TO: Manual Recipients

FROM: Jessica Rowe, Director of Staffing Services

SUBJECT: Clarification of Policy Bulletin 2020-01 and 2020-04

Introduction

This policy bulletin provides updated information related to the implementation and interpretation of the Families First Coronavirus Response Act (FFCRA), which implicates leave under the Federal Emergency Paid Sick Leave Act (FEPSLA) and/or benefits provided by the Emergency Family and Medical Leave Act (EFMLA), all related to employees impacted by COVID-19.

The following are clarifications to the provisions of both Policy Bulletin 2020-01 (April 2020) and Policy Bulletin 2020-04 (September 2020).

Definition of Health Care Provider

Effective September 16, 2020, the U.S. Department of Labor amended and clarified its rules on the use of FEPSLA and EFMLA. Specifically, the U.S. Department of Labor amended the definition of health care provider. As of September 16, 2020, agencies should apply the definition of health care provider found at 29 C.F.R. § 826.30(c)(1) when implementing exclusions to leave under the FFCRA:

> (i) *Basic definition*. For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is
>
> (A) Any Employee who is a health care provider under 29 CFR 825.102 and 825.125, or;
>
> (B) Any other Employee who is capable of providing health care services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.
>
> (ii) *Types of Employees*. Employees described in paragraph (c)(1)(i)(B) include only:
>
> (A) Nurses, nurse assistants, medical technicians, and any other persons who directly provide services described in (c)(1)(i)(B);

(B) Employees providing services described in (c)(1)(i)(B) of this section under the supervision, order, or direction of, or providing direct assistance to, a person described in paragraphs (c)(1)(i)(A) or (c)(1)(ii)(A); and

(C) Employees who are otherwise integrated into and necessary to the provision of health care services, such as laboratory technicians who process test results necessary to diagnoses and treatment.

(iii) Employees who do not provide health care services as described above are not health care providers even if their services could affect the provision of health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers.

(iv) *Typical work locations*. Employees described in paragraph (c)(1)(i) of this section may include Employees who work at, for example, a doctor's office, hospital, health care center, clinic, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar permanent or temporary institution, facility, location, or site where medical services are provided. This list is illustrative. An Employee does not need to work at one of these facilities to be a health care provider and working at one of these facilities does not necessarily mean an Employee is a health care provider.

(v) *Further clarifications*.

(A) Diagnostic services include taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results.

(B) Preventive services include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.

(C) Treatment services include performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.

(D) Services that are integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, include bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.

(vi) The definition of *health care provider* contained in this section applies only for the purpose of determining whether an Employer may elect to exclude an Employee from taking leave under the EPSLA and/or the EFMLEA, and does not otherwise apply for purposes of the FMLA or section 5102(a)(2) of the EPSLA.

Questions concerning the guidance set forth in this Policy Bulletin should be directed to the Attendance and Leave Unit of the Department of Civil Service at (518) 457-2295.

TO: Manual Recipients
FROM: Jessica Rowe, Director Staffing Services Division
SUBJECT: Clarification of Policy Bulletin 2020-01, entitled *Guidance Related to Recent State and Federal Law and Policy Changes Due to COVID-19*

Introduction

This policy bulletin provides updated information related to the implementation and interpretation of the Families First Coronavirus Response Act (FFCRA), which implicates leave under the Federal Emergency Paid Sick Leave Act (FEPSLA) and/or benefits provided by the Emergency Family and Medical Leave Act (EFMLA), all related to employees impacted by COVID-19.

The following are clarifications to the provisions of Policy Bulletin 2020-01 (April 2020).

Intermittent Use of FEPSLA and EFMLA

As of August 3, 2020, employees may intermittently use FEPSLA or EFMLA to care for the employee's son or daughter whose school or place of care is closed, or the child care provider is unavailable, because of reasons related to COVID-19, which is detailed as FEPSLA Category 5 in Policy Bulletin 2020-01 (April 2020).

Employees may not use FEPSLA leave intermittently for any of the remaining reasons that are classified as FEPSLA Categories 1 through 4 and Category 6 in Policy Bulletin 2020-01 (April 2020). For these FEPSLA Categories, an employee must take leave consecutively until the need for such leave ends. The employee retains and may use any remaining FEPSLA leave time if and when another FEPSLA reason arises before its expiration on December 31, 2020. Intermittent leave may be used in increments of ¼ of an hour.

Exclusions

As set forth in Policy Bulletin 2020-01 (April 2020), FFCRA allows employers to exempt health care providers and emergency responders from FEPSLA and EFLMA. As of August 3, 2020, the definition for health care provider is found in the Family and Medical Leave Act (FMLA). The emergency responder definition is found in the U.S. DOL regulations implementing the FFCRA. Both definitions are provided below.

Agencies should continue to comply with FFCRA by applying and implementing, where applicable, the definitions of these exemptions to their workforce, and to take the necessary steps to ensure that the law is followed based on these definitions. Agencies need not consult or get prior approval before excluding employees under either of these exemptions, as was required by Policy Bulletin 2020-01 (April 2020).

Definitions

As of August 3, 2020, for the purposes of employees who may be excluded from FEPSLA or EFMLA leave under the FFCRA, the following definitions are to be applied.

The term "health care provider," as found at 29 C.F.R. § 825.102, means:

- A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; or
- Nurse practitioners, nurse-midwives, clinical social workers, and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; or
- Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; or
- 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.

  The phrase "authorized to practice in the State," as used in this definition, means that the provider must be authorized by the State of New York to diagnose and treat physical or mental health conditions.

The term "emergency responder," as found at 29 C.F.R. § 826.30(c)(2), means anyone necessary for the provision of transport, care, healthcare, comfort, and nutrition of such patients, or others needed for the response to COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any

individual whom the highest official of the State determines is an emergency responder necessary for the State's response to COVID-19.

Questions concerning the guidance set forth in this policy bulletin should be directed to the Attendance and Leave Unit of the Department of Civil Service at (518) 457-2295.

