

 <b>Montana Operations Manual Policy</b>	Category	<b>Human Resources/ Employee Benefits</b>
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Issuing Authority	<b>Department of Administration State Human Resources Division</b>	
<b>Family and Medical Leave Policy</b>		

### **I. Purpose**

This policy provides the framework under which the Family and Medical Leave Act (FMLA) will be administered in Montana state government. This policy also provides employees information about FMLA entitlements and outlines any obligations employers and employees may have during such leaves. Employees and managers should direct questions regarding FMLA leave to their agency human resources office.

### **II. Scope**

This policy covers all agencies in Montana’s executive branch except the Montana university system, the Montana State Fund, elected officials, personal staff of elected officials, and any other position specifically excluded under Sections [2-18-103](#) and [-104](#), Montana Code Annotated (MCA).

Any state law or collective bargaining agreement that provides greater family or medical leave rights supersedes this policy.

### **III. Procedures**

The FMLA allows employees to balance their work and family life by taking reasonable leave for qualifying family and medical reasons. The FMLA provides eligible employees with job-protected leave and requires group health benefits to be maintained during the leave.

## **A. Eligibility**

1. To be eligible for FMLA leave, the employee must have:
  - a. worked for Montana state government a minimum of 12 months, which need not be consecutive or served just prior to taking leave; and
  - b. been in a pay status for at least 1,040 hours during the 12-month period immediately preceding the commencement of leave.
2. Hours spent in service to the National Guard, Reserves, or Uniformed Services Employment and Reemployment Rights Act (USERRA)-covered service will count toward FMLA eligibility.
3. In most cases, all time worked for the state counts towards the 12-month period, including seasonal employment. Breaks in service of seven years or longer do not count toward this entitlement unless the break in service was related to military service covered under the Uniformed Services Employment and Reemployment Rights Act or otherwise specified in a written agreement.

## **B. Loss of Eligibility**

1. The employee's eligibility and protection under the FMLA ends when:
  - a. an employee gives an agency unequivocal notice of the employee's intent not to return to work;
  - b. the employee exhausts all FMLA leave benefits for the covered periods; or
  - c. the employee exhausts all FMLA leave and is unable to return to work.

## **C. Types and Duration of Leave**

1. An agency will not deny employees the benefits of FMLA because they are "key employees," as that term is defined in the FMLA regulations.
2. **Basic FMLA Year:** The executive branch uses the 12-month period measured forward from the first date of leave designated as an eligible employee's FMLA leave. Under this method, an eligible employee is entitled to 12 weeks of leave during the 12-month

period beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after the completion of any previous 12-month period.

**3. Basic Leave:**

- a. Eligible employees may take up to 12 workweeks of FMLA leave within a 12-month period for certain types of family and medical leave. The 12-month period begins on the first day an employee takes FMLA leave. Eligible employees may use leave for one or more of the following FMLA-qualifying reasons within the 12-month period:
  - i. the birth of an employee's child and to care for a newborn child within one year of birth;
  - ii. the placement of a child for adoption or foster care with the employee (including counseling, consultation, court appearances, etc., prior to placement) and to care for the newly placed child within one year of placement;
  - iii. to care for the employee's spouse, son, daughter, or parent with a serious health condition;
  - iv. for the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; or
  - v. any qualifying exigency arising when the employee's spouse, son, daughter, or parent is a military member, including members of the National Guard and Reserves and the Regular Armed Forces, on covered active duty or notified of an impending call or order to covered active duty.
- b. Eligible employees may take FMLA leave for the birth or placement of a child within 12 months of the birth or placement. Maternity leave provided by the *Maternity and Parental Leave Policy* will run concurrently with FMLA leave.
- c. When both parents are employed by the State of Montana, both may take up to 12 weeks of FMLA leave for the birth, adoption, or placement of a foster child.
- d. Eligible part-time employees will receive pro-rated leave based on the average weekly hours in a pay status. For example, a part-time employee who works 20 hours per week is entitled to

20 hours of FMLA leave per week for 12 weeks. An employer may convert the weeks to hours as long as the conversion equitably reflects the employee's normally scheduled hours.

**4. Serious Health Conditions:**

A serious health condition is an illness, injury, impairment, or physical or mental condition either involving an overnight stay in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider.

