380E or 380F) as soon as a request for leave is submitted or within five business days. The employee must return the completed certification to the Employer within 15 calendar days after the employee's request, unless it is not practicable. The certification shall include:

- (a) medical facts supporting certification (a diagnosis is not required by the FMLA);
- (b) date of commencement and duration of absence;
- (c) additional treatments required or need for intermittent absence (a diagnosis is not required by the FMLA); and
- (d) ability of employee to perform essential functions of the job.

The FMLA Form (380E or 380F), if properly completed by a health care provider, should contain the required information. *If the*

form is not properly completed, the form will be returned to the employee or health care provider and may delay the approval of the FMLA absence.

2. USE OF SECOND AND THIRD OPINIONS OF HEALTH CARE PROVIDERS

If an appointing authority has reason to doubt the validity of a medical certification supporting a request for FMLA leave, the appointing authority may require that the employee obtain additional information or see another physician for a second opinion. The appointing authority shall pay the cost for the second (and third, if needed) medical opinion. Pending receipt of the second opinion, the employee is provisionally entitled to the FMLA absence. If it is determined that the employee is not entitled to the requested FMLA leave, the employee's absence shall be treated as paid or unpaid leave.

If there is a conflict between the first and the second opinions, the appointing authority may require a third opinion. The third health care provider must be designated or jointly approved by the employee and the appointing authority. The third opinion is binding. Agencies must reimburse an employee or family member for any reasonable travel expenses incurred to obtain a second and third medical opinion.

The health care provider used to resolve differences may not be employed on a regular basis by the State. Therefore, the State Medical Director may not provide the second or third opinion.

3. CONTACTING AN EMPLOYEE'S HEALTH CARE PROVIDER

If an employee provides a certification that is incomplete (one or more entries have not been completed) or insufficient (the information is vague, ambiguous, or unresponsive), s/he shall be advised in writing what additional information is necessary to make the certification complete and sufficient. The employee must be given seven (7) days to cure any such deficiency.

If an employee submits a complete and sufficient certification signed by the health care provider, the appointing authority may ***NOT*** request additional information from the employee's health care provider. However, *the appointing authority may, through a health care provider, human resources professional, leave administrator, or management official contact the health care provider for purposes of*

clarification and authentication of the medical certification, after the employee has been given the opportunity to cure any deficiencies, as outlined above. Under no circumstances may the employee's direct supervisor contact the health care provider.

Pending receipt of the additional information, the employee is provisionally entitled to FMLA leave. If it is determined that the employee is not entitled to FMLA leave, the employee's absence shall be treated as paid or unpaid leave.

D. RECERTIFICATION OF MEDICAL CONDITIONS

For conditions under the continuing supervision of a health care provider, including pregnancy, of **employees not subject to a collective bargaining agreement**, recertification may be requested no more than once every 30 days and only in connection with an absence by the employee, unless circumstances described by the previous certification have changed significantly (*e.g.*, the severity of the condition, complications, etc.). However, **for those employees who are covered by a collective bargaining agreement** who have identified chronic or permanent disabling conditions, recertification may not be requested more than once every six months.

In situations **not** governed by collective bargaining agreements, if the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, recertification may not be requested until the minimum duration has passed unless:

1. the employee requests an extension of leave;
2. circumstances described by the previous certification have changed significantly (*e.g.*, the severity of the condition, complications, etc.); or
3. reasonable and serious doubt has been cast upon the continuing validity of the certification. (Mere comment by a co-worker is not sufficient to justify a request for recertification.)

For intermittent and reduced schedule leave requests in excess of six months, the appointing authority may request certification every six months in connection with an absence.

In any situations in which recertification is allowed and requested, the employee must provide the requested recertification within the time frame requested, which must not be sooner than 15 calendar days after the employer's request, unless it is not practicable under the circumstances despite the employee's diligent, good faith efforts.

E. RECORD, MAINTENANCE AND INSPECTION REQUIREMENTS

1. Appointing authorities must keep the following records for at least three years:
 - (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 of any FMLA absence taken by employees (leave must be designated in the records as a FMLA absence);
 - (c) if the FMLA absence is in increments of less than one full day, the hours of the leave;
 - (d) copies of notices and requests for absence furnished by the employee to the appointing authority, if in writing, and copies of all general and specific notices given to employees as required under FMLA and its regulations;
 - (e) any documents describing employee benefits or the State of Maryland's policies and practices regarding the taking of paid and unpaid leave;
 - (f) premium payments of employee benefits; and
 - (g) records of any dispute between the appointing authority and an employee regarding designation of leave as a FMLA absence.
2. *Records and documents relating to medical certifications, recertifications, or medical histories of employees or employee family members, **must** be maintained in separate files and be treated as confidential medical records.*

3. The only persons who can obtain access to these confidential records are:
- (a) supervisors and managers who need to be informed of restrictions on the work or duties of an employee and necessary accommodations;
 - (b) first aid and safety personnel, if an employee's physical or medical condition might require emergency treatment; and
 - (c) government officials investigating compliance with FMLA.

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 to 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 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.

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



U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

WHD Publication 1420 Revised January 2009