TO: New York State Agencies and Departments
FROM: Jessica Rowe, Director of Staffing Services
SUBJECT: Guidance Related to Recent State and Federal Law and Policy Changes Due to COVID-19

Introduction

This policy bulletin provides information and implementation guidance on the recently enacted State Paid Sick Leave Law (Chapter 25 of the Laws of 2020) and recent policy guidance issued by the Governor's Office of Employee Relations (GOER) to Directors of Human Resource Management on March 11, 2020. It also describes New York State's implementation of the Families First Coronavirus Response Act (FFCRA), which provides for the Federal Emergency Paid Sick Leave Act (FEPSLA) and the expansion of benefits under the Emergency Family and Medical Leave Act (EFMLA) related to employees impacted by COVID-19. The attached chart displays how these laws and policies apply to specific circumstances. Also attached is an employee notice that describes these benefits.

The information contained in this document summarizes our current understanding of the significant revisions to the EFMLA and FEPSLA. **Further guidance will be provided as it becomes available.**

Questions concerning this material should be directed to the Attendance and Leave Unit of the Department of Civil Service at (518) 457-2295.

GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS POLICY GUIDANCE

On March 11, 2020, the Governor's Office of Employee Relations (GOER) issued policy guidance for employees quarantined due to the novel coronavirus (COVID-19). This policy relates to employees who are placed on mandatory or precautionary quarantine related to COVID-19.

Eligibility

All State employees, regardless of Attendance Rules coverage, are eligible for quarantine leave.

Use of Leave

This policy provides employees leave with pay without charge to accruals, for all workdays within the 14-day period of the quarantine. This leave will be provided regardless of whether employee is symptomatic. If an employee placed on precautionary quarantine can work from home, arrangements should be made to do so. If not, the employee will be placed on leave with pay, without charge to accruals, for all workdays within the 14-day period of quarantine.

CHAPTER 25 OF THE LAWS OF 2020

On March 18, 2020, Chapter 25 of the Laws of 2020 was enacted to provide for a 2-week period of sick leave with pay, without charge to accruals. The law also authorized Paid Family Leave (PFL) benefits for employees with minor children that are subject to mandatory quarantine or precautionary quarantine.

The Paid Family Leave provision is optional for public sector employers; New York State has opted not to implement this provision.

Chapter 25 of the Laws of 2020 also included an exclusion for employees who had traveled to a country in which the Centers for Disease Control and Prevention (CDC) has issued a level two or three travel health notice; such employees are not entitled to such leave, unless the travel was directed by their employer.

Use of Leave

The policy issued by GOER on March 11, 2020, for employees under Precautionary or Mandatory Quarantine, generally exceeds the quarantine benefits provided by Chapter 25 of the NYS Laws. Therefore, quarantine benefits should be provided to employees under the statewide GOER Policy.

FEDERAL EMERGENCY PAID SICK LEAVE ACT

The Federal Emergency Paid Sick Leave Act (FEPSLA or The Act) provides paid sick leave to individuals who are subject to quarantine or isolation, advised by a health care provider to precautionary-quarantine, or experiencing symptoms of COVID-19 and seeking a medical diagnosis. The Act also provides paid sick leave for employees who are taking care of individuals in certain categories or are caring for a minor child whose school or place of care has been closed, or the childcare provider is unavailable, due to COVID-19 precautions.

The new law took effect on April 1, 2020 and will remain in effect until December 31, 2020. The following describes the State's implementation of this new law.

Basic Requirements

The Act provides that each employer (as defined in the Act), including the State of New York, provide an employee with paid sick leave to the extent that the employee is unable to work due to a qualifying event. FEPSLA leave is considered a leave at full pay, without charge to accruals, for all attendance and leave purposes. Leave under this Act shall be called FEPSLA leave; agencies should add this leave category to their automated or paper timekeeping systems.

Eligibility

All employees, regardless of Attendance Rules coverage, are eligible for FEPSLA leave. There are no minimum service requirements for the FEPSLA benefits. In lieu of these paid benefits, employees may elect to use any available leave accruals.

Categories of Leave

Employees who are unable to work or telework are entitled to FEPSLA for any of the following qualifying events:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID–19.
2. The employee has been advised by a health care provider to self-quarantine (termed precautionary quarantine in New York) due to concerns related to COVID–19.
3. The employee is experiencing symptoms of COVID–19 and is seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in (1) or (2) above.
5. The employee is caring for a minor child of such employee, if the school or place of care of the minor child has been closed, or the childcare provider of such minor child is unavailable, due to COVID–19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

Pay Status/Calculation

An employee's pay on FEPSLA leave is calculated based on their regular rate of pay, subject to specific monetary caps imposed by the FEPSLA.

An employee's pay is calculated as follows:

An employee shall be paid at the employee's regular rate of compensation, subject to a cap of $511 per day for a maximum of $511 per day and $5,110 in the aggregate, for those employees who work a 40-hour work week who take leave in the following categories:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID–19;
2. The employee has been advised by a health care provider to self- (precautionary) quarantine due to concerns related to COVID–19; or
3. The employee is experiencing symptoms of COVID–19 and is seeking a medical diagnosis.

An employee shall be paid at two-thirds of the employee's regular rate of pay, subject to a cap of $200 per day and $2,000 in the aggregate, for those employees who work a 40-hour work week and who take leave in the following categories:

1. The employee is caring for an individual who is subject to an order as described in subparagraph (1) above or who has been advised as described in subparagraph (2) above.
2. The employee is caring for a minor child of such employee if the school or place of care of the minor child has been closed, or the childcare provider of such minor child is unavailable, due to COVID–19 precautions.

An agency must use the following procedure to calculate the number of hours worked for part-time employees who work varied schedules from week-to-week:

1. Subject to (2) below, a number equal to the average number of hours that the employee was scheduled, per day, over the 6-month period, ending on the date on which the employee takes the FEPSLA leave, including hours for which the employee took leave of any type.
2. If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours, per day, that the employee would normally be scheduled to work.