**5. Continuing Treatment:**

- a. The continuing treatment requirement may be met by:
  - i. a period of incapacity of more than three consecutive calendar days combined with at least two visits to a health care provider, or
  - ii. one visit and a regimen of continuing treatment, or
  - iii. incapacity resulting from pregnancy, or
  - iv. incapacity due to a chronic condition, or
  - v. permanent or long-term conditions; or
  - vi. conditions requiring multiple treatments.
- b. Other conditions may meet the definition of continuing treatment. Agency staff should direct questions to their agency HR office.

**6. Exigency Leave:**

- a. Examples of qualifying exigencies are:
  - i. short-notice deployments (when notice is given seven or less days before deployment);
  - ii. military events and related activities;
  - iii. child care and school-related activities;
  - iv. arrangements for the care of a military member's parent who is incapable of self-care;
  - v. financial and legal arrangements;

- vi. counseling (provided by someone other than a health care provider);
  - vii. rest and recuperation (up to fifteen days while the military member is on rest and recuperation leave);
  - viii. post deployment activities (within 90 days of the end of the military member's covered active duty); and
  - ix. any other event an employee and their supervisor agree is a qualifying exigency.
- b. Exigency activities are further described in *A Manager's Guide to the FMLA* located at: <https://hr.mt.gov/Public/Policies> and in 29 CFR 825.126.

## **7. Military Caregiver Leave:**

- a. In addition to the basic FMLA leave entitlement above, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember is entitled to take up to 26 weeks of leave in a single 12-month period to care for the service member with a serious injury or illness.
- b. Leave to care for a covered servicemember will only be available during a single 12-month period and, when combined with other FMLA-qualifying leave, may not exceed 26 weeks during the single 12-month period.
- c. The 12-month period begins on the first day the employee takes leave to care for a covered servicemember, even if basic FMLA leave was taken within the 12 months prior. A Manager's Guide to the FMLA contains examples on determining the 12-month period.
- d. Eligible part-time employees will receive pro-rated leave based on the average weekly hours in a pay status. For example, a part-time employee who works 20 hours per week is entitled to 20 hours of military caregiver FMLA leave per week for 26 weeks. An employer may convert the weeks to hours as long as the conversion equitably reflects the employee's normally scheduled hours.

## **8. Covered Servicemember:**

- a. A covered servicemember is:

- i. a current member of the Armed Forces, including a member of the National Guard or Reserves, undergoing medical treatment, recuperation, or therapy, or who is in outpatient status, or is on the temporary disability retired list for a serious injury or illness; or
  - ii. a covered veteran who is a former member of the Armed forces, including the National Guard or Reserves, undergoing medical treatment recuperation or therapy for a serious injury or illness and 1) was discharged or released under conditions other than dishonorable and 2) was discharged within the five-year period prior to the first date the eligible employee takes military care leave to care for the covered veteran. (The period between enactment of the FY2010 NDAA on October 28, 2009 and the effective date of the 2013 Final Rule is excluded in the determination of the five-year period for covered veteran status.)
- b. A servicemember is considered to have a serious injury or illness if he or she incurred the injury or illness in the line of duty on active duty, and the injury or illness renders the servicemember medically unfit to perform duties of his or her office, grade, rank, or rating. A serious injury or illness also includes conditions that existed before the servicemember's active duty and were aggravated by service in the line of duty on active duty in the Armed Forces.
- 9. A veteran of the Armed Forces is considered to have a serious injury or illness if the injury or illness incurred or was aggravated in the line of duty on active duty and manifested itself before or after the member became a veteran. The covered veteran's serious injury or illness must be one of the following:
  - i. a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the service member unable to perform the duties of their office, grade, rank, or rating;
  - ii. a physical or mental condition for which the veteran has received a Veterans Affairs (VA) Service Related Disability Rating (VASRD) of 50 percent or greater as long as the VASRD rating is based on the condition precipitating the need for military caregiver leave;

- iii. a physical or mental condition resulting from disability related to military service which substantially impairs the veteran's ability to secure or maintain a substantially gainful occupation or would do so absent treatment; or
- iv. an injury, including a psychological injury, resulting in the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

