

Family and Medical Leave

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Purpose

Family and Medical Leave Act of 1993 was passed by Congress to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; to minimize the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons; and to promote the goal of equal employment opportunity for women and men.

This Act provides reasonable unpaid (1) Family and medical leave for the birth of a child and to care for the newborn child; for the placement of a child with the employee for adoption or foster care; for the care of a child, spouse or parent who has a serious health condition; for the employee's own serious health condition; (2) Qualifying Exigency Leave for families of covered members and (3) Military Caregiver Leave.

Definitions

Following are definition of terms used in this policy:

Parent - a biological, adoptive, step or foster father or mother or an individual who stood in loco parentis (a person who is in the position or place of a parent) to an employee when the employee was a child. This term does not include parents "in-law".

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Child - a son or daughter who is:

- under 18 years of age, or
- is 18 years of age or older and incapable of self-care because of a mental or physical disability

and who is:

- a biological child,
- an adopted child,
- a foster child (a child for whom the employee performs the duties of a parent as if it were the employee's child),
- a step-child (a child of the employee's spouse from a former marriage),
- a legal ward (a minor child placed by the court under the care of a guardian), or
- a child of an employee standing in loco parentis.

Spouse – A husband or wife recognized by the State of North Carolina

Incapable of Self Care - the individual requires active assistance or supervision to provide daily self-care in several of the “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living including cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephone and directories, using a post office, etc.

Physical or Mental Disability – a physical or mental impairment that substantially limits one or more of the major life activities of an individual as regulated under 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA).

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Serious Health Condition – an illness, injury, impairment, or physical or mental condition that involves:

1. inpatient care (i.e., an overnight stay) in a hospital, hospice or residential medical facility, including any period of incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment for or recovery from), or any subsequent treatment in connection with such impairment; or
2. continuing treatment by a health care provider involving one or more of the following:
 - a. a period of incapacity as defined above of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:
 - 1) treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services under orders of or on referral by a health care provider, or
 - 2) 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
 - 3) the requirements in paragraph (a)(1) and (a)(2) of this section 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.
 - 4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.
 - 5) The term “extenuating circumstances” in paragraph (a)(1) of this section means circumstances beyond the employee’s control that prevent the follow-up visit from occurring as planned by the health care provider (i.e., no available appointments).
 - b. any period of incapacity due to pregnancy or for prenatal care, even when the employee or family member does not receive treatment from a health care

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- provider during the absence and even if the absence does not last more than three days (prenatal examinations, severe morning sickness)
- c. any period of incapacity or treatment due to a “chronic serious health condition,” even when the employee or family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than three days, which is defined as one:
- requiring periodic visits (at least two visits per year) for treatment by a health care provider, or by a nurse or physician’s assistant under the direct supervision of a health care provider,
 - continuing over an extended period of time (including recurring episodes of a single underlying condition), and
 - which may cause episodic rather than continuing period(s) of incapacity (e.g., asthma, diabetes, epilepsy, etc.)
- d. incapacity for a permanent or long-term condition for which treatment may not be effective (Alzheimer’s, a severe stroke or terminal stages of a disease)
- e. multiple treatments for restorative surgery or incapacity for serious conditions that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment (chemotherapy, radiation, dialysis, etc.)

Advisory Note: Ordinarily, unless complications arise, the following are examples of conditions that do not meet the definition: common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, cosmetic treatments, etc. The following may meet the definition if all other conditions of this section are met: restorative dental or plastic surgery after an injury or removal of cancerous growths, mental illness, allergies, or treatment from substance abuse.

Incapacity – inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

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Treatment – examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical exams, eye exams, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g. an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g. oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves, or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to the health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FML.

Health Care Provider - a Doctor of medicine or osteopathy who is authorized to practice medicine or surgery in the State of North Carolina, or any other person determined by statute, credential or licensure to be capable of providing health care services which include:

- Physician assistants, Podiatrists, Dentists, Clinical psychologists, Clinical social workers, Optometrists, Nurse practitioners, Nurse midwives, Chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist)
- Health care providers from whom state approved group health plans will accept certification of a serious health condition to substantiate a claim for benefits
- Foreign health care providers in above stated areas who are authorized to practice in that country and who are performing within the scope of the laws
- Christian Science practitioners listed with First Church of Christian Scientists in Boston, MA.