It should be noted that FEPSLA requires that paid sick leave be paid only up to 80 hours over a 2-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the FEPSLA is capped at 80 hours.

Use of Leave

FEPSLA leave shall be available for immediate use by an employee, for the purposes described above, regardless of how long the employee has been employed by the State. An employee may first use FEPSLA leave for the purposes described above. An agency may not require an employee to use other paid leave provided by the State before the employee uses FEPSLA leave.

Leave shall be used in full day increments, except for the first day.

Amount of Leave

A full-time employee who works a 40-hour work week shall be entitled to 80 hours of FEPSLA leave. Less than full-time employees shall be entitled to a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.

In the case of a less than full-time employee whose schedule varies from week-to-week to such an extent that you are unable to determine with certainty the number of hours the employee would have worked if such employee had not taken paid sick time, the following procedure shall be used to calculate the number of hours worked:

1. Subject to (2) or (3) below, a number equal to the average number of hours that the employee was scheduled, per day, over the 6-month period, ending on the date on which the employee takes the paid sick time, including hours for which the employee took leave of any type.
2. If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours, per day, that the employee would normally be scheduled to work. OR
3. If the employee did not work over a full 6-month period, average the hours worked over the period the employee did work.

Employees who work 37.5 hours per week will be entitled to 75 hours of leave in a 2-week period.

FEPSLA leave does not carry over and expires on December 31, 2020.

FEPSLA leave provided to an employee ends at the beginning of the employee's next scheduled work shift immediately following the termination of the need for paid sick time.

An agency may not require, as a condition of providing FEPSLA leave, that the employee search for or find a replacement to cover the employee's scheduled work times.

Notification

An employee must provide as much notice, as practicable under the circumstances, of the need for leave.

After the first workday (or portion thereof) an employee receives paid sick time under this Act, an agency may require the employee to check in each day.

An employee must provide an agency with notice of a change in status, as soon as practicable, after finding out about that change in status.

Documentation

An agency can require proof consistent with the categories of FEPSLA leave listed above.

Posting and Notice Requirements

Each agency shall post and keep posted, in conspicuous places where notices to employees are customarily posted, a notice, prepared or approved by the Secretary of Labor, of the requirements described in this Act. That notice is available here.

Unlawful Discrimination/Other Rights

It is unlawful for any agency to discharge, discipline, or in any other manner discriminate against any employee who takes FEPSLA leave and who has filed any complaint or instituted or caused to be instituted any proceeding under or related to FEPSLA leave (including a proceeding that seeks enforcement of the Act), or who has testified or is about to testify in any such proceeding.

FEPSLA leave shall not diminish the rights or benefits that an employee is entitled to under any other federal, state, or local law, collective bargaining agreement, or existing policy. There is no entitlement to be paid for any unused FEPSLA leave upon an employee's termination, resignation, retirement, or other separation from employment.

Definitions

1. Employer – the State of New York is a public agency covered by the provisions of this law.
2. Employee – employees of the State of New York.
3. The term "health care provider" has the meaning given such term in section 101 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611).

4. Health care provider and emergency responder – United States Department of Labor (USDOL) guidance on employees who may be included in the exclusion can be found at: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT

The federal Family and Medical Leave Act (FMLA) was revised to expand benefits for employees impacted by COVID-19. These new Emergency FMLA (EFMLA) benefits are in effect April 1, 2020. The changes are a temporary expansion of benefits and will expire on December 31, 2020. The revisions modify current FMLA eligibility provisions and provide a new category of approved leave: public health emergency leave related to the COVID-19 pandemic. This leave is available to eligible employees who must take leave to care for their minor children because the school or place of care for their children has been closed due to the COVID-19 public health emergency. The law also provides paid leave requirements for employers.

This memorandum provides a brief overview of the revisions to the FMLA. Agencies are cautioned that provisions of the FMLA must be applied in the context of State leave policy, consistent with the Attendance Rules and negotiated agreements.

The information contained in this document summarizes our current understanding of the revisions to the FMLA related to COVID-19. Further guidance may be provided as issues are clarified.

Eligibility

The FMLA eligibility criteria for employees impacted by the COVID-19 public health emergency has been substantially expanded. Employees absent due to the COVID-19 are only required to have worked for New York State for a period of 30 calendar days. The requirement of one cumulative year of State service and 1,250 hours prior to the qualifying event **does not** apply to absences for the public health emergency leave related to COVID-19.

All employees meeting the 30-day requirement are entitled to the EFMLA benefits described below, regardless of their eligibility for Attendance Rules coverage (i.e., hourly and per diem employees). It should be noted that the normal FMLA eligibility criteria still applies to all other conditions for which an employee seeks FMLA.

Amount of Leave to be Granted

Eligible employees are entitled to 12 work weeks of public health emergency leave from April 1, 2020 through December 31, 2020. Any FMLA an employee used prior to April 1, 2020, for reasons other than those related to COVID-19, is subtracted from this additional 12 weeks of EFMLA Leave. This new period of FMLA does not provide an additional 12 weeks of leave entitlement, but rather provides a new qualifying reason for which leave can be taken. Employees are still limited to a total of 12 week of FMLA for 2020.

Eligible employees are now allowed to take leave due to a qualifying need related to the COVID-19 public health emergency. The EFMLA defines a public health emergency as a COVID-19 emergency declared by a federal, state, or local authority.

The only qualifying need is that the employee is unable to work or telework because the employee is needed to care for the employee's minor child under age 18 due to an elementary or secondary school or place of care closure, or due to the unavailability of a child care provider, because of a COVID-19 public health emergency. Employees who have a child, age 18 or older, who is incapable of self-care because of a mental or physical disability shall be eligible for public health emergency leave.

Pay During Leave

The first 10 days of COVID-19 public health emergency leave may be unpaid, although employees have the option to substitute any type of available paid leave (i.e., FEPSLA, vacation, personal leave, or sick leave). The Federal Emergency Sick Leave may run concurrently with this 10-day period.