**10. Intermittent Leave or Reduced Leave Schedule:**

- a. FMLA leave will usually be taken for a period of consecutive days, weeks, or months. However, eligible employees may take FMLA leave intermittently or on a reduced leave schedule, in one-half hour increments or greater, when medically necessary because of:
  - i. his or her own serious health condition;
  - ii. to care for a spouse, parent, or son or daughter with a serious health condition; or
  - iii. to care for a covered servicemember with a serious injury or illness.
- b. When requested by an agency representative, the employee must provide certification confirming the medical necessity for intermittent leave.
- c. If an employee needs leave intermittently for planned medical treatment, the employee must make a reasonable effort to schedule the treatment so it does not unduly disrupt agency operations.
- d. Eligible employees may take intermittent leave or leave on a reduced leave schedule for a qualifying exigency or following birth or adoption, subject to supervisor approval. In this case, the employee will notify his or her supervisor as soon as the need for leave is known and request a schedule that minimizes disruption of the workplace.
- e. In all cases of intermittent and reduced-schedule leaves, the agency reserves the right to transfer an employee to another position that better accommodates the employee's need for leave and the agency's operations. This decision is at the

discretion of the employee's supervisor. The alternative position must have equivalent pay and benefits.

## **D. Agency FMLA Leave Obligations**

### **1. General Notice Requirements:**

- a. State agencies must provide employees with information about the FMLA, including information about the provisions and procedures for filing complaints for violations of the FMLA. Agencies must:
  - i. post and keep posted an FMLA notice in a conspicuous place that explains the rights and responsibilities of employees under the FMLA; and
  - ii. provide information about employee rights and obligations under this policy and the FMLA in employee handbooks or other written materials. Written materials should include the agency's requirements for requesting FMLA leave.
- b. Agencies should also provide ongoing FMLA training that includes information about any changes to the policy or the FMLA.

### **2. Agency Notice Requirements:**

Agency representatives determine whether leave qualifies as FMLA-covered leave. Agency representatives must designate all leave meeting FMLA requirements as FMLA leave regardless of an employee's desire regarding the designation. When an employee requests FMLA leave, or when an agency representative acquires knowledge an employee's leave may be for an FMLA-qualifying reason, three notice requirements are triggered.

- a. **Eligibility Notice:** The agency representative must notify employees about their eligibility to take FMLA leave within five business days. Employees requesting FMLA leave are entitled to receive written notice from the agency notifying them whether they are eligible for FMLA leave and, if not eligible, the reasons why they are not eligible.
- b. **Rights and Responsibility Notice:** The rights and responsibility notice may be included with the eligibility notice and must:
  - i. state the leave may be designated as FMLA leave;



- ii. include the state's 12-month period;
  - iii. describe any certification requirements;
  - iv. state the employee's right to substitute paid leave;
  - v. state the requirement to use accrued sick and other leave concurrently with FMLA leave, according to Paragraph F, below.
  - vi. notify the employee of his or her responsibility to continue paying the employee's portion of insurance premiums; and
  - vii. reaffirm the employee's right to return to their position with the same benefits they received prior to using FMLA-qualifying leave;
  - viii. notify of the employee's potential liability for payment of health insurance premiums paid by the employer if the employee fails to return to work after taking FMLA leave.
- c. **Designation Notice:** Agency representatives must provide a written designation notice for each FMLA-qualifying reason within an applicable 12-month period. When an agency representative has enough information to determine whether an employee's leave is FMLA-qualifying, they must notify the employee within five days. The designation notice must include:
- i. the agency's designation determination;
  - ii. any fitness-for-duty requirements; and
  - iii. the amount of leave, if known, that will be counted against the employee's FMLA leave entitlement.

### 3. **Recordkeeping Requirements:**

Agency representatives must make, keep, and preserve records under the FMLA for no less than three years. These records are usually maintained in the agency's payroll or human resource offices or in the central payroll system. The following must be kept in accordance with the requirements of the FMLA, Fair Labor Standards Act (FLSA), Genetic Information Non-Discrimination Act (GINA), and Americans with Disabilities Act (ADA):

