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A MANAGER'S GUIDE TO THE  
**Family Medical Leave Act**  
IN MONTANA STATE GOVERNMENT

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State Human Resources Division  
Department of Administration

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## Introduction

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The Family Medical Leave Act (FMLA or Act) provides specific benefits to employees. FMLA is intended to balance the demands of the workplace with the needs of families and to promote family stability, economic security and national interests in preserving family integrity (29 CFR 825.101). Specifically, the FMLA:

- entitles eligible employees to job protected leave;
- maintains an employee's health benefits during leave;
- restores an employee to a job at the conclusion of leave;
- sets employer and employee requirements for notice of leave; and
- assists managers and supervisors in managing leave requests.

The Act requires managers to provide eligible employees with leave for any of the following reasons:

- the birth of a son or daughter and to care for the newborn child;
- for placement of a son or daughter for adoption or foster care;
- to care for a spouse, son, daughter, or parent with a serious health condition;
- for the employee's serious health condition;
- a qualifying exigency because the employee's spouse, son, daughter, or parent is on covered active duty or has been notified of or called to covered active duty; or
- to care for a spouse, son, daughter, parent, or next of kin who is a covered service member with a qualifying injury.

This guide provides human resource professionals, managers, and supervisors with some information about implementing the FMLA. This guide supplements the regulations, our policy, and the question and answer document. We organized this guide into two parts. Part one is general information – including eligibility. Part two addresses administration. You can find references to the FMLA regulations throughout the guide. For a complete set of regulations, see the Department of Labor's web site at <http://www.dol.gov/whd/fmla/>.

## Part One: General

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In this section, we've included general FMLA requirements and information about employee eligibility. We also describe the reasons for leave qualifying as FMLA covered leave.

### General Employer Notice Requirement

The Act requires an employer to notify its employees of their rights and responsibilities. Your agency can provide notice through employee handbooks or other written materials. We have included the general notice in the State of Montana employee (SOME) information system. However, your agency also has responsibilities under the Act. Your agency must post notice of FMLA rights in conspicuous locations in the work place (29 CFR 825.300). The U.S. Department of Labor provides a general notice poster. See Appendix I for a link to this form. Your agency must also supply written notice to newly-hired employees.

### Requesting Leave

An employee may give you oral or written notice of the need for FMLA leave (29 CFR 825.302 and 303). The Act does not require an employee to specifically mention the FMLA. An employee requesting leave must provide you with sufficient information to determine if the leave qualifies as FMLA leave and the anticipated timing and duration of the leave. Calling in "sick" and not providing additional information is not sufficient notice.

Whether the need for leave is foreseeable or unforeseeable, you may require an employee's compliance with your agency's customary and usual procedures for requesting time away from work. For example, in an unforeseeable situation, your usual policy may require employees give two hours' advance notice before a shift starts. However, an emergency medical situation may make it impractical or impossible for the employee to make a call. In such a situation, we expect the employee to make the call as soon as possible and practical after the emergency has passed. If an employee does not comply with your agency's procedures for requesting time away from work, you may delay or deny FMLA coverage (29 CFR 825.303).

We recommend employees submit a State of Montana Employee FMLA Notice Form when they request foreseeable leave. See Appendix I for a link to this form.

## Timing of an employee's notice

When the need for FMLA leave is foreseeable, the employee should give you at least 30 days' notice. You may also require the employee to follow your agency's usual and customary leave notice procedures. For example, you may require 30 days' notice when leave is for birth, placement or adoption, or planned medical treatment. If the need is foreseeable and you do not receive 30 days' notice, you may consider the employee's reasonable explanation for not giving notice. If the explanation is not reasonable, you may deny FMLA coverage until 30 days after the date the employee provided notice (29 CFR 825.304).

If a 30-day notice is not practical, the employee must give notice as soon as possible and practical. Typically, this is the same or next business day after the employee becomes aware of the need for leave.

The employee must give you notice for leave only once. However, if the dates for scheduled leave change, the employee must advise you as soon as possible.

## Determining Employee Eligibility

Our FMLA policy (MOM #03-0309) sets different eligibility requirements from the Act. A state employee qualifies for FMLA leave if the employee has worked:

- for state government for at least 12 months; **and**
- at least 1,040 hours during the previous 12 months.

The 12-month period of employment does not have to be consecutive. In most cases, all time worked for the state counts towards the 12-month period. You may disregard previous employment when a break in service of more than seven years occurs unless it was for military service.

## Reasons for FMLA Leave

Once you determine the employee meets the eligibility requirements, you must decide whether the stated reason for leave qualifies under the Act. The following sections describe the types of covered leave.