After the first 10 days, the employee is entitled to be paid for the leave. Under normal circumstances, the leave is paid at two-thirds of the employee's regular rate of pay multiplied by the number of hours the employee would normally be scheduled to work. The amount of paid leave is capped at $200 a day, but may not exceed a total of $10,000. For employees who work variable hours, the employer should calculate the average number of hours the employee was scheduled to work for the six-month period prior to the date the leave begins, including hours for which the employee took leave of any type (e.g., vacation, sick leave, etc.). If the employee works variable hours, but has not worked for the employer for 6 months, the employer must use the average number of hours the employee reasonably would have been expected to work at the time of hire.

COVID-19 public health emergency leave shall be used in full day increments only.

Intersection of FEPSLA and EFMLA

Employees taking paid sick leave because they are unable to work or telework due to a need for leave because they (1) are subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self (precautionary)-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, will receive for each applicable hour the greater of:

- Their regular rate of pay;
- The federal minimum wage in effect under the FLSA; or
- The applicable State or local minimum wage.

In these circumstances, an employee is entitled to a maximum of $511 per day, or $5,110 total over the entire 2-week paid sick leave period.

An employee is entitled to compensation at two-thirds of the greater of the amounts above if the employee is taking paid sick leave because they are: (1) caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self (precautionary)-quarantine due to concerns related to COVID-19; (2) caring for their child whose school or place of care is closed, or because their childcare provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services.

Under these circumstances, the employee is subject to a maximum of $200 per day, or $2,000 over the entire 2-week period.

If the employee is taking EFMLA, they may take paid sick leave for the first 10 days of that leave period, or they may substitute any accrued vacation leave, personal leave, or sick leave available under State policy. For the following 10 weeks, they will be paid for their leave at an amount no less than two-thirds of their regular rate of pay for the hours they would be normally scheduled to work. The regular rate of pay used to calculate this amount must be at or above the federal minimum wage, or the applicable state or local minimum wage. However, the employee will not receive more than $200 per day or $12,000 for the 12 weeks that include both paid sick leave and EFMLA when the employee is on leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

It should be noted that employees cannot use existing leave entitlements (e.g., sick leave, vacation, or personal leave) to supplement their pay while using FEPSLA or EFMLA COVID-19 public health emergency leave.

Documentation

An employee must submit appropriate documentation to support the use of public health emergency leave to the extent practicable.

Return to Work

An employee must be restored to the same or a substantially equivalent position.

Notice Requirements

An employee who needs COVID-19 public health emergency leave is required to provide the employer with as much notice as is practicable.

Exclusions

The FEPSLA and EFMLA provisions allow employers to exclude healthcare providers or emergency responders from the provisions of the Act. **State agencies interested in exercising this option must consult with GOER and receive prior approval from their Deputy Secretary.** Healthcare providers or emergency responders responding to the COVID-19 public health emergency should continue to report

to their agencies. United States Department of Labor (USDOL) guidance on employees who may be included in the exclusion can be found at: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

New York State Department of Civil Service
Attendance and Leave Manual Policy Bulletin 2020-01
Policy and Law Related to COVID-19 Employee Leave
April 4, 2020

Employee Status	Chapter 25 of the NYS Laws of 2020	GOER March 11, 2020 Policy on COVID-19	Emergency Paid Sick Leave Act	Emergency FMLA Expansion Act
Employee subject to state, federal, or local quarantine	Augmented by the Governor's Office of Employee Relations' (GOER) March 11 Policy	X	X	N/A
Employee advised by health care provider to self (precautionary) quarantine	Augmented by GOER's March 11 Policy	X	X	N/A
Employee is symptomatic	Augmented by GOER's March 11 Policy	X	X	N/A
Employee caring for someone who is quarantined or advised by health care provider to self (precautionary)-quarantine	N/A	N/A	X	N/A
Employee is caring for child of such employee if the school or place of care of the child has been closed	New York State opted out of the Paid Family Leave benefit related to COVID-19	N/A	X	X

It is important to remember, when reviewing the information provided in this Policy Bulletin, that employees under the Emergency FMLA Expansion Act may choose any leave option available at their discretion (i.e., the Federal Emergency Paid Sick Leave Act, vacation, personal leave, or sick leave). This includes the initial two-week period of unpaid leave, available under the FMLA Expansion Act.

The policy issued by GOER on March 11, 2020, for employees under Precautionary or Mandatory Quarantine, generally exceeds the benefits provided by Chapter 25 of the NYS Laws of 2020. Benefits should be provided to employees under the statewide GOER Policy.

NEW YORK STATE OF OPPORTUNITY. Department of Civil Service

ANDREW M. CUOMO
Governor
LOLA W. BRABHAM
Acting Commissioner

EMPLOYEE NOTICE
Emergency Paid Sick Leave and Emergency Expanded Family and Medical Leave
April 4, 2020

Emergency Paid Sick Leave

As a result of recently enacted federal law, beginning April 1, 2020, every New York State employee, regardless of Attendance Rules coverage and bargaining unit, will be eligible for up to two weeks of paid sick leave if unable to work or work from home because the employee:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine because of COVID-19;
3. Is experiencing COVID-19 related symptoms and is seeking a medical diagnosis;
4. Is caring for an individual subject to either an order, as described above in (1), or self-quarantine, as described above in (2);
5. Is caring for the employee's child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19; or
6. Is experiencing any other condition specified by the federal government; however, the federal government has not yet identified anything in this category.

Leave for numbers 1, 2, and 3 above will be paid at 100% of an employee's regular rate of pay, up to $511.00 daily, capped at $5,110.00 for the two-week period.

Leave for numbers 4, 5, and 6 above will be paid at two-thirds of the employee's regular rate of pay, up to $200.00 daily, capped at $2,000.00 for each two-week period.