(Note: In this situation, the employee cannot object to an agency requirement to obtain a second or third certification. For employees or family members receiving treatment through a Christian Science practitioner, an employee may not object to any requirement that the employee or family member submit to an examination (though not treatment) to obtain a second or third opinion)

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Workweek - the number of hours an employee is regularly scheduled to work each week, including holidays.

Reduced Work Schedule - a work schedule involving less hours than an employee is regularly scheduled to work.

Intermittent Work Schedule - a work schedule in which an employee works on an irregular basis and is taking leave in separate blocks of time, rather than for one continuous period of time, usually to accommodate some form of regularly scheduled medical treatment due to a single qualifying reason

12-Month Period - the 12-month period measured forward from the date any employee's family and medical leave begins.

Covered Employees and Eligibility

An employee's eligibility for family and medical leave shall be made based on the employee's months of service and hours of work as of the date leave is to commence.

An employee is eligible if:

<p>Full-time Permanent, probationary, trainee, or time-limited, or Part-time (half-time or more) Permanent, probationary, trainee, or time-limited</p>	<ul style="list-style-type: none"> • has 12 months cumulative service with State government, including temporary service (See ⁽¹⁾ and ⁽²⁾ notes below.), and • has been in pay status at least 1040 hours during the previous 12-months.
<p>Temporary, intermittent, or part-time (less than half-time) Note: This leave shall be without pay.</p>	<ul style="list-style-type: none"> • has 12 months cumulative service (See ⁽¹⁾ and ⁽²⁾ notes below.), and • has been in pay status at least 1250 hours during the previous 12 months.

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Advisory Note: For the purpose of FML eligibility, State government is considered a single employer. Any employment, including temporary employment in a State agency position including employment through Temporary Solutions or other State agency administered temporary service, would be considered State service. State service does not include service with SPA local government agencies, public schools, or community colleges. State service also does not include temporaries hired through private staffing agencies.

- (1) Employment periods prior to a break in service of seven years or more shall not be counted in determining whether the employee has been employed by the agency for at least 12 months.
- (2) USSERA-covered military service in the Regular Armed Forces, National Guard or reserves count as time worked to determine eligibility for FML.

Amount of Leave and Qualifying Reasons for Leave

- (1) An eligible employee is entitled to a total of 12 workweeks, paid or unpaid, leave during any 12-month period:

Advisory Note: This leave is provided for both spouses even if employed in the same agency.

- (a) for the birth of a child and to care for the newborn child after birth, provided the leave is taken within a 12-month period following birth, or

Note: An expectant mother may also take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work, or requires a reduced work schedule.

- (b) for the placement of or to care for a child placed with the employee for adoption or foster care, provided the leave is taken within a 12-month period following placement, or

Note: FMLA leave must also be granted before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed.

- (c) for the employee to care for the employee's child, spouse, or parent, where that child, spouse, or parent has a serious health condition, (also, see the Family

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Illness Leave Policy for extended leave for up to an additional 52 weeks for these reasons),or

(d) because the employee has a serious health condition that prevents the employee from performing one or more essential functions of the position, or

(e) because of any qualifying exigency. (See FMLA-Qualifying Exigency Policy)

Military Caregiver Leave– An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member shall be entitled to a total of 26 workweeks of leave during a single 12-month period. (See FMLA-Military Caregiver Policy)

What counts towards the 12 or 26 weeks leave?

Paid or Unpaid Leave - All approved periods of paid leave and periods of leave without pay (including leave without pay while drawing short-term disability benefits) count towards the 12 (or 26, as appropriate) workweeks to which the employee is entitled. This includes leave taken under the Voluntary Shared Leave Policy.

Holidays occurring during a FMLA period of a full week count toward the FMLA leave entitlement. Holidays occurring during a partial week of FMLA leave do not count against the FMLA leave entitlement, unless the employee was otherwise scheduled and expected to work during the holiday.