## **Leave for the birth of a son or daughter**

Parents are entitled to FMLA leave for pregnancy or birth of a child (29 CFR 825.120). Montana state government allows each parent to take up to 12 weeks of leave even though the FMLA allows an employer of both the mother and father to combine their leave. The right to take leave to be with a healthy newborn child expires at the end of the 12-month period following birth.

A mother may take FMLA leave for incapacity due to pregnancy, prenatal care, or for her own serious health condition. The absence does not need to last three consecutive days, and medical treatment is not required. A husband may take FMLA leave to care for an incapacitated pregnant spouse or to care for her during prenatal care.

An employee must obtain your approval to take intermittent or reduced schedule leave to be with a healthy newborn child. Your permission is not required to care for a seriously ill newborn child.

## **Leave for adoption or foster care**

An eligible employee may take up to 12 weeks of FMLA leave before or after placement of a son or daughter for adoption or foster care (29 CFR 825.121). When leave is necessary for the placement to proceed, an employee may take leave before the actual placement or adoption.

An employee's right to take leave to be with a healthy adopted or foster care child expires 12 months after the first day of placement. The State of Montana allows each parent to take up to 12 weeks of FMLA leave.

Your approval is required to take intermittent or reduced schedule leave. Your approval is not required to care for a seriously ill adopted or foster care child.

## **Leave for a serious health condition**

The Act defines a serious health condition as an illness, injury, impairment, or physical or mental condition involving inpatient care or "continuing treatment by a health care provider" (29 CFR 825.113). Inpatient care is an overnight stay in a hospital, hospice or residential medical care facility. This includes any period of incapacity or subsequent treatment in connection with the period of inpatient care. Incapacity is the inability to work, attend school, or perform other regular daily activities because of a serious health condition.

Continuing treatment may be present in several different scenarios. Examples include a series of physical therapy treatments, repeated medical visits to monitor new medication levels, and prenatal care.

The Act describes qualifying serious health conditions involving continuing treatment (29 CFR 825.115) as:

- a period of incapacity of more than three consecutive, full calendar days and any subsequent treatment, or
- a period of incapacity relating to the same condition also involving:
  - treatment two or more times within 30 days of the first day of incapacity or
  - treatment by a health care provider on at least one occasion resulting in a regimen of continuing treatment.

These situations usually arise when an individual experiences a new health condition. Therefore, the Act requires the first (or only) in-person treatment take place within seven days of the first day of incapacity.

Chronic conditions may also qualify as a serious health condition. Chronic conditions require the following:

- periodic visits for treatment by a health care provider at least twice a year;
- continue over an extended period of time and include recurring episodes; and
- may cause episodic rather than continuing periods of incapacity.

An absence resulting from a qualifying chronic condition does not require a person to receive treatment during the absence. For example, a person with asthma who is controlling it with medication does not have to receive treatment during each period of incapacity. A single day of absence for a chronic condition may qualify.

### **Leave to care for a spouse, son, daughter or parent with a serious health condition**

An eligible employee may take up to 12 weeks of leave during a 12-month period to care for the employee's spouse, son, daughter, or parent with a serious health condition (29 CFR 825.112). The Act has the following definitions for a serious health condition.

- **Spouse** means a husband or wife, as defined or recognized under state law for the purposes of marriage in the state where the employee resides. This may include common law marriage.
- **Parent** means a biological, adoptive, step, or foster father or mother, or any other individual who stood "in loco parentis" to the employee when the employee was a son or daughter. The term parent does not include parents' in-law.
- **Son or daughter** means a biological, adopted, or foster child, a stepchild, a legal ward, or child of a person standing in loco parentis, who is either under the age of 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time FMLA leave commences.
- **Incapable of self-care** means the individual requires active assistance or supervision to provide daily self-care in several of the activities of daily living or instrumental activities of daily living.
  - 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 include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

### **Leave for an employee's serious health condition**

An eligible employee may take up to 12 weeks FMLA leave during a 12-month period because of a serious health condition rendering the employee unable to perform any one of the essential functions of the employee's job (29 CFR 825.123). The employee's health care provider determines when an employee meets this threshold.

You may provide a statement to the employee's health care provider describing the essential functions of the employee's job. You may require an employee provide you with sufficient information describing why they cannot perform one or more essential functions of the job.