Emergency Expanded Family and Medical Leave

In addition to the leave described above, New York State employees who have been employed for at least 30 days prior to their request for leave may be eligible for up to an additional 10 weeks of paid leave for number 5 above (i.e. caring for a child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19), paid at two-thirds of the employee's regular rate of pay up to $200.00 daily, capped at $10,000.00 for the additional 10 week period.

You cannot be discharged, disciplined, or otherwise discriminated against for taking this leave, filing a complaint, or challenging a denial of leave in any proceeding.

Contact your Human Resources Department with any questions about how these leave benefits work with other Attendance and Leave benefits.

NEW YORK STATE OF OPPORTUNITY. Department of Civil Service

ANDREW M. CUOMO
Governor
LOLA W. BRABHAM
Acting Commissioner

EMPLOYEE NOTICE
Emergency Paid Sick Leave and Emergency Expanded Family and Medical Leave
April 4, 2020

Emergency Paid Sick Leave

As a result of recently enacted federal law, beginning April 1, 2020, every New York State employee, regardless of Attendance Rules coverage and bargaining unit, will be eligible for up to two weeks of paid sick leave if unable to work or work from home because the employee:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine because of COVID-19;
3. Is experiencing COVID-19 related symptoms and is seeking a medical diagnosis;
4. Is caring for an individual subject to either an order, as described above in (1), or self-quarantine, as described above in (2);
5. Is caring for the employee's child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19; or
6. Is experiencing any other condition specified by the federal government; however, the federal government has not yet identified anything in this category.

Leave for numbers 1, 2, and 3 above will be paid at 100% of an employee's regular rate of pay, up to $511.00 daily, capped at $5,110.00 for the two-week period.

Leave for numbers 4, 5, and 6 above will be paid at two-thirds of the employee's regular rate of pay, up to $200.00 daily, capped at $2,000.00 for each two-week period.

Emergency Expanded Family and Medical Leave

In addition to the leave described above, New York State employees who have been employed for at least 30 days prior to their request for leave may be eligible for up to an additional 10 weeks of paid leave for number 5 above (i.e. caring for a child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19), paid at two-thirds of the employee's regular rate of pay up to $200.00 daily, capped at $10,000.00 for the additional 10 week period.

You cannot be discharged, disciplined, or otherwise discriminated against for taking this leave, filing a complaint, or challenging a denial of leave in any proceeding.

Contact your Human Resources Department with any questions about how these leave benefits work with other Attendance and Leave benefits.

TO: Manual Recipients
FROM: Scott DeFruscio, Director Staffing Services Division
SUBJECT: FMLA Notification Regarding Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave (Family and Medical Leave Act)

The information contained in this document summarizes our current understanding of the revisions to the FMLA and should be read in conjunction with Policy Bulletins 2009-01 and 2010-01, and may be updated once new regulations or information becomes available.

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking military caregiver leave under the FMLA due to a serious injury or illness of a covered veteran to submit a certification providing sufficient facts to support the request for leave.

For purposes of FMLA military caregiver leave, a serious injury or illness means an injury or illness incurred by the servicemember in the line of duty while on active duty in the Armed Forces (or that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty while on active duty in the Armed Forces) and manifested itself before or after the servicemember became a veteran, and is:

(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 servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
(ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
(iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

The U.S. DOL has created a new form to reflect the amended changes. As a matter of State policy, agencies are required to use such form and must be aware of the amendments to the FMLA as they review documentation.

REVISED MILITARY FAMILY LEAVE ENTITLEMENTS
Military Caregiver Leave Due to
Injury or Illness of a Covered Veteran

- ***Documentation Provisions***
  The U.S. DOL has developed form WH-385-V, Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave, to assist the employer in obtaining documentation for military caregiver leave under the FMLA due to a serious injury or illness of a covered veteran.

  Any one of the following health care providers may complete this certification:

  - A United States Department of Defense (DOD) health care provider
  - A United States Department of Veterans Affairs (VA) health care provider
  - A DOD TRICARE network authorized private health care provider
  - A DOD non-network TRICARE authorized private health care provider, or
  - A health care provider as defined in Title 29 CFR 825.125.

  A complete and sufficient certification to support a request for FMLA military caregiver leave due to a covered veteran's serious injury or illness includes written documentation confirming that the veteran's injury or illness was incurred in the line of duty while on active duty or existed before the beginning of the veteran's active duty and was aggravated by service in the line of duty while on active duty, and that the veteran is undergoing treatment, recuperation, or therapy for such injury or illness by a health care provider listed above.

  Satisfactory medical documentation also includes "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill veteran at his or her bedside.

  The regulations prohibit recertification during the time period specified in the documentation, and prohibit second or third medical opinions in connection with leave requested for this purpose unless the certification is provided by a non-military affiliated health care provider.

Other Provisions
Other provisions from the discussion of Military Caregiver Leave in Policy Bulletin 2009-01 (Eligible Employee, Amount of Leave to be Granted, Notice, and Use of Leave Credits) remain unchanged and are repeated below for reference.

Eligible Employee
An employee who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son, daughter, or next of kin of a covered veteran is eligible for leave for this purpose. The regulations define next of kin of a covered veteran as the nearest blood relative other than the covered veteran's spouse, parent, son, or daughter in the following priority: blood relatives who have been granted legal custody, brothers

and sisters, grandparents, aunts and uncles, and first cousins, unless the veteran has specifically designated in writing another blood relative for purposes of military caregiver leave under the FMLA.

A husband and wife employed by the same employer are limited to a combined 26 week military caregiver leave in a single 12-month period per veteran per injury.

Covered Veteran
A covered veteran means a veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness if he or she:

(1) was a member of the Armed Forces (including a member of the National Guard or Reserves);

(2) was discharged or released under conditions other than dishonorable; and

(3) was discharged within the five-year period before the eligible employee first takes FMLA military caregiver leave to care for the veteran.

For any veteran who was discharged prior to March 8, 2013, the period of time between October 28, 2009 and March 8, 2013 will not count as part of the five-year period. For example, if your family member became a veteran on October 28, 2009 then you may begin to use your military caregiver leave entitlement at any time up until March 8, 2018. As long as your military caregiver leave begins within five years of the veteran's discharge, the 12-month period may extend beyond the five-year period.