If the agency closes for one or more weeks, the days that the agency is closed do not count against the employees' FMLA leave entitlement (e.g. a school closing two weeks for the Christmas holidays, or summer vacation).

Workers' Compensation Leave - If an employee is out on workers' compensation leave drawing temporary total disability, the time away from work is not considered as a part of the FMLA entitlement.

Compensatory Time – All compensatory time used shall be counted against the employee's FMLA leave entitlement. See the following Leave Charge Options.

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Leave Charges Options

In some cases, the employee has an option to exhaust leave or go on leave without pay. Use of paid leave must be decided upon initial request of leave and used prior to going on leave without pay. Listed below are the options.

Note: An employee may not change their work schedule in order to extend the period of paid leave. Example: An employee may not switch from a 40-hour schedule to a 30-hour schedule in order to lengthen their pay status.

Provision for Agencies in the BEACON HR/Payroll System: In compliance with the OSP FLSA policy, all agencies must require FLSA "subject" employees to use overtime compensatory time prior to using vacation/bonus leave. In the BEACON HR/Payroll System, if an employee chooses to exhaust vacation/bonus leave in any of the following situations it shall be used after overtime compensatory time, on-call compensatory time, holiday compensatory time and travel compensatory time.

If leave is for:	the employee
Birth (applies to both parents) and child care after birth	may choose to exhaust all or any portion of sick leave and/or vacation/bonus leave or go on leave without pay during the period of disability. Only vacation/bonus or leave without pay may be used before and after the period of disability unless the sick leave policy becomes appropriate for medical conditions affecting the mother or child.
Adoption	may choose to exhaust available vacation/bonus leave (or any portion), a maximum of 30 days sick leave (see Sick Leave Policy), or go on LWOP.
Foster Care	may choose to exhaust available vacation/bonus leave (or any portion) or go on LWOP.

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Illness of Child, Spouse, Parent	may choose to exhaust available sick and/or vacation/bonus leave, or any portion, or go on LWOP.
Employee's Illness	does not have the option of taking leave without pay if sick leave is available; however, the employee may use vacation/bonus leave in lieu of sick leave. If the illness extends beyond the 60-day waiting period required for short-term disability, the employee may choose to exhaust the balance of available leave or begin drawing short-term disability benefits.
Military Caregiver	See FML-Military Caregiver policy.
Qualifying Exigency	See FML-Qualifying Exigency policy.

Intermittent Leave or Reduced Work Schedule

Leave may be taken intermittently or on a reduced schedule for the following:

- (1) When medically necessary, to care for the employee's child, spouse, or parent who has a serious health condition, or because the employee has a serious health condition. (This would also apply to next of kin to care for a service member - see FML-Military Caregiver policy.)
- (2) Because of any qualifying exigency (see FML-Qualifying Exigency policy.)
- (3) When leave is taken after childbirth or for adoption/foster care, the employee may take leave intermittently or on a reduced schedule only if the agency agrees.

There is no minimum limitation on the amount of leave taken intermittently; however, the agency may not require leave to be taken in increments of more than one hour.

If leave is foreseeable, based on planned medical treatment, the agency may require the employee to transfer temporarily to an available alternative position for which the

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employee is qualified and that has equivalent pay and benefits and better accommodates recurring periods of leave.

Only the time actually taken as leave may be counted toward the leave entitlement.

Example: An employee normally works 40 hours each week. The employee is on a reduced work schedule of 20 hours per week. The FMLA leave may continue for up to 24 calendar weeks.

Procedure: If an employee works a reduced or intermittent work schedule and does not use paid leave to make up the difference between the normal work schedule and the new temporary schedule to bring the number of hours worked up to the regular schedule, the agency must submit a personnel action form showing a change in the number of hours the employee is scheduled to work. This will result in an employee earning pay and leave at a reduced rate. The agency remains responsible for paying the employee's medical premium.

AGENCY RESPONSIBILITIES

Notification of FMLA Provisions

Each agency is required to post and keep posted in conspicuous places a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment.

In addition to posting the FMLA provisions, handbooks and other written materials must include the general notice information. Where such materials do not exist, the agency must provide the general notice to new employees upon being hired, rather than requiring that it be distributed to all employees annually.