- a. basic payroll and identifying employee data and compensation details;
- b. dates FMLA leave is taken by eligible employees;
- c. if leave is taken in less than full days, then the hours taken;
- d. copies of notices given by employees and the agency (these copies may be maintained in the employee's personnel file);
- e. policies describing employee benefits and the practice of taking paid and unpaid leave;
- f. premium payments of employee benefits;
- g. disputes between the agency and employee regarding the designation of leave as FMLA leave;
- h. GINA notice requirements: Agency managers must include the safe-harbor language required by the GINA regulations on all certification requests. This language should also be included in any documents addressed to a medical professional or the employee when any type of medical information is requested or may be disclosed;
- i. agency representatives should not ask employees probing questions about the FMLA-qualifying event that may elicit genetic information about an employee or an employee's family members. See the Non-Discrimination EEO Policy (2.21.4001 et seq., ARM) for further guidance; and
- j. records or documents relating to the employee or the employee's family's certifications.\*\*\*These records will be maintained as confidential medical records in separate files from the usual personnel files and maintained according to ADA and GINA confidentiality requirements. See the Employee Records Management Policy (2.21.6601 through - .6622, ARM) for further guidance.

## **E. Employee FMLA Leave Obligations**

### **1. Employee Notice of Leave Requirements:**

- a. An employee requesting FMLA leave must provide:
  - i. at least a 30-day advance oral or written notice of the need to take FMLA leave when the need is foreseeable; or

- ii. timely notice, as soon as possible and practical, when the need for FMLA leave is not foreseeable; and
  - iii. sufficient information for the employer to understand the leave is for an FMLA-qualifying reason.
- b. The following sections provide direction as to the content and timing of employee notices.

**2. Content of Employee Notice:**

- a. To trigger protections under the FMLA, employees must inform their agency representative of the need for FMLA-qualifying leave. Employees must also notify the agency of the anticipated timing and duration of leave, if known.
- b. Employees can do this by specifically requesting FMLA leave or explaining the reason for the leave so the agency representative can make a determination if the leave is FMLA-qualifying. For example, employees might explain that:
  - i. a medical condition renders them unable to perform the functions of their job;
  - ii. they are pregnant;
  - iii. they have been hospitalized overnight;
  - iv. they or a covered family member are under continuing care of a healthcare provider;
  - v. the leave is because of a qualifying exigency caused by a military member being on covered active duty or notified of an impending call or order to covered active duty; or
  - vi. the leave is for a family member unable to perform daily activities or the family member is a covered servicemember with a serious injury or illness.
- c. Calling in “sick” without providing the reasons for the needed leave will not be considered sufficient notice for FMLA leave under this policy.
- d. Employees are expected to respond to the agency’s questions to determine if absences are potentially FMLA-qualifying.
- e. When the agency representative receives enough information to determine the leave qualifies as FMLA, the agency

representative must retroactively designate the leave as FMLA, provided the agency notifies the employee about the designation.

- f. If an employee fails to provide enough information to make a determination, the agency may deny the leave.
- g. Employees who are seeking additional leave because of a previously-qualified FMLA reason and who have not exhausted their FMLA leave benefits must continue to provide sufficient information to agency representatives so the agency may properly record, account for, and track the use of FMLA leave.
- h. Employees should never provide genetic information when responding to a request for FMLA medical certification. GINA prohibits employers from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law.

**3. Timing of Employee Notice:**

- a. Employees must provide 30 days' advance notice of the need to take FMLA leave when the need is foreseeable.
- b. If 30-days' notice is not possible, or the approximate timing of the need for leave is not foreseeable, employees must provide the agency notice of the need for leave as soon as practicable under the facts and circumstances of the particular case.
- c. Employees must comply with their agency's customary notice requirements for requesting leave, absent unusual circumstances.
- d. An agency may delay or deny FMLA coverage if the employee fails to provide notice, without a reasonable reason for the delay, or otherwise fails to satisfy FMLA-notice obligations.
- e. An employee who requests intermittent leave or a reduced leave schedule will notify his or her supervisor as soon as the need for the leave is known.

**4. Scheduling of Planned Medical Treatment and Intermittent Leave or Reduced Leave Schedules:**

- a. Employees must consult with their agency representative and make a reasonable effort to schedule medical treatment so it

does not unduly disrupt the agency's operations. The employee's health care provider must approve treatment schedules.