Amount of Leave to be Granted
Eligible employees are entitled to up to 26 weeks of leave in a single 12-month period per covered veteran per injury. Additional periods of up to 26 weeks of leave may be taken in subsequent 12-month periods to care for a different veteran or to care for the same veteran who has a subsequent serious illness or injury.

To determine the single 12-month period, the regulations require that the 12-month period must be measured forward from the date an employee's first military caregiver leave to care for the covered veteran begins.

During the designated 12-month period, employees are limited to a combined total of 26 weeks of FMLA leave for any qualifying reason. Employees continue to be limited to 12 weeks of FMLA leave per calendar year for reasons other than to care for a covered veteran.

Leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition should be designated as military caregiver leave in the first instance.

Leave is available in a continuous block of time or on an intermittent or reduced schedule basis as required.

Notice

Where leave is foreseeable based on planned medical treatment for a serious injury or illness of a veteran, the normal FMLA notice requirement of 30 days or as soon as possible applies. Where leave is unforeseen, the normal FMLA notice requirement of as soon as practicable under the facts and circumstances of the specific case applies.

Use of Leave Credits

FMLA leave is unpaid. However, employees may also elect to charge appropriate leave credits during a period of FMLA leave. For example, a State employee taking military caregiver leave to provide care for her wounded son who is a covered veteran is eligible to charge up to 15 days of absence in a calendar year to family sick leave and may also elect to charge other categories of leave credits.

As a reminder, the FMLA does not require an employer to authorize the use of paid sick leave in any circumstance where it would not otherwise be authorized. As a matter of State policy, when use of leave credits would be allowed under the Attendance Rules, employees may elect to use appropriate leave credits during a period of FMLA leave or may choose not to use credits at their option. The term "appropriate leave credits" means credits that are available for absences for that specific reason. For example, no more than 15 days of accrued sick leave may be used in any calendar year for illness in the family.

The FMLA permits employees to use accrued vacation and personal leave credits and to go on leave without pay during FMLA absences even when accrued sick leave credits are available. Agencies cannot require that employees first exhaust sick leave credits before using other credits as sick leave or that all credits be exhausted before going on leave without pay. (This supersedes the normal State policy that sick leave credits must be used first.)

Questions concerning this benefit should be directed to the Attendance and Leave Unit of this Department at (518) 457-2295.

Attachment

Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave (Form WH-385-V)

Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave (Family and Medical Leave Act)

U.S. Department of Labor

Wage and Hour Division

OMB Control Number: 1235-0003
Expires: 5/31/2018

Notice to the EMPLOYER

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 CFR 1635.9, if the Genetic Information Nondiscrimination Act applies.

SECTION I: For completion by the EMPLOYEE and/or the VETERAN for whom the employee is requesting leave

INSTRUCTIONS to the EMPLOYEE and/or VETERAN: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

(This section must be completed before Section II can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and address of employer (this is the employer of the employee requesting leave to care for a veteran):

_____

Name of employee requesting leave to care for a veteran:

_____
First Middle Last

Name of veteran (for whom employee is requesting leave):

_____
First Middle Last

Relationship of employee to veteran:

Spouse☐ Parent☐ Son☐ Daughter☐ Next of Kin ☐ (please specify relationship):

Part B: VETERAN INFORMATION

(1) Date of the veteran's discharge:

_____

(2) Was the veteran **dishonorably** discharged or released from the Armed Forces (including the National Guard or Reserves)? Yes☐ No☐

(3) Please provide the veteran's military branch, rank and unit at the time of discharge:

_____

(4) Is the veteran receiving medical treatment, recuperation, or therapy for an injury or illness? Yes☐ No☐

Part C: CARE TO BE PROVIDED TO THE VETERAN

Describe the care to be provided to the veteran and an estimate of the leave needed to provide the care:

_____

_____

SECTION II: For completion by: (1) a United States Department of Defense ("DOD") health care provider; (2) a United States Department of Veterans Affairs ("VA") health care provider; (3) a DOD TRICARE network authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care provider; or (5) a health care provider as defined in 29 CFR 825.125.

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee named in Section I has requested leave under the military caregiver leave provision of the FMLA to care for a family member who is a veteran. For purposes of FMLA military caregiver leave, a serious injury or illness means an injury or illness incurred by the servicemember in the line of duty on active duty in the Armed Forces (or that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the servicemember became a veteran, and is:

(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 servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
(ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
(iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

A complete and sufficient certification to support a request for FMLA military caregiver leave due to a covered veteran's serious injury or illness includes written documentation confirming that the veteran's injury or illness was incurred in the line of duty on active duty or existed before the beginning of the veteran's active duty and was aggravated by service in the line of duty on active duty, and that the veteran is undergoing treatment, recuperation, or therapy for such injury or illness by a health care provider listed above. Answer fully and completely all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA military caregiver leave coverage. Limit your responses to the veteran's condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 CFR 1635.3(f), or genetic services, as defined in 29 CFR 1635.3(e).

(Please ensure that Section I has been completed before completing this section. Please be sure to sign the form on the last page and return this form to the employee requesting leave (See Section I, Part A above). **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**)

Part A: HEALTH CARE PROVIDER INFORMATION

Health care provider's name and business address:

_____

Telephone: ( ) _____ Fax: ( ) _____ Email: _____

Type of Practice/Medical Specialty: _____

Please indicate if you are:

☐ a DOD health care provider

☐ a VA health care provider

☐ a DOD TRICARE network authorized private health care provider

☐ a DOD non-network TRICARE authorized private health care provider

☐ other health care provider

PART B: MEDICAL STATUS

Note: If you are unable to make certain of the military-related determinations contained in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as, DOD Recovery Care Coordinator) or an authorized VA representative.

(1) The Veteran's medical condition is:

☐ 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 servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating.