Agencies are permitted to distribute the handbook or general notice to new employees through electronic means so long as all of the information is accessible to all employees, that it is made available to employees not literate in English (if required), and that the

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information provided includes, at a minimum, all of the information contained in the general notice.

Note: Agencies may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Wage and Hour Division.

Notice of Eligibility

When an employee requests FMLA leave, or when the agency knows that an employee's leave may be for an FMLA-qualifying reason, the employee must be notified of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible. Notification of eligibility may be oral or in writing.

If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed the agency must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

The agency shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice shall be provided to the employee each time the eligibility notice is provided. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

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- That the leave may be designated and counted against the employee's annual FMLA leave entitlement;
- Requirements for the employee to furnish certifications;
- The employee's right to substitute paid leave;
- Requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments;
- The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;
- The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and
- The employee's potential liability for payment of health insurance premiums paid by the agency during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

Designation of Leave as FMLA Leave

It is the responsibility of the agency to:

- determine that leave requested is for a FMLA qualifying reason, and
- designate leave, whether paid or unpaid, as FMLA leave even when an employee would rather not use any of the FMLA entitlement.

The agency must give notice of the designation to the employee within five business days absent extenuating circumstances. The notice may be oral or in writing, but must be confirmed in writing no later than the following payday.

If the agency determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the agency must notify the employee of that determination.

For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the agency must designate such leave as military

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caregiver leave first. The leave cannot be counted against both an employee's entitlement of 26 workweeks of military caregiver leave and 12 workweeks of leave for other qualifying reasons.

The key in designating FMLA leave is the qualifying reason(s), not the employee's election or reluctance to use FMLA leave or to use all, some or none of the accrued leave. The agency's designation must be based on information obtained from the employee or an employee's representative (e.g., spouse, parent, physician, etc.).

If the agency will require the employee to present a fitness-for-duty certification to be restored to employment, the agency must provide notice of such requirement with the designation notice. If the agency will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the agency must so indicate in the designation notice, and must include a list of the essential functions of the employee's position.

The agency must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement.

The agency may retroactively designate leave as FMLA leave with appropriate notice to the employee provided that the agency's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, the agency and employee can mutually agree that leave be retroactively designated as FMLA leave.

Designation of Paid Leave as FMLA Leave

When an employee is on paid leave but has not given notice of the need for FMLA leave, the agency shall, after a period of 10 workdays, request that the employee provide sufficient information to establish whether the leave is for a FMLA-qualifying reason. This does not preclude the agency from requesting the information sooner, or at any time an extension is requested.

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If an absence which begins as other than FMLA leave later develops into an FMLA qualifying absence, the entire portion of the leave period that qualifies under FMLA may be counted as FMLA leave.

Designation of FMLA Leave after Return to Work

The agency may not designate leave that has already been taken as FMLA leave after the employee returns to work, with two exceptions:

- if an employee is out for a reason that qualifies for FMLA leave and the agency does not learn of the reason for the leave until the employee returns to work, the agency may designate the leave as FMLA leave within two business days of the employee's return; or
- if the agency has provisionally designated the leave under FMLA leave and is awaiting receipt from the employee of documentation.

Similarly, the employee is not entitled to the protection of the FMLA if the employee gives notice of the reason for the leave later than two days after returning to work.

EMPLOYEE RESPONSIBILITIES

Notice

The employee shall give notice to the supervisor of the intention to take leave under this policy unless the leave is a medical emergency. The notice must follow the agency's usual and customary call-in procedures for reporting an absence. The employee must explain the reasons for the needed leave in order to allow the agency to determine that the leave qualifies under the Act.

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If the reason for leave is foreseeable and is:	the employee shall:
For Birth/Adoption/Foster Care	give the agency not less than a 30-day notice, in writing. If the date of the birth or adoption requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable, which means within one or two business days of when the need for leave becomes known to the employee.
For Planned Medical Treatment	(1) make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations and (2) give not less than a 30-day notice. If the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.
Due to Active Duty of Family Member	See FML-Qualifying Exigency policy.

If the employee will not return to work after the period of leave, the agency shall be notified in writing. Failure to report at the expiration of the leave, unless an extension has been requested, may be considered as a resignation.