- b. An agency representative may temporarily transfer an employee during the period of the intermittent or reduced-leave schedule to an alternative position for which the employee is qualified. The alternative position must have equivalent pay and benefits and better accommodate the recurring periods of leave.
- c. Employees seeking intermittent or reduced-schedule leave for reasons unrelated to planned medical treatment must advise their agency representative of the reason for the leave. In such cases, the agency representative and employee will develop a leave schedule meeting the employee's needs without unduly disrupting the agency's operations.
- d. Intermittent or reduced schedule FMLA leave for childbirth or placement of a child for adoption or foster care is subject to supervisor approval.
- e. Employees must provide reasonable and practicable notice to an agency representative when requesting intermittent leave or a reduced leave schedule because of a qualifying exigency.

**5. Medical Certifications Supporting Need for FMLA Leave:**

- a. Depending on the type of leave requested, employees may be required to submit medical certifications supporting their need for FMLA-qualifying leave. Employees may be required to provide medical certification for their own serious health condition, to care for a family member with a serious health condition, because of a qualify exigency, or to care for a covered service member with a serious injury or illness.
- b. Three types of FMLA medical certifications exist: an initial certification, a recertification, and a return-to-work or fitness-for-duty certification (refer to FMLA guide for more information on recertification and fitness-for-duty certification).
- c. The employee is responsible for providing an agency representative with timely, complete, and sufficient medical certifications. When the agency representative requests employees provide FMLA certifications, employees must provide the requested certification within 15-working days after the agency's request unless it is not practicable to do so

despite an employee's diligent, good-faith efforts. Employees must keep an agency representative informed of any delays in providing the appropriate FMLA certification and when they can reasonably expect to receive the certification.

**6. Incomplete or Insufficient Medical Certifications:**

- a. An agency representative will inform an employee in writing if his or her medical certification is incomplete or insufficient. The written notice must identify the specific information required.
- b. Employees will have seven working days to correct incomplete or insufficient certifications. Agency representatives may deny FMLA leave for employees who fail to correct deficiencies in a timely manner or otherwise fail to timely submit requested medical certifications or furnish the healthcare provider providing the certification with authorization to release a sufficient and complete certification.

**7. Authenticating or Clarifying Information on a Medical Certification:**

- a. Agency representatives may not request additional information from an employee's health care provider once the employee has provided a complete and sufficient certification. However, an agency representative (not the employee's direct supervisor) may contact an employee's health care provider to authenticate or clarify a completed and sufficient medical certification. The agency representative may verify the health care provider completed or authorized information on the certification, clarify handwriting on the form, or clarify the meaning of a response to a question on the form.
- b. An agency representative may deny FMLA leave if certifications are unclear and the employee chooses not to provide the agency representative with sufficient and complete certification.
- c. An agency representative may waive its right to receive timely, complete, and sufficient FMLA medical certifications, as it deems appropriate.

**8. Second and Third Medical Opinions:**

- a. Agency representatives may request a second opinion if they doubt the validity of the medical certification for a serious health condition. Agency representatives will select the health care provider for the second opinion.
- b. If the first and second opinions agree, agency representatives must accept the second opinion. If they disagree, the agency representatives and the employee must jointly select the health care provider for the third opinion. The third opinion is final and binding.
- c. The agency must pay for the second and third opinion as well as reasonable out-of-pocket travel expenses incurred by the employee.
- d. An employee may request copies of the second and third medical opinions. Agency representatives must provide the opinions within five business days of the request.

**9. Certifications Supporting the Need for Exigency FMLA Leave:**

- a. Upon request, employees seeking qualifying exigency leave may be required to provide:
  - i. a copy of the military member's covered active-duty orders or call to covered active-duty status, and
  - ii. a certification from the employee setting forth information concerning the nature of the qualifying exigency for which the leave is requested.
- b. An agency representative may request the covered active-duty orders only once. Subsequent separate calls to covered active duty may constitute a new request for exigency FMLA leave.
- c. An employee who provides optional Form WH-384 may not be required to provide additional certification.

**10. Certifications Supporting Need for Military Caregiver FMLA Leave:**

- a. Agency representatives may require employees to obtain certifications completed by authorized health care providers when military caregiver leave is taken. Authorized health

care providers may include Department of Defense, VA, TRICARE network and non-network health care providers, or non-military-affiliated health care providers. The agency representative may request the certification include additional information confirming an eligible employee's entitlement to military caregiver leave. Agency representatives may request second or third opinions if the healthcare provider completing the certification is not affiliated with DOD, VA, or TRICARE.

