

**STATEWIDE POLICY**  
**SECTION 4: FAMILY AND MEDICAL LEAVE ACT (FMLA) LEAVE**

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**4A. General Information**

The Family and Medical Leave Act (FMLA) is a federal law which entitles eligible employees to unpaid, job protected leave, under qualifying circumstances, as follows: (1) for a qualifying health condition of the employee or a family member; (2) for the birth or adoption of a child; and (3) for specific purposes to family members of qualifying military service members.

To qualify for FMLA leave, the employee must meet eligibility criteria, must submit a written request, and upon return to work must provide a medical release (as appropriate).

In the event an employee does not request FMLA leave for time off work for a qualifying health condition, the Agency will notify the employee that the leave is designated as FMLA (as appropriate).

Each agency must notify employees of their rights under the FMLA. To meet this requirement each agency must post, in a prominent place, in the workplace the [Family and Medical Leave Act poster](#). In addition, each agency must either: (1) include the information contained in the Family and Medical Leave Act Poster in their employee handbook; or (2) provide a copy of the information contained in the Family and Medical Leave Act Poster to each new hire.

This policy is not intended to be all-inclusive. The exceptions and unique situations regarding FMLA benefits are too numerous and complex to address in a single policy. Consultation with Human Resources is strongly encouraged.

## **4B. Employee Eligibility**

An employee must meet the following criteria to be eligible for FMLA leave:

1. The employee must have been employed with the State of Idaho for a total of at least twelve months.<sup>1</sup> The twelve months do not have to be continuous employment. Similarly, the twelve months do not have to be all with one agency. Employees who were on the payroll for any part of a week (even just one day) will be credited with a full week toward their total.
2. The employee must have at least 1,250 hours of service during the twelve-month period immediately preceding the leave. These 1,250 hours must be hours worked, and do not include paid vacation or sick time, nor periods of unpaid leave during which other benefits (i.e. a group health plan or worker's compensation) continued to be provided by the employer.

## **4C. Quantity of and Allowable Purposes for FMLA Leave**

FMLA provides leave to employees for the following six circumstances:

1. Birth and bonding of a child.
  - FMLA leave to care for or assist in the care of a newborn is available to all employees (male and female) as long as they are the parents or legal guardians of the child.
  - An expectant mother may take FMLA leave if her pregnancy makes her unable to work before the birth of the baby. Under the FMLA, pregnancy and pre-natal care involve continuing treatment by a health care provider, and therefore qualify as a serious health condition.
  - All eligible employees are allowed up to twelve work weeks of unpaid, job protected leave.
2. Adoption of a child or placement of a child in foster care.
  - FMLA leave may be taken for events incident to the placement of a son or daughter with the employee for adoption or foster care. This includes, but is not limited to, pre-placement counseling sessions,

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<sup>1</sup> If an employee has a break in service of more than seven (7) years, time worked prior to rehire/reinstatement following that break in service does not count towards the twelve-month eligibility requirement (unless the break in service was due to the employee's National Guard or Reserve military service obligations).

court appearances, attorney consultations, and care for the adopted or foster child.

- All eligible employees are allowed up to twelve work weeks of unpaid, job protected leave.

Limitation: An employee's right to take leave for birth and care of a newborn, or for placement of a child for adoption or foster care, must conclude within twelve months of the birth or placement.

3. To care for a qualifying family member with a serious health condition.

- Qualifying family members are limited to the employee's spouse, the employee's children under 18 years of age, the employee's children incapable of self-care due to a mental or physical disability regardless of age, and the employee's parents with a serious health condition. Care for siblings or in-laws with a serious health condition are ineligible for this provision of FMLA.
- If an employee requests FMLA leave to care for a qualifying family member, the employer may require a medical certification stating the need for support or care for the family member's illness, as well as its expected duration.
- All eligible employees are allowed up to twelve work weeks of unpaid, job protected leave.

4. Due to the employee's own serious health condition.

- All eligible employees are allowed up to twelve work weeks of unpaid, job protected leave.