CERTIFICATION REQUIREMENTS FOR FAMILY AND MEDICAL LEAVE

Certification

The employee shall provide certification in accordance with the provisions listed below. If the employee does not provide medical certification, any leave taken is not protected by FMLA.

The agency should request medical certification within five business days after the employee provides notice of the need for FMLA leave.

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The employee shall provide a copy of the health care provider's certification within the time frame requested by the agency (which must be at least 15 calendar days) unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

Certification Requirements

Certification shall be sufficient if it states the following:

- (1) The date on which the serious health condition commenced;
- (2) The probable duration of the condition;
- (3) The appropriate medical facts within the knowledge of the health care provider regarding the condition;
- (4) When caring for a child, spouse or parent, a statement that the employee is needed and an estimate of the amount of time that such employee is needed;
- (5) When for the employee's illness, a statement that the employee is unable to perform the functions of the position;
- (6) When for intermittent leave, or leave on a reduced work schedule, for planned medical treatment, the dates on which treatment is expected and the duration;
- (7) When for intermittent leave, or leave on a reduced work schedule for the employee's illness, a statement of the medical necessity for the arrangement and the expected duration;
- (8) When for intermittent leave, or leave on a reduced work schedule, to care for a child, parent or spouse, a statement that the arrangement is necessary or will assist in their recovery and the expected duration.

Note: Medical Certification Form - Form WH-380, developed by the Department of Labor as an optional form for use in obtaining medical certification, including second and third opinions, may be used. Another form containing the same basic information may be used; however, no information in addition to that requested on Form WH-380 may be required.

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Validity of Certification

If an employee submits a complete certification signed by the health care provider, the agency may not request additional information; however, a health care provider, human resource professional, a leave administrator, or a management official representing the agency may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification. In no case, may the employee's direct supervisor contact the employee's health care provider.

If an agency deems a medical certification to be incomplete or insufficient, the agency must specify in writing what information is lacking, and give the employee seven calendar days to cure the deficiency.

Second Opinion - An agency that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion with the following conditions:

- The agency bears the expenses, including reasonable "out of pocket" travel expenses.
- The agency may not require the employee or family member to travel outside normal commuting distance except in very unusual circumstance.
- Pending receipt of the second (or third) opinion, the employee is provisionally entitled to FLMA leave.
- If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave.
- The agency is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the agency unless the agency is located in an area where access to health care is extremely limited.

Third Opinion - If the opinions of the employee's and the agency's designated health care providers differ, the agency may require the employee to obtain certification from a third health care provider, again at the agency's expense. This third opinion shall be final

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and binding. The third health care provider must be designated or approved jointly by the agency and the employee.

The agency is required to provide the employee, within two business days, with a copy of the second and third medical opinions, where applicable, upon request by the employee.

Recertification of Medical Conditions

An agency may request recertification no more often than every 30 days unless:

- an extension is requested,
- circumstances described by the previous certification have changed significantly, or
- the agency receives information that casts doubt upon the employee's stated reason for the absence.

If the minimum duration specified on a certification is more than 30 days, the agency may not request recertification until that minimum duration has passed unless one of the conditions above is met

When the duration of a condition is described as "lifetime" or "unknown," the agency may request recertification of an ongoing condition every six months in conjunction with an absence.

The employee must provide the requested recertification to the agency within the time frame requested by the agency (which must allow at least 15 calendar days after the agency's request), unless it is not practicable under the particular circumstances.

Any recertification requested by the agency shall be at the employee's expense unless the agency provides otherwise. No second or third opinion on recertification may be required.

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Intent to Return to Work

An agency may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The agency's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

If an employee gives unequivocal notice of intent not to return to work, the agency's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the agency may require that the employee provide the agency reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The agency may also obtain information on such changed circumstances through requested status reports.

Fitness for Duty Certification

Agencies may enforce uniformly-applied policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work. An agency may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Where reasonable job safety concerns exist, an agency may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

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EMPLOYMENT AND BENEFITS PROTECTIONS

Reinstatement

The employee shall be reinstated to the same position held when the leave began or one of like pay grade, pay, benefits, and other conditions of employment. The agency may require the employee to report at reasonable intervals to the agency on the employee's status and intention to return to work. The agency may require that the employee provide certification that the employee is able to return to work.