- b. The employee may use WH-385 or WH-285-V to ensure certification meets FMLA requirements.
- c. An employee who provides an international travel order or authorization (ITO or ITA) may not be required to provide additional certification.

#### **F. Substituting Paid Leave for Unpaid FMLA Leave**

1. Employees may elect to use any accrued paid time while taking unpaid FMLA leave. Use of some paid leave may be required as described below.
2. The substitution of paid time for unpaid FMLA leave time does not extend the length of FMLA leave. Paid time off will run concurrently with an employee's FMLA leave entitlement.
3. **Annual Leave:** As provided in 2-18-615, MCA, agencies may not require employees to take accrued annual leave concurrently with FMLA leave if the reason for absence is illness. However, the employee may do so voluntarily.
4. **Required Use of Sick Leave:**
  - a. Employees taking FMLA leave for purposes that also qualify for use of sick leave will be required to take a minimum of 20 hours of accrued sick leave each week, concurrently with FMLA leave, except as provided below. The 20-hour requirement will be prorated for part-time employees based on either:
    - i. The part-time employee's regular schedule at the time the employee is on a FMLA-qualified absence; or
    - ii. The average amount of time the employee is in a pay status when agency management cannot determine or has not assigned a regular schedule.



- b. The employee may also be eligible to use sick leave fund benefits concurrently with FMLA leave.

**5. Workers Compensation**

Leaves of absence taken in connection with a workers' compensation injury or illness will run concurrently with any FMLA leave entitlement.

**6. Required Use of Banked Holidays**

Agency representatives may require employees to use banked holidays. Banked holidays will run concurrently with FMLA leave.

**7. Required Use of Compensatory Time**

Agency representatives may require employees to use accrued exempt and nonexempt compensatory time (as defined under the FLSA) concurrently with all types of FMLA-approved leave.

**G. Benefits During Leave**

**1. Employee's Share of Insurance Benefits:**

- a. Employees on approved FMLA leave are entitled to continue insurance benefits under the same conditions as if they had continued to work.
- b. The agency will continue to pay the state contribution towards the cost of the employee's insurance while the employee is on approved FMLA leave.
- c. If the employee is receiving pay from the agency during the FMLA leave, the agency will continue to deduct the employee's portion of the insurance premiums from the employee's paycheck in the same manner as if the employee was actively working.
- d. If the leave is unpaid, the employee is required to continue to pay the employee portion of any insurance premiums normally deducted from the employee's paycheck. The employee will pay such amount on or before the due date determined by the Health Care and Benefits Division. A check payable to the State of Montana should be sent to:

Health Care and Benefits Division

100 N Park Avenue, Suite 320

P.O. Box 200130

Helena, MT 59620-0130

- e. If coverage lapses because an employee has not made his or her share of the required payments, upon the employee's return to work, the agency will restore the employee and their dependents to coverage/benefits equivalent to those the employee would have had if leave had not been taken and payments had not been missed. The employee may elect to remove dependent coverage/benefits by completing and returning an enrollment/change form, either before or within 30 days of the date that he or she returned to work.
- f. If an employee fails to return to work for 30 calendar days after the leave entitlement has been exhausted, the agency may recover the cost of any insurance benefits provided during FMLA leave.
- g. The employee will not be required to reimburse the agency if there is a recurrence or onset of a serious health condition or, in the opinion of agency management, there is a change of circumstances beyond the employee's control.

**H. FMLA Leave on Holidays**

- 1. Employees may be paid holiday pay while on FMLA leave if they meet the requirement of the Holiday Policy.
- 2. If an employee takes intermittent leave during a week a holiday occurs, the holiday is not counted towards the employee's FMLA entitlement unless the employee was scheduled to work the holiday and takes the day off for an FMLA-qualifying reason.
- 3. If an employee is using leave for the entire week, agency representatives will count the entire week including the holiday as FMLA leave.

**I. Return to Work or Reinstatement**

- 1. An employee taking leave under this policy will be returned to the employee's same position or to an equivalent position, unless the

employee would have been terminated for reasons unrelated to the FMLA leave of absence.