5. To attend to a Qualifying Exigency (QE) arising out of the fact that the employee's spouse, parent, son, or daughter is a service member who is "on active duty (or notified of an impending call or order to active duty) in support of a contingency operation." QE leave is available to family members of active duty Regular Armed Forces, National Guard and Reserve service members.

Activities considered to be a Qualifying Exigency may include:

- Short-notice deployment;
- Military events and related activities (in advance of and during deployment);
- Childcare and school activities;
- Financial and legal arrangements;

- Counseling;
  - Rest and recuperation;
  - Post deployment activities; and
  - Additional activities agreed upon between the employer and the employee.
- All eligible employees are allowed up to 26 work weeks of unpaid, job protected leave.
  - Agencies may require eligibility verification regarding the QE, including: DOL form WH-384; the service member's orders; and confirmation from third parties (such as a teacher).
6. To care for a qualifying family member who incurred a serious injury or illness in the line of duty while on active duty in the Armed Forces.
- Family members who qualify are limited to covered service member's spouse, parent, child, or next of kin.<sup>2</sup>
  - Covered service members include current members of the Armed Forces (Including members of the National Guard or Reserves) or veterans (who were members during the 5 years preceding their injury or illness); who are undergoing medical treatment, recuperation, or therapy; are otherwise in outpatient status, or are otherwise on the temporary disability retired list for a serious injury or illness.
  - All eligible employees are allowed up to 26 work weeks of unpaid, job protected leave during a single 12-month period at any time during the five years preceding the date of treatment, recuperation, or therapy.
  - If an employee's leave qualifies as both military FMLA and non-military FMLA leave, FMLA military leave shall be designated first.
  - Total FMLA leave allowed during the 12-month period is 26 work weeks. (For example, an employee may not, in the same 12-month period, take 26 work weeks of military FMLA leave per this circumstance and also take 6 work weeks of FMLA leave due to circumstances 1-5 described above.

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<sup>2</sup> "Next of kin" refers to the nearest blood relative of the individual, other than the service members spouse, parent, or child, in the following order of priority: (1) individuals designated in writing by the service member as next of kin for purposes of this provision of the FMLA; (2) blood relatives who have been granted legal custody of the service member by statute or court authority; (3) siblings of the service member; (4) grandparents of the service member; (5) aunts and uncles of the service member; (6) first cousins of the service member.

#### 4D. Definition of “Serious Health Condition”

A “Serious Health Condition” means an illness, injury, impairment, or physical or mental condition that involves one of the following.

1. Hospital Care. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment related to or resulting from such inpatient care.<sup>3</sup>
2. Incapacity<sup>4</sup> Plus Treatment. A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of related incapacity that also involves:
  - (1) An in-person treatment by a health care provider within seven days of the first day of incapacity followed by at least one more in-person treatment within 30 days, unless extenuating circumstances exist; or
  - (2) An in-person treatment by a health care provider within seven days of the first day of incapacity which results in a regimen of continuing treatment under the supervision of the health care provider.<sup>5</sup>
  - (3) Whether additional treatment visits or a regimen of continuing treatment are necessary within the 30-day period is to be determined by the health care provider.
3. Pregnancy (includes prenatal care and any period of incapacity due to pregnancy or recovery from childbirth).
4. Chronic Conditions Requiring Treatments. A chronic condition is a condition that: (1) requires periodic visits (minimum two visits per year) for treatment by a health care provider, or by a nurse or physician’s assistant under a health care provider’s direct supervision; (2) continues over an extended period of time (including recurring episodes of a single underlying condition); and (3) may cause episodic rather than a continued period of incapacity (e.g. asthma, diabetes, epilepsy, etc.).

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<sup>3</sup> “Incapacity,” for purposes of FMLA, is defined to mean inability to perform one or more of the functions of one’s job, attend school, or perform other regular daily activities due to the serious health condition, treatment for that condition, or recovery from that condition.

<sup>4</sup> Please refer to Footnote 3 for the definition of incapacity.

<sup>5</sup> Continuing treatment is further defined as either (1) Treatment two or more times by a healthcare provider; or (2) Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment. A regimen of continuing treatment includes, for example, a source of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include 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 a health care provider.