Reinstatement is not required if an employee is reduced in force during the course of taking FMLA leave. The agency has the burden of proving that the reduction would have occurred had the employee not been on FMLA leave.

Benefits

The employee shall be reinstated without loss of benefits accrued when the leave began. All benefits accrue during any period of paid leave; however, no benefits will be accrued during any period of leave without pay.

Health Benefits

The State shall maintain coverage for the employee under the State's group health plan for the duration of leave at the level and under the conditions coverage would have been provided if the employee had continued employment. Any share of health plan premiums which an employee had paid prior to leave must continue to be paid by the employee during the leave period. The agency must give advance written notice to employees of the terms for payment of premiums during FMLA leave. The obligation to maintain health insurance coverage stops if an employee's premium payment is more than 30 days late. The agency shall provide 15 days notice that coverage will cease.

If the employee's failure to make the premium payments leads to a lapse in coverage, the agency must still restore the employee, upon return to work, to the health coverage equivalent to that which the employee would have had if leave had not been taken and

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the premium payments had not been missed without any waiting period or preexisting conditions.

Advisory Note: Even if the employee chooses not to maintain group health plan coverage for dependents or if coverage lapses during FMLA leave, the employee is entitled to be reinstated on the same terms as prior to taking leave, including family or dependent coverage, without any qualifying period, physical examination, exclusion of pre-existing condition, etc. Therefore, the agency should assure that health benefits coverage will be reinstated; otherwise, the agency would need to pay the premium and recover it after the employee returns to work.

The agency may recover the premiums if the employee fails to return after the period of leave to which the employee is entitled has expired for a reason other than the continuation, recurrence, or onset of a serious health condition or other circumstances beyond the employee's control. For this purpose, return to work is defined as 30 calendar days; therefore, if the employee resigns any time within 30 days after the return to work, the insurance premium may be recovered unless the reason for the resignation is related to the continuation, recurrence, or onset of a series health condition or other circumstances beyond the employee's control.

INTERFERENCE WITH RIGHTS

Actions Prohibited

It is unlawful to interfere with, restrain, or deny any right provided by this policy or to discharge or in any other manner discriminate against an employee for opposing any practice made unlawful by this policy.

Protected Activity

It is unlawful to discharge or in any other manner discriminate against any employee because the employee does any of the following:

Family and Medical Leave

- files any civil action, or institutes or causes to be instituted any civil proceeding under or related to this policy;
 - gives, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided by this policy; or
 - testifies, or is about to testify, in any inquiry or proceeding relating to any right provided under this policy.
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ENFORCEMENT

Violations

Denial of leave requested pursuant to the Family and Medical Leave Act is a grievable issue and employees, except for ones in exempt positions (policymaking, exempt managerial, confidential assistants, confidential secretaries and chief deputy or chief administrative assistant), may appeal under the State Personnel Act.

Violations can result in any of the following or a combination of any of the following and are enforced by the U. S. Secretary of Labor:

- U. S. Department of Labor investigation,
 - Civil liability with the imposition of court cost and attorney's fees, or
 - Administrative action by the U. S. Department of Labor.
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POSTING AND RECORDKEEPING REQUIREMENTS

Posting

Agencies are required to post and keep posted, in a conspicuous place, a notice explaining the FMLA provisions and providing information concerning the procedures for filing complaints of violations of the Act with the U. S. Department of Labor, Wage and Hour Division.

Note: Copies of the required notice may be obtained from local offices of the Wage and Hour Division.

Family and Medical Leave

Records

Agencies are required to keep records for no less than three years and make them available to the Department of Labor upon request.

In addition to the records required by the Fair Labor Standards Act, the agency must keep records of:

- dates FMLA leave is taken,
- hours of leave if less than a full day,
- copies of employee notices,
- documents describing employee benefits,
- premium payments of employee benefits, and
- records of any disputes.

Records and documents relating to medical certifications, recertification or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements, except that:

- Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.
- First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment.
- Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.