2. FMLA leave will not result in any loss of benefits or conditions of employment accrued prior to the beginning of the leave period unless the benefit or condition of employment has been discontinued for other agency employees during the FMLA leave. For example, an agency may discontinue employee benefits during a reduction in force lasting more than six months.

#### **J. Employees Who Are Unable to Return to Work**

If an employee is unable to return to work because of his or her own serious health condition, agency representatives must consider the implications of ADA.

#### **K. Transfers**

If an employee transfers between agencies, the record of any FMLA leave taken will transfer with the employee and will count toward an employee's FMLA leave entitlement in the new agency.

#### **L. Abuse of FMLA**

FMLA leave abuse occurs when an employee uses leave for unauthorized purposes or misrepresents the actual reason for charging an absence to FMLA leave. Abuse is cause for discipline, up to and including discharge.

#### **M. Enforcement Mechanisms**

1. An employee who determines that an agency has violated the FMLA may either:
  - a. file a complaint with the U.S Secretary of Labor, or
  - b. file a lawsuit.
2. Complaints should be filed within a reasonable time and may not be filed more than two years after the last action the employee contends was in violation of the FMLA or more than three years if the violation was willful.
3. A complaint to the Secretary of Labor may be made in person, by telephone, or by mail with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

No particular format is required. The complaint must be in writing and include a full statement of acts and omissions which are believed to constitute a violation. The complaint must include all pertinent dates.

4. An employee may recover wages, benefits, or other compensation denied, or actual monetary loss sustained by the employee as a direct result of being denied leave. When appropriate, the employee may be reinstated and promoted. If the employer is found in violation, the employee may recover reasonable attorney fees and other costs of the action.
5. An employee may have additional enforcement rights under a collective bargaining agreement.

#### IV. Definitions

All definitions contained in the FMLA and [2-18-101](#), MCA, apply to this policy. The following definitions also apply:

**Agency Representative:** The employee's immediate supervisor, agency upper management or agency HR personnel, or as defined in an agency policy.

**Child:** A biological, adopted, or foster child, stepchild, legal ward, or a child of a person standing in loco parentis who is either under age 18 or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time the FMLA leave is to commence. The term "child" who is a "covered service member" for purposes of exigency leave or military caregiver leave includes sons and daughters of any age.

**Continuing treatment:** A serious health condition by a health care provider includes any one or more of the following: incapacity and treatment, pregnancy or prenatal care, chronic conditions, permanent or long-term conditions, or conditions requiring multiple treatments.

**Covered Active Duty:** In the case of a member of a regular component of the Armed Forces, it means duty during the deployment of the member with the Armed Forces to a foreign country. In the case of a member of a reserve component of the Armed Forces, it means duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under section 101(a)(13)(B) of title 10, United States Code.

**Genetic information:** As defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

**Inpatient care:** An overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in (29 CFR) 825.113(b), or any subsequent treatment in connection with such inpatient care.

**Incomplete certification** means one or more of the applicable entries on the certification form have not been completed.

**Insufficient certification** means the information provided on the certification form is vague, unclear, or non-responsive.

**Intermittent leave:** FMLA leave taken in separate blocks of time because of a single qualifying reason.

**Next of kin of a covered service member:** Nearest blood relative other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and multiple family members have the same level of relationship to the covered service member, all such family members will be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. When such designation has been made, the designated individual will be deemed to be the covered service member's only next of kin.

**Parent and parent of a covered service member:** A biological parent or any other individual who stood *in loco parentis* to an employee, when the employee was a son or daughter as defined in law. The terms do not include parents "in law."

**Parent of a military member:** A biological parent or any other individual who stood *in loco parentis* to a military member, who is an employee's spouse, son, daughter or parent.

**Pay status:** The employee is being paid for hours worked or for annual leave, sick leave, or other paid leave, sick leave fund grants, holidays, or compensatory time.

**A reduced leave schedule:** A leave schedule that reduces an employee's usual number of working hours per workweek or per workday.

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

**Serious health condition:** An illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.

**Spouse:** A husband or wife, as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage.

## V. References

The State Human Resources Division publishes a guide designed to assist human resource professionals and managers in Montana state government in administering the FMLA. The guide is available at <https://hr.mt.gov/Public/Policies>.

The US Department of Labor provides several resources and forms which are helpful in complying with the FMLA. They can be found at <https://www.dol.gov/agencies/whd/fmla/forms>.