☐ A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50% or higher, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave.

☐ A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment.

☐ An injury, including a psychological injury, on the basis of which the covered veteran is enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

☐ None of the above.

(2) Is the veteran being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces? Yes☐ No☐

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the veteran undergoing medical treatment, recuperation, or therapy for this condition? Yes☐ No☐

If yes, please describe medical treatment, recuperation or therapy:

_____

PART C: VETERAN'S NEED FOR CARE BY FAMILY MEMBER

"Need for care" encompasses both physical and psychological care. It includes situations where, for example, due to his or her serious injury or illness, the veteran is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport him or herself to the doctor. It also includes providing psychological comfort and reassurance which would be beneficial to the veteran who is receiving inpatient or home care.

(1) Will the veteran need care for a single continuous period of time, including any time for treatment and recovery? Yes☐ No☐

If yes, estimate the beginning and ending dates for this period of time: _____

(2) Will the veteran require periodic follow-up treatment appointments? Yes☐ No☐

If yes, estimate the treatment schedule: _____

(3) Is there a medical necessity for the veteran to have periodic care for these follow-up treatment appointments? Yes☐ No☐

(4) Is there a medical necessity for the veteran to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? Yes☐ No☐

If yes, please estimate the frequency and duration of the periodic care:

_____

_____

Signature of Health Care Provider: _____ Date: _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. 2616; 29 CFR 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYEE REQUESTING LEAVE (As shown in Section I, Part "A" above).**

TO: Manual Recipients
FROM: Blaine Ryan-Lynch, Director of Staffing Services
SUBJECT: Revisions to the Recently Enacted Military Family Leave Provisions under the Family and Medical Leave Act

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INTRODUCTION

On October 28, 2009, President Obama signed into law the Fiscal Year 2010 National Defense Authorization Act. The new law includes both an expansion of and limitations to the recently enacted exigency leave benefits, and expansion of the caregiver leave provisions for eligible employees under the Family and Medical Leave Act (FMLA).

This memo provides an overview of the amendments to the FMLA. It should be noted that new regulations have not yet been promulgated by the United States Department of Labor (U.S. DOL). The information contained in this document summarizes our current understanding of the revisions to the FMLA and should be read in conjunction with Policy Bulletin 2009-01 and may be updated once new regulations or information becomes available.

Agencies are cautioned that provisions of the FMLA must be applied in the context of State leave policy, consistent with the Attendance Rules and negotiated agreements.

Agencies are required to post notices and update agency handbooks, and other written or electronic information about leave benefits to reflect the updated provisions regarding the FMLA.

Agencies should contact the Attendance and Leave Unit of this Department at 518-457-2295 if they require information when applying these revisions**.**

REVISED MILITARY FAMILY LEAVE ENTITLEMENTS

Qualifying Exigency Leave

Eligible employees may take up to 12 weeks of FMLA leave per calendar year for a qualifying exigency because the employee's spouse, son, daughter, or parent in the Armed Forces (including the National Guard or Reserves) is on covered active duty or has been notified of an impending call or order to covered active duty. The new legislation defines covered active duty to include members of the regular Armed Forces as well as members of the Reserves and National Guard but limits the availability of qualifying exigency leave to those members who are deployed to a foreign country. Specifically, for a member of a regular component of the Armed Forces, covered active duty means duty during the deployment of the member to a foreign country. For a member of a Reserve component of the Armed Forces covered active duty means duty during deployment of the member to a foreign country under a call or order to active duty during a war or during a national emergency declared by the President or Congress.

Qualifying Event

The new legislation retains the original eight situations for which qualifying exigency leave may be taken. However, the language has been edited to incorporate reference to 'covered active duty' as follows:

1. For "short-notice deployment" where a military member is notified of an impending call or order to covered active duty seven or fewer days from the date of deployment, in which case an eligible employee may take qualifying exigency leave for a period of seven days beginning on the date when the military member is notified of the impending deployment;
2. To attend official ceremonies, events or programs sponsored by the military that are related to covered active duty or call to covered active duty of a military member, or in advance of or during deployment to attend similarly related family support or assistance programs or informational briefings sponsored or promoted by the military, military service organizations, or the Red Cross;
3. For certain childcare and school activities necessitated by covered active duty or the call to covered active duty status of a military member, including to arrange for alternative childcare, provide childcare on an urgent, emergency (but not routine, regular or everyday) basis, enroll or transfer a child in a new school or day care facility, or attend meetings with school or day care staff due to circumstances arising from the deployment of the military member;
4. To make or update financial or legal arrangements to address a military member's absence while on covered active duty, and act as the military member's representative with respect to issues involving military service benefits;

5. To attend counseling provided by someone other than a health care provider due to covered active duty or call to covered active duty status of a military member;
6. To spend time with a military member who is on a short-term, temporary rest and recuperation leave during the period of deployment, limited to five days for each instance of rest and recuperation;
7. To attend certain post-deployment activities, such as arrival ceremonies and reintegration briefings and address issues arising from the death of a military member while on covered active duty status;
8. For additional activities arising out of a military member's covered active duty or call to covered active duty status where the employer and employee agree that such leave qualifies as an exigency and agree to both the timing and duration of the leave.

Eligible Employee

An eligible employee is one who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son, or daughter of a military member who is on covered active duty or has been notified of an impending call or order to covered active duty in the Armed Forces. As noted above, qualifying exigency leave is now available to family members of servicemembers in the regular Armed Forces as well as the National Guard and Reserves, provided the deployment is to a foreign country.

Documentation Provisions

The U.S. DOL has developed form WH-384 to enable the employer to obtain sufficient information to confirm the need for qualifying exigency leave. The first time an employee requests qualifying exigency leave under a specific set of orders, the employer may also require the employee to provide a copy of the military member's active duty orders.

The U.S. DOL has not yet issued new regulations, or updated the form to reflect the amended change. Agencies are still required to use the current form but must be aware of the amendments to the FMLA as they review documentation.