5. **Permanent/Long-term Conditions Requiring Supervision.** This is defined as a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider (e.g., Alzheimer's disease, a severe stroke, or the terminal stages of a disease, etc.).
6. **Multiple Treatments (Non-Chronic Conditions).** This section encompasses absences to receive multiple treatments by a health care provider, or by a provider of health care services under orders of, or on referral by a health care provider, for restorative surgery or for a condition which would likely result in a period of incapacity if not treated, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis).
7. **Treatment for Substance Abuse.** FMLA leave may only be taken for treatment for substance abuse that is provided by a health care provider or by a provider of health care services on referral by a health care provider. Absence because of the employee's use of the substance, rather than treatment, does not qualify for FMLA leave. An employee may take FMLA leave to care for a covered family member who is receiving treatment for substance abuse as well.

The FMLA is not intended to cover short-term conditions for which treatment and recovery are very brief. Unless complications arise, the following conditions, including but not limited to, generally would not meet the definition of an FMLA serious health condition: common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease.

#### **4E. Use of Paid Leave**

The FMLA only requires unpaid leave, however, the law permits an employee to elect, or the employer to require the employee, to use eligible accrued paid leave which includes sick, vacation, and compensatory time for some or all of the FMLA leave period.

If the employee uses the above eligible accrued paid leave concurrently with FMLA leave, the employee is required to comply with all procedural requirements, such as notice requirements, of the agency's paid leave policies. Failure to do so may result in loss of entitlement to paid leave for the time period for which the employee failed to comply with the agency's leave policies, although the employee remains entitled to take unpaid FMLA leave.<sup>6</sup>

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<sup>6</sup> If FMLA leave without pay (FML) is used, the employee cannot request to change to a paid leave after the payroll has processed.

Employees on FMLA leave who are concurrently using available sick or vacation time shall accrue sick and vacation hours at the same rate as if they were not on FMLA. However, employees utilizing compensatory time (coded “FMC” or “FSC” on timesheets) or unpaid FMLA (coded “FML” or “FSL” on timesheets) do not accrue leave credits.

A bona fide illness must exist to use sick leave concurrently with FMLA leave.

#### **4F. Types of FMLA Leave**

There are two types of FMLA leave: continuous and intermittent/reduced work schedule.

Continuous FMLA Leave. An employee, who is off work entirely for a single qualifying reason, is on continuous FMLA leave.

Intermittent FMLA Leave. Intermittent FMLA leave (or a reduced work schedule) is leave taken in separate blocks of time, interspersed with periods of work, due to a single qualifying reason. For example, an employee may request intermittent FMLA leave or a reduced work schedule for: transporting a family member to a medical care facility, filling in for primary caregivers, making arrangements for changes in care, periodic medical treatments, or episodic chronic illnesses/treatment (i.e.: chemotherapy treatment).

Employees requesting intermittent leave or reduced work hours should schedule their leave so as to disrupt the Agency’s operations as little as possible. Employees should, when possible, submit a schedule disclosing their planned leave. Anticipated leave which was not actually taken will not be counted against the employee’s FMLA hours. Employers cannot require employees to make up intermittent FMLA time.

Employees on intermittent leave may be temporarily transferred to another similar position, if the transfer helps to accommodate the employee’s intermittent leave, until the need for intermittent leave no longer exists.

Intermittent leave related to birth, adoption, or foster care is only available with employer (Appointing Authority) approval. In approving or denying the employee’s request for intermittent FMLA leave, the Appointing Authority should consider the business needs of the Agency.<sup>7</sup>

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<sup>7</sup> The Agency has the right to require the employee to temporarily transfer to another equivalent position while on intermittent leave to least disrupt business.

## 4G. Calculating Eligibility

The State of Idaho uses a rolling 12-month period measured backward from the date an employee uses any FMLA designated leave. Each time an employee takes FMLA leave, the amount of leave taken shall be computed and subtracted from the available weeks of leave. The balance remaining is the amount the employee is entitled to take at that time.