### **Leave for a qualifying exigency**

An eligible employee may take leave for a qualifying exigency when the employee's spouse, son, daughter, or parent is a "covered service member on covered active duty or notified of an impending call or order to covered active duty" (29 CFR 825.126). The covered service member

must be a member of a reserve component of the armed forces, for example, the National Guard, Army Reserve, or Navy Reserve or retired members of the Regular Armed Forces or Reserves. Service members in the regular Armed Forces are also covered. For the purpose of exigency leave, the Act has a different definition of “son or daughter” than provided in the serious health condition section. The Act defines son or daughter in this section as follows:

- the employee's biological, adopted, or foster child, a stepchild, a legal ward, or child of a person standing in loco parentis, who is on active duty or call to active duty status. The son or daughter may be any age.

The definitions of “spouse” and “parent” are the same.

### **Reasons for qualifying exigency leave**

The amount of FMLA leave for a qualifying exigency depends on the reason for leave. In most cases, an eligible employee may take up to 12 weeks of leave in a 12-month period. Leave may be intermittent. We have listed some examples of qualifying exigency leave below.

- Short notice deployment leave to address any issue resulting from notification of an impending call or order to active duty. Short notice deployment leave is limited to a maximum of seven calendar days prior to the date of deployment.
- Attendance at military events and related activities;
  - any official ceremony, program, or event sponsored by the military related to active duty; or
  - family support or assistance programs and informational briefings sponsored or promoted by the military.
- Attendance at childcare and school activities for a covered service member's biological, adopted or foster care child, stepchild, or legal ward.
- Arrange alternative childcare when the active duty status of the covered military member necessitates the change.
- Provide childcare on an urgent, immediate basis.
- Enroll or transfer the child in a new school or day care facility.
- Attend meetings with staff at a school or day care facility.
- Make financial and legal arrangements or update arrangements to address the covered service member's absence.
- Attend counseling provided by someone other than a health care provider.

- Spend time with a covered service member on short-term, temporary, rest and recuperation leave during deployment. This type of leave is limited to five days for each instance.
- Attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military. (Leave for these purposes must be taken within 90 days following termination of active duty.)
- Address issues due to the death of a covered military member.
- Attend additional activities and other events because of the covered service member's active duty. (You and the employee must agree to the timing and duration of this type of leave.)

### **Leave to care for a covered service member with a serious illness or injury**

In this section, we used the term "military caregiver leave" to describe leave to care for a "covered service member with a serious illness or injury." To qualify for military caregiver leave, an employee must be the spouse, son, daughter, parent, or next of kin of a covered service member "who has a serious illness or injury incurred in the line of duty on active duty" (29 CFR 825.127).

The covered service member can either be:

- a. a current member of the Armed Forces, National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, including those members on the temporary disability retired list, for a serious injury or illness; or
- b. a veteran undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces including the National Guard or Reserves at any time during the five year period preceding the date on which the veteran undergoes treatment.

The Act provides definitions specific to military caregiver leave (29 CFR 825.122). We have included these definitions below.

- **Serious illness or injury** means a member of the Armed Forces with an injury or illness incurred in the line of duty while on active duty rendering the service member medically unfit to perform duties of their office, grade, rank, or rating. Serious injury or illness also includes conditions existing before the beginning of the member's active duty aggravated by the service in the line of duty on active duty in the Armed Forces.

In the case of a veteran, a serious injury or illness qualifies when the injury or illness was incurred by the member in the line of duty on active duty in the Armed Forces and manifested itself before or after the member became a veteran. Conditions existing before the beginning of the member's active duty aggravated by service in the line of duty on active duty manifesting before or after the member became a veteran are also covered.

- **A son or daughter of a covered service member** means a covered service member's biological, adopted or foster child, stepchild, legal ward, or a child for whom the service member stood in loco parentis. The son or daughter may be any age.
- **Parent** means a covered service member's biological, adoptive, step, or foster father or mother, or any other individual who stood "in loco parentis" to the covered service member. The term parent does not include parents' in-law.
- **Next of kin** means the nearest blood relative, other than the service member's spouse, parent, son or daughter, in the following order of priority: blood relatives who have been granted legal custody of the service member by court decree or by statute, brothers and sisters, grandparents, aunts, uncles, and first cousins, unless the covered service member has designated a blood relative as next of kin for purposes of the FMLA.

An eligible employee may take up to **26 weeks** of military caregiver leave in a "single 12-month period." Military caregiver leave is permitted on a per-covered service member, per-injury basis, which means one employee may take more than one 26-week military caregiver leave if it is for a different service member or the same service member with a subsequent injury. However, the employee is limited to taking one 26-week leave in a 12-month period.

The reason for military caregiver leave may also qualify as leave to care for a family member with a serious health condition. In this case, the FMLA requires you to designate the leave as military caregiver leave.

## Using Paid Leave

The Act does not provide paid leave. The State of Montana FMLA policy (MOM 3-0309) allows, and in some cases requires, an employee to use paid leave concurrently with FMLA leave. We included a discussion about the types of paid leave in Appendix II.

## **Insurance Benefit Requirements**

Your agency must maintain an employee's coverage of health insurance benefits when the employee is taking FMLA leave (29 CFR 825.208). This includes paying the state's share of insurance premiums. Employees must also pay their portion to maintain coverage.

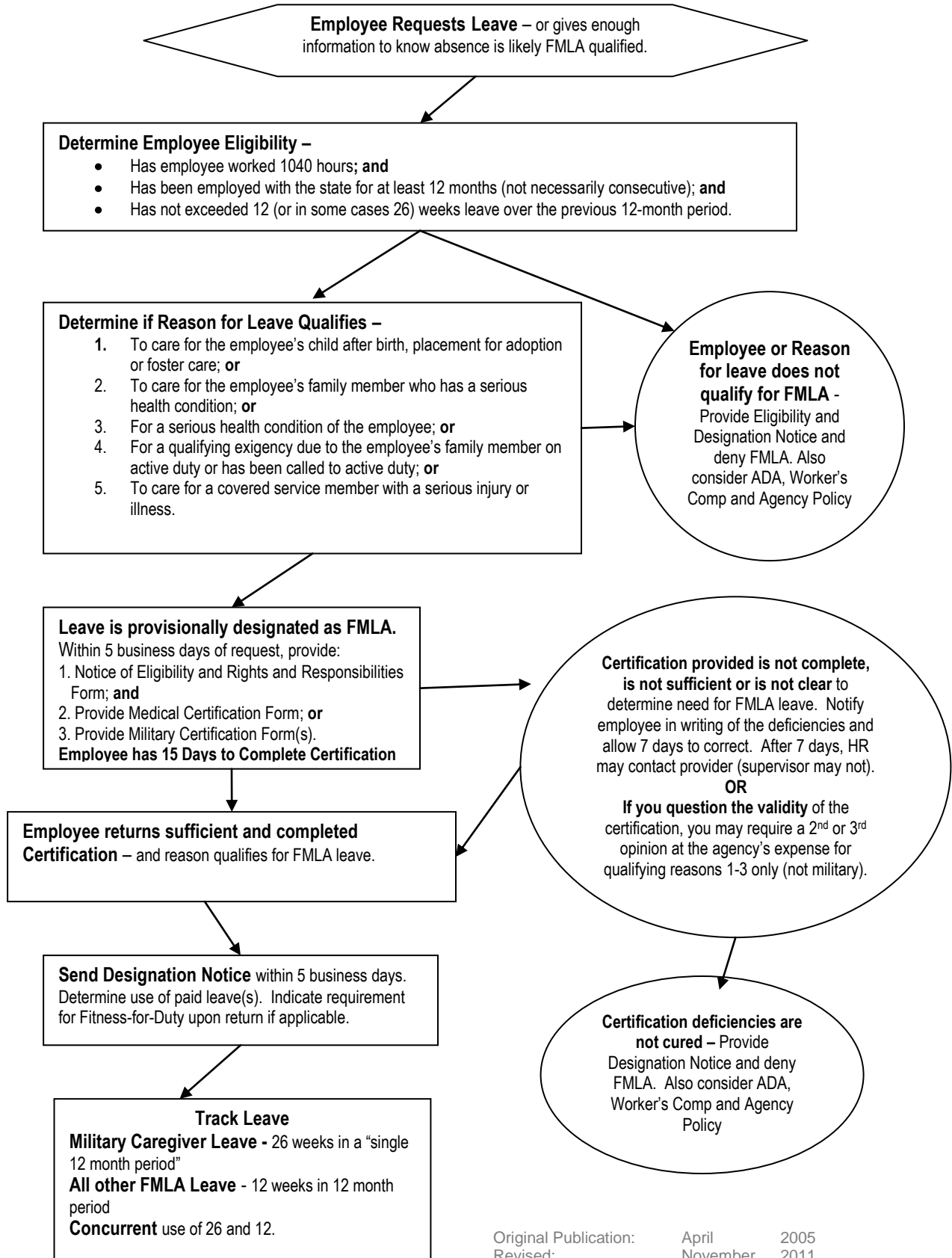
You must give the employee advance written notice of the requirement to make payments. In this notice, you will need to describe the terms and conditions of making payments and the consequences of failing to make payments. These notice requirements are included in the Eligibility – Rights and Responsibilities Notice. See Appendix I for a link to this notice.

## **Part Two: Administration**

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We organized this part of the guide in the order you will typically address FMLA issues in the work place. On the following page, we included a simplified flow chart to help you track the various steps in administering FMLA leave. You may want to refer to it throughout this section.