## 4H. FMLA and Worker's Compensation

An employee on leave concurrently under FMLA and worker's compensation who receives a written certification from their health care provider that they are able to return to work in a light duty position is not required under the FMLA to do so.

If the employee refuses the light duty position, the employee may lose their workers' compensation benefits. In such a situation, the employee retains the right to continue on protected leave under the FMLA until the employee can return to their position or the FMLA entitlement is exhausted.

## 4I. FMLA Procedures

1. **Notification and Request.** In some, but not all, instances, the need for FMLA leave is foreseeable.

Advance Notification Required. When the employee knows in advance of the need to take FMLA leave, the employee must give the Agency 30 days notice prior to taking such leave. Notice shall include the anticipated start date of the FMLA leave, and the expected duration of the leave. Employees are to use the "FMLA Leave Request" form for this purpose.

Impromptu Leave. In situations where advance notification is not practicable, the employee shall notify the Agency as soon as feasible. "As soon as feasible" would ordinarily mean the employee provides verbal notification to the employer within one business day of the employee knowing of the need for FMLA leave.

If the employee is unable to complete the "FMLA Leave Request" form to request unforeseen FMLA leave, the supervisor or agency human resources shall complete the form on the employee's behalf.

If an employee is unable to provide notice, an employee's friend or family member, acting on the employee's behalf, may notify the employer of the employee's need to take FMLA leave. Such notice may be communicated via phone call, fax, mail, or E-mail. In such situations, the supervisor or agency human resources shall complete the "FMLA Leave Request" form on the employee's behalf.



2. **Medical Certification.** When an employee requests FMLA leave for their own medical condition, or to care for family members, the employer may require the employee to furnish a medical provider's statement certifying the medical information necessary to determine the employee's eligibility for FMLA leave at the time such leave is requested. These certification forms can be accessed at <https://www.dol.gov/whd/forms/WH-380-E.pdf> and <https://www.dol.gov/whd/forms/WH-380-F.pdf>.

To expedite the processing of the leave request, employees are encouraged to furnish the medical provider's statement with their completed "FMLA Leave Request" form. Ultimately, the employee must return the completed medical documentation within 15 days from the date of the leave request, unless a request for extension was received and approved. If an employee fails to provide medical documentation, FMLA leave may be denied.

In situations where FMLA leave was unforeseen, the employer shall request certification within two business days after the leave commences. The employee then must provide the medical certification within 15 days of receipt of the employer's request.

In cases where medical certification is required, the certification must be complete and sufficient. If the agency finds that the medical certification provided by the employee is incomplete (one or more of the applicable entries have not been completed) or insufficient (the information provided is vague, ambiguous, or inconclusive), the agency shall notify the employee in writing of the additional information needed to make the certification complete and sufficient. The employee shall have seven days (unless not practicable despite the employee's diligent efforts) to cure the deficiencies. Failure by the employee to do so may result in denial of FMLA leave.

To determine the extent of an employee's serious health condition, if the first medical certification appears to lack validity, the employer may request a second opinion. If the second opinion is different from the first opinion, the employer may request a third medical opinion. The third opinion will be binding. If the employer requests second and third opinions, the cost is at the employer's expense.

3. **Eligibility Determination and Response.** The employer is required to provide the employee with an Eligibility Notice and with a Designation Notice once FMLA leave is requested.
  - a. [Eligibility Notice] Within five days of the employee requesting leave or the employer learning an employee's leave **may** be FMLA eligible, the employer shall notify the employee in writing whether the employee is eligible for FMLA leave, pursuant to Section 4B of this policy (and if

not, why the employee is ineligible). In conjunction with the Eligibility Notice, the employer shall also provide the employee with written notification of the employee's rights and responsibilities under the FMLA, including the information contained in the "Notice of Eligibility and Rights & Responsibilities" form. This notification can be accessed at <http://www.dol.gov/whd/forms/WH-381.pdf> and shall include:

- Whether medical certification is required, and the consequences for failure to provide such medical certification;
- Whether certification to verify a Qualifying Exigency is required, and the consequences for failure to provide such certification; and
- Whether a "fitness for duty" certification is required for the employee to return to work, and the consequences for failure to provide such a certification.