# FMLA Simplified Flow Chart



## **Sending the Eligibility – Rights and Responsibilities Notice**

When an employee requests FMLA leave, you must notify the employee of their eligibility to take the FMLA leave. You must provide this notice within five business days of:

- the employee's request to take FMLA leave; or
- having knowledge leave may be for an FMLA qualifying reason.

If the employee is ineligible, you must explain the reason for the ineligibility.

The agency must also provide written notice of the employee's rights and responsibilities each time they provide an eligibility notice.

The regulations require you to include the following additional information in the Eligibility-Rights and Responsibilities Notice, (29 CFR 825.300 (c)):

- the leave may be designated and counted as FMLA leave and the applicable 12-month period for the entitlement;
- any requirement to furnish medical certification and the nature of the certification;
- the right or requirement to substitute paid leave;
- any requirement to make health benefit premium payments and the consequences of failing to do so;
- the right to the maintenance of benefits and restoration to the same or equivalent job;
- if the employee fails to return to work, the potential liability for payment of employer paid health insurance premiums; and
- the right to not provide any genetic information when responding to FMLA related requests as outlined in the Genetic Information Nondiscrimination Act (GINA).

To ensure compliance, we recommend you use the Eligibility and Rights and Responsibilities Notice Form (WH 381). See Appendix I for a link to this form.

## **Requiring Certification**

You may require medical or other certification to verify the employee's need for FMLA leave and require certification every time an employee experiences a qualifying event (29 CFR 825.305). The request for

certification must be in writing. We recommend you notify the employee about any certification requirements in the Eligibility - Rights and Responsibilities Notice.

If you require certification, you must request it:

- at the time an employee requests leave;
- within five business days of the employee's request to take leave; or
- within five business days after the leave commences if the need for leave is unforeseen.



You may request certification at a later date if you have questions about the appropriateness of leave or its duration. You must allow your employee at least 15 business days to provide certification.

All certification requests must also include safe-harbor language required by the GINA regulations. The Genetic Information Nondiscrimination Act of 2008 (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.

The required safe-harbor language is included on the FMLA forms referenced in Appendix I. Again, we encourage you to use these forms. The safe-harbor language should also be included in any letter addressed to a medical professional or the employee when any type of medical information is requested or may be disclosed.

The GINA regulations also advise employees not to provide any genetic information when responding to a request for FMLA medical certification. '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.

## **Serious Health Condition**

When an employee requests leave for his or her own or an immediate family member's serious health condition, you may require medical certification from a health care provider (29 CFR 825.305 and 825.306).

“Health Care Provider” means:

- a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices;
- podiatrists, dentists, clinical psychologists, optometrists, and chiropractors authorized to practice in the state in which they practice and performing within the scope of their practice under state law;
- nurse practitioners, nurse-midwives, physician assistants and clinical social workers authorized to practice in the state in which they practice and performing within the scope of their practice as defined under state law;
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; or
- any health care provider recognized by the employer, or the employer's group health plan's benefits manager; and a health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

You may require annual medical certification when an employee or family member's serious health condition lasts more than a year.

The FMLA regulations limit the information you may require. To ensure compliance, we recommend you use the Employee Serious Health Condition form (WH 380E) and the Family Member Serious Health Condition form (WH 380F). See Appendix I for links to these forms.

A word of caution when inquiring about a serious health condition: In order to comply with the GINA regulations, agency managers should not ask employees probing questions about the serious health condition because this type of questioning may elicit genetic information about an employee or an employee's family members. Probing questions would include asking whether other family members have the condition, or whether the individual has been tested for the condition. If an employee inadvertently offers information, it is important that managers do not follow-up with additional probing questions.

## Qualifying Exigency

When an employee requests leave for a qualifying exigency, you may require a copy of the covered service member's active duty orders or other documents confirming a call to active duty (29 CFR 825.309).

The regulations limit the information you may require. To ensure compliance, we recommend you use the Qualifying Exigency Leave Certification Form (WH 384) provided by the U.S. Department of Labor. See Appendix I for a link to this form.

## Military Caregiver Leave

When an employee requests military caregiver leave, you may require certification from the service member's health care provider (29 CFR 825.310).

Your employee may give you a Department of Defense authorized "invitational travel order" or "invitational travel authorization" in lieu of certification from a health care provider. If this occurs, you must approve the leave. You cannot require additional information.

When an employee takes military caregiver leave, you cannot require second or third medical opinions or recertification from a covered service member's health care provider. However, you may require additional information from the employee, the covered service member, or both.

The FMLA regulations limit the types of information you may require. To ensure compliance, we recommend you use the Military Caregiver Leave Certification Form (WH 385). See Appendix I for a link to this form.

Agency managers should use caution when inquiring about the condition of the individual in need of care, especially if it is a member of the employee's family. The GINA regulations limit the types of questions that may be asked. Specifically, agency managers should avoid using probing questions about family members. Probing questions would include asking whether other family members have the condition, or whether the individual has been tested for the condition. If an employee inadvertently offers information, it is important that managers do not follow-up with additional probing questions.

## Documenting Family Relationships

There may be times when you need to verify a family relationship before you approve leave. You may require reasonable documentation to establish a family relationship. For example, you may require documentation confirming the need for leave following adoption. This documentation may be an employee's signed statement or adoption papers, etc.

## Recertification

You may request recertification when an employee takes leave for his or her own serious health condition or the serious health condition of a family member (29 CFR 825.308). The employee is responsible for costs associated with recertification.

You may only ask for the same information you requested in the original medical certification. An employee must provide you with recertification information within the timeframe you request. Be sure to allow the employee at least 15 calendar days. You may not require recertification more often than every 30 days and only in connection with an employee absence unless:

- the employee requests an extension of leave;
- the circumstances described in the previous certification have significantly changed; or
- you receive information casting doubt on the employee's stated reason for the absence or the continuing validity of the certification.

When the original medical certification indicates the minimum duration of the condition is more than 30 days, you must wait until the minimum duration expires to request recertification. For example, if the original certification indicated a need for 40 days of intermittent leave, you must wait 40 days before requesting recertification.



The minimum duration timelines explained above do not apply if you receive information casting doubt upon the employee's stated reason for the absence or the validity of medical certification. In all cases, the regulations allow you to request recertification every six months.

## Determining if the Employee's Certification is Complete and Sufficient

When you ask for certification, your employee must provide "complete and sufficient" certification (29 CFR 825.305). If you receive certification that is incomplete, vague or ambiguous, you may ask for additional information. You must notify the employee about the deficiency in writing. Identify the specific information you need. Advise the employee that you could deny FMLA leave if the employee doesn't provide the information.

When requesting additional information, you should be cautious and comply with the restrictions in the GINA regulations as referenced in the Requiring Certification section of this guide.



Be sure to allow the employee at least seven calendar days to provide the information. If the employee does not provide it, you may deny FMLA leave.

## Authenticating and Clarifying Medical Certification

Once an employee provides complete and sufficient certification, you may contact the health care provider to "clarify and authenticate" the information (29 CFR 825.307). The regulations place limits on the types of information you may request. However, you may:

- provide a copy of the certification to the provider to verify the provider supplied the information; and
- contact the provider to understand the handwriting or meaning of the response.



The regulations prohibit an employee's direct supervisor from making contact with the health care provider. We recommend human resources contact the provider.

## Requiring Second and Third Medical Opinions

If you doubt the validity of medical certification for a serious health condition, you may require a second medical opinion (29 CFR 825.307)

(b)). You may select an independent health care provider for the second opinion.

If the first and second opinions agree, you must accept the second opinion. If they disagree, you may request a third opinion. You and the employee must jointly select the third health care provider. The third provider's opinion is final and binding.

When requested, you must provide the employee with copies of second and third medical opinions. Provide them within five business days of the employee's request. Your agency must pay for the second and third medical opinions and the employee's reasonable out-of-pocket travel expenses.

## **Sending the Designation Notice**

You have the responsibility to determine whether an absence qualifies as FMLA covered leave (29 CFR 825.300 and 825.301). You make the decision to designate leave as FMLA covered leave.

Once you have enough information to determine whether the reason for the leave qualifies under FMLA, you must notify the employee in writing. Use the Designation Notice form to inform the employee about your decision. Typically, you will send the Designation Notice after you receive certification documenting the reason for the leave. If you don't require certification, send the Designation Notice along with the Eligibility – Rights and Responsibilities Notice.

If you don't have enough information to determine if leave is for an FMLA qualifying reason, use the Eligibility-Rights and Responsibilities Notice to inform the employee you need more information.

Be sure to provide the notice within five business days of receiving the employee's certification (29 CFR 825.300 (e)). You may retroactively designate leave as FMLA qualifying leave after the employee provides sufficient certification.

Only one Designation Notice is required in a 12-month period for each qualifying reason. Another notice is necessary when the circumstances surrounding the leave change. When this occurs, be sure you notify the employee within five business days.



Before the employee returns to work, you may require a fitness for duty certificate which addresses the employee's ability to perform the essential functions of the job. If you do so, you must include the essential functions with the Designation Notice.