b. [Designation Notice] Within five days of receiving enough information to determine that an employee's leave is FMLA eligible, the employer shall provide written, official confirmation of the designation of the employee's leave as FMLA leave and the parameters (i.e., expectations, obligations, and consequences for failure to meet the same) of the FMLA leave, using the "FMLA Designation Notice" form. This form can be accessed at <https://www.dol.gov/whd/forms/WH-382.pdf>. An employee can affirmatively decline to use FMLA leave after receiving written, official confirmation of the employee's eligibility for FMLA leave.

If a "fitness for duty" certification specifically addressing the issue of whether the employee can meet the essential functions of their job will be required for the employee to return to work, the employer must provide a list of the essential job functions no later than the date of the Designation Notice. In such a case, the Designation Notice must specifically inform the employee that the certification must address the employee's ability to perform those essential job functions.

4. **Procedures for Coding FMLA Leave.** Employees/supervisors should not code FMLA leave on timesheets until the employer has verified and designated the employee's eligibility for such leave. Available time codes include:

For leave pursuant to circumstances 1 through 4 (in 4C above):

- FMS: Family Medical Leave—Sick. (This coding uses the employee's accrued sick leave while on FMLA leave.)
- FMV: Family Medical Leave—Vacation. (This coding uses the employee's accrued vacation leave while on FMLA leave.)
- FMC: Family Medical Leave—Comp Time (This coding uses the

employees accrued compensatory time while on FMLA leave.)

- FML: Family Medical Leave—Unpaid.

For leave pursuant to circumstance 5 through 6 (in 4C above):

- FSS: Service Member Family Leave—Sick. (This coding uses the employee's accrued sick leave while on FMLA leave.)
- FSV: Service Member Family Leave—Vacation. (This coding uses the employee's accrued vacation leave while on FMLA leave.)
- FSC: Service Member Family Leave—Comp Time (This coding uses the employees accrued compensatory time while on FMLA leave.)
- FSL: Service Member Family Leave—Unpaid.

Supervisors are responsible for ensuring accuracy of employee timesheets, including the use of FMLA leave codes.

5. **Completion of Leave.** An employee who is returning from FMLA leave may be required to provide a "Fitness for Duty" certification from their medical practitioner, if, due to the nature of the health condition and the job:

- Light duty work or other accommodation is requested; or
- The Agency, having a reasonable basis in fact to do so, requires assurance that returning to work would not create a significant risk of substantial harm to the employee or others.

Note: If a "Fitness for Duty" certification will be required upon return to work, the employee must be notified of that requirement in advance writing, on the "FMLA Designation Notice" form. If the employer wishes the "Fitness for Duty" certification to address the employee's ability to meet essential job functions, the employer must provide the employee with a list of the essential job functions in conjunction with the Designation Notice.

Additionally, an employer may require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the condition for which the leave was taken.

#### **4J. Benefits and Employee Rights**

While on FMLA leave, the employee's health and dental benefits will remain unchanged. Thus, the employee will remain responsible for their share of the monthly health and dental premiums. If the employee is using eligible accrued paid leave balances to receive a full or partial paycheck while on FMLA leave, the employee's portion of health and dental insurance premiums will be deducted as

usual. However, if the employee is not receiving a sufficient paycheck, he or she must arrange to pay the employee's portion of health and dental insurance premiums. If the employee does not return to work after FMLA leave for reasons beyond their medical condition, the employer can require the employee to reimburse the State's share of the premiums paid during the employee's FMLA absence.

An employee's use of FMLA leave cannot result in the loss of any employment benefits that the employee earned or to which he or she was entitled **before** using FMLA leave.

**Use of FMLA leave cannot be counted against the employee for any disciplinary action regarding attendance.**

Upon return from FMLA leave, employees are entitled to be restored to the position they held prior to the FMLA leave, or to be restored in a substantially equivalent position with substantially equivalent benefits, pay, and other terms and conditions of employment.