There is additional information you must include in the Designation Notice. To ensure compliance, we recommend using the Designation Notice Form (WH 382). See Appendix I for a link to this form.

## Tracking Leave

For most reasons, employees may take up to 12 weeks of leave during a 12-month period. They also may take 26 weeks during a "single 12-month period" for military caregiver leave. Therefore, you may need to track leave separately depending on the reason.

### The 12-month period

For most reasons except military caregiver leave, employees are eligible to take up to 12 weeks of leave in a 12-month period. We refer to the 12-month time period as the FMLA year. The FMLA year begins on the first day the employee takes leave. We use the 12-month period looking forward from the date an employee first takes leave to determine the FMLA "year."

### Military caregiver leave – 26 weeks in a single 12-month period

The FMLA also provides up to 26 weeks in a "single 12-month period" for military caregiver leave. The single 12-month period begins on the first day the employee takes military caregiver leave and ends 12 months after that date. If the employee does not use the entire 26 weeks within this time, the employee forfeits the remaining leave.

### Tracking different types of leave taken simultaneously

The regulations explain an employee is entitled to "a combined total of 26 workweeks of leave for any qualifying reason during the single 12-month period" (29 CFR 825.127 (c) (3)). In this section, we included examples to show how an employee might use different types of FMLA leave simultaneously. We also provided recommendations on how to track leave.

### **Example 1**

The facts:

- On February 1, 2009, Candy begins leave for a serious health condition. The 12-month period for the serious health condition leave begins on this date.
- She takes eight weeks of FMLA leave for this condition.
- On April 1, 2009, she begins taking military caregiver leave. The "single 12-month period" to take military caregiver leave begins on this date.
- She takes 26 weeks of military caregiver leave.

The analysis:

Initially, Candy was eligible for 12 weeks of leave for a serious health condition. The 12-month period for this leave began on February 1, 2009 and runs through January 31, 2010. On April 1, she became eligible for up to 26 weeks for military caregiver leave. The single 12-month period for the military caregiver leave began on April 1, 2009 and runs through March 31, 2010.

Because she took the entire 26 weeks of military caregiver leave, Candy is ineligible for any additional FMLA leave until April 1, 2010. In this case, she took 34 weeks of FMLA leave in the 2009 calendar year – eight weeks for a serious health condition, plus 26 weeks military caregiver leave.

### **Example 2**

The facts:

- On January 1, 2009, Dave begins taking military caregiver leave. The single 12-month period for military caregiver leave begins on this date.
- He takes 16 weeks of military caregiver leave.
- On May 1, 2009, the Dave begins taking leave for his serious health condition. The 12-month period for a serious health condition begins on this date.

The analysis:

For the remainder of 2009, Dave is limited to 10 weeks of leave for his serious health condition (26 weeks minus 16 weeks military leave taken). If he takes the entire 10 weeks for his serious health condition in 2009, Dave is limited to two additional weeks of leave for this reason during the remainder of the 12-month period ending April 30, 2010. This is because

the limit of 26 weeks in a "single 12-month period" expired on December 31, 2009. He only used 10 of the 12 weeks in the single 12-month period for his serious health condition. Dave has forfeited 10 weeks of unused military caregiver leave.

## **Counting Holidays as FMLA Leave**

If an employee takes intermittent leave during a week a holiday occurs, you should not count the holiday 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.

If an employee is using leave for the entire week, count the entire week including the holiday as FMLA leave. Some agencies allow employees to "bank" holiday hours. You may count banked holiday hours used concurrently with FMLA leave towards an employee's FMLA entitlement.

## **Intermittent or Reduced Schedule Leave**

An employee may take intermittent leave or work a reduced schedule under certain circumstances. Intermittent leave is leave "taken in separate blocks of time due to a single qualifying reason" (29 CFR 825.202). A reduced schedule is a reduction in the number of hours in a workweek or workday.

You cannot deny intermittent leave when an employee takes it for the following reasons:

- when leave is medically necessary for the employee or family member's serious health condition;
- when leave is medically necessary to care for a covered service member with a serious injury or illness;
- for prenatal examinations or for a pregnant employee's own condition; or
- for a qualifying exigency.

The health care provider determines when intermittent or reduced schedule leave is medically necessary. When leave is necessary for planned medical treatment, the employee must make a reasonable effort to schedule treatment so it does not disrupt your agency's operations.

An employee must request your permission to take intermittent leave for the following reasons:

- after the birth of a healthy child; or
- placement of a healthy child for adoption or foster care.

## Transferring an Employee

When the need for leave is foreseeable because of a planned medical treatment for the employee, a family member, or covered service member, you have discretion to temporarily transfer the employee. You may also transfer an employee who takes intermittent leave because of the birth of a child, placement for adoption, or foster care (29 CFR 825.204).

A transfer may last for the duration of the intermittent or reduced scheduled leave. The regulations require equivalent pay and benefits in the temporary position. When the need for intermittent leave ends, and the employee is able to return to full-time work, you must place the employee in his or her former position or an equivalent position.

## Returning to Work - Fitness for Duty

When an employee takes leave for the employee's serious health condition, you may require a fitness for duty certification (29 CFR 825.312). As with all certifications, the employee must provide complete and sufficient information. The employee pays the costs of fitness for duty certification. If your agency has a fitness for duty policy, you must apply it to all employees in similar positions.



You may require fitness for duty certification that addresses the employee's ability to perform the essential functions of the job. However, you must have given the employee a list of the essential functions when you provided the original FMLA Designation Notice.

If an employee does not provide sufficient fitness for duty certification, and you have noticed the fitness-for-duty certification requirement, you may delay the employee's return to work. When an employee provides sufficient certification, you may contact the health care provider to clarify and authenticate the certification. When doing so, you should be cautious and comply with the restrictions in the GINA regulations as referenced in the Requiring Certification section of this guide.



You may not delay the employee's return to work while you contact the provider.

You may request a fitness for duty certification when an employee takes intermittent or reduced schedule leave. You may not require fitness for duty certification more often than every 30 days.



The 30-day restriction does not apply when reasonable safety concerns exist. The regulations describe reasonable safety concerns as a reasonable belief of significant risk of harm to the employee or others.

## Recordkeeping Requirements

You must make, keep and preserve records of your obligations under the FMLA for no less than three years. However, you are not required to submit them unless requested by the Department of Labor (29 CFR 825.500). You must keep the following information:

- basic payroll and identifying employee data, and compensation details;
- dates FMLA leave is taken by eligible employees;
- If leave is taken in less than full days, then the hours taken;
- copies of notices given by employees and the agency (these copies may be maintained in the employee's personnel file);
- policies describing employee benefits and the practice of taking paid and unpaid leave;
- premium payments of employee benefits;
- disputes between the agency and employee regarding the designation of leave as FMLA leave; and
- records or documents relating to the employee or the employee's family's certifications. **\*\*\*These records shall be maintained as confidential medical records in separate files from the usual personnel files and maintained according to ADA and GINA confidentiality requirements.**

## **Appendix I: Links to Forms**

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The following link directs you to the FMLA forms provided by the U.S. Department of Labor and adopted by the Department of Administration:

<http://hr.mt.gov/hrpp/forms.mcpX>

## **Appendix II: State Leave Policies and FMLA**

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An eligible employee may use accrued paid leave concurrently with FMLA leave, which is unpaid leave. In some cases, you may require the use of paid leave. The following policies apply.

**Sick Leave Policy (MOM #03-0310)**

**Sick Leave Fund Policy (MOM #03-0311)**

**Maternity and Parental Leave Policy (MOM #03-0317)**

**Annual Leave Policy (MOM #03-0305)**

**Exempt Compensatory Time Policy (MOM #03-0211)**

**Overtime and Nonexempt Compensatory Time Policy (MOM #03-0210)**

**Holidays (MOM #03-0325)**

## Appendix III: Additional Resources

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Your agency human resource office is a good resource for information about the FMLA and agency specific procedures. Our staff in the State Human Resources Division, Human Resources Policy and Programs Bureau can also answer your general questions about the FMLA. Call us at 444-3871.

The Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration enforces and administers the FMLA. The Division has developed the Family and Medical Leave Act Advisor. This internet system answers a variety of questions about the FMLA including employee eligibility, valid reasons for leave, notification responsibilities, etc.

See the following links to the US Department of Labor – Wage and Hour Division FMLA related resources.

US Department of Labor – Wage & Hour Division – Compliance Assistance

<http://www.dol.gov/compliance/laws/comp-fmla.htm>

FMLA Poster

<http://www.dol.gov/whd/regs/compliance/posters/fmla.htm>

**We designed this guide to assist executive branch human resource professionals, supervisors, and managers in administering the Family Medical Leave Act. It is a companion to information contained in statute and policy.**

We will provide alternative accessible formats of this Guide on request. If you need an alternative format, please contact the State Human Resources Division, Department of Administration, 125 N. Roberts Street Box 200127, Helena, Montana 59620-0127. Telephone 406-444-3871. Those using a TTY may call through the Montana Relay Service at 711.