If the qualifying exigency involves meeting with a third party, the form requires that the employee provide contact information for that third party and explain the nature of the meeting. The employer may contact the third party to verify the appointment schedule and nature of the meeting but no additional information can be requested.

The employer may also contact an appropriate unit of the Department of Defense to verify that a military member is on covered active duty or call to covered active duty status but no additional information can be requested.

Other Provisions

Other provisions from the discussion of Qualifying Exigency Leave in Policy Bulletin 2009-01 (Amount of Leave to be Granted, Notice, and Use of Leave Credits) remain unchanged and are repeated below for reference.

Amount of Leave to be Granted

Eligible employees are entitled to up to 12 weeks of FMLA qualifying exigency leave per calendar year. Employees cannot exceed a combined total of 12 weeks of FMLA leave per calendar year for all qualifying reasons combined, excluding military caregiver leave.

Leave is available for a continuous period of time or on an intermittent or reduced schedule basis as necessary.

Notice

An employee's obligation to provide notice of leave due to a qualifying exigency is triggered when the employee first seeks to take such leave. Where this leave is foreseeable, eligible employees must provide notice to the employer that is reasonable and practicable.

Use of Leave Credits

FMLA leave is unpaid. However, employees may elect to charge appropriate leave credits during a period of FMLA leave. For example, an employee absent to make legal arrangements could elect to charge the absence to vacation or personal leave, but not to sick leave.

Military Caregiver Leave

Eligible employees may take up to 26 weeks of military caregiver leave under the FMLA in a single 12-month period to care for a covered servicemember with a serious injury or illness that was incurred in the line of duty while on active duty in the Armed Forces (including the National Guard or Reserves) or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces.

The new legislation expands the availability of military caregiver leave to include certain veterans. Specifically, the new legislation redefines the terms 'covered servicemember' and 'serious injury or illness.'

The term 'covered servicemember' means a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness that was incurred by the member in the line of duty on active

duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces); or a **veteran** who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

In the case of a member of the Armed Forces (including a member of the National Guard or Reserves), the term 'serious injury or illness' means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. In the case of a **veteran** who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes medical treatment, recuperation or therapy for the serious injury or illness, the term 'serious injury or illness' means a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.

As the U.S. DOL has not yet issued new regulations regarding the amendments to the FMLA and the U.S. Secretary of Labor has not yet defined the term 'qualifying injury or illness,' agencies are encouraged to call the Attendance and Leave Unit of the NYS Department of Civil Service for guidance.

Documentation Provisions

The U.S. DOL has developed form WH-385, Certification for Serious Injury or Illness of Covered Servicemember, to assist the employer in obtaining documentation of the need for military caregiver leave.

Any one of the following health care providers may complete this certification:

- A United States Department of Defense (DOD) health care provider
- A United States Department of Veterans Affairs (VA) health care provider
- A DOD TRICARE network authorized private health care provider or
- A DOD non-network TRICARE authorized private health care provider.

Satisfactory medical documentation also includes "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside.

The regulations prohibit recertification during the time period specified in the documentation, and prohibit second or third medical opinions in connection with leave requested for this purpose.

The U.S. DOL has not yet issued new regulations, or updated the form to reflect the amended changes. Agencies are still required to use the current form but must be aware of the amendments to the FMLA as they review documentation.

Other Provisions

Other provisions from the discussion of Military Caregiver Leave in Policy Bulletin 2009-01 (Eligible Employee, Amount of Leave to be Granted, Notice, and Use of Leave Credits) remain unchanged and are repeated below for reference.

Eligible Employee

An employee who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son, daughter, or next of kin of a covered servicemember is eligible for leave for this purpose. The regulations define next of kin of a covered servicemember as the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter in the following priority: blood relatives who have been granted legal custody, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the servicemember has specifically designated in writing another blood relative for purposes of military caregiver leave under the FMLA.

A husband and wife employed by the same employer are limited to a combined 26 week military caregiver leave in a single 12-month period per servicemember per injury.

Amount of Leave to be Granted

Eligible employees are entitled to up to 26 weeks of leave in a single 12-month period per covered servicemember per injury. Additional periods of up to 26 weeks of leave may be taken in subsequent 12-month period**s** to care for a different servicemember or to care for the same servicemember who has a subsequent serious illness or injury.

To determine the single 12-month period, the regulations require that the 12-month period must be measured forward from the date an employee's first military caregiver leave to care for the covered servicemember begins.

During the designated 12-month period, employees are limited to a combined total of 26 weeks of FMLA leave for any qualifying reason. Employees continue to be limited to 12 weeks of FMLA leave per calendar year for reasons other than to care for a covered servicemember.

Leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition should be designated as military caregiver leave in the first instance.

Leave is available in a continuous block of time or on an intermittent or reduced schedule basis as required.

Notice

Where leave is foreseeable based on planned medical treatment for a serious injury or illness of a servicemember, the normal FMLA notice requirement of 30 days or as soon as possible applies. Where leave is unforeseen, the normal FMLA notice requirement of as soon as practicable under the facts and circumstances of the specific case applies.

Use of Leave Credits

FMLA leave is unpaid. However, employees may elect to charge appropriate leave credits during a period of FMLA leave. For example, a State employee taking military caregiver leave to provide care for her wounded son is eligible to charge up to 15 days of absence in a calendar year to family sick leave and may also elect to charge other categories of leave credits.

TO: Manual Recipients
FROM: Blaine Ryan-Lynch, Director of Staffing Services
SUBJECT: Revised FMLA Regulations

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Revised Forms

INTRODUCTION

The revised federal Family and Medical Leave Act (FMLA) regulations become effective January 16, 2009. The revised regulations issued by the United States Department of Labor (U.S. DOL) clarify and modify current FMLA provisions, and establish two new FMLA entitlements – military caregiver leave and qualifying exigency leave which are described in greater detail below. In addition, revised FMLA forms have been promulgated; copies are attached.

This memo provides an overview of the changes in the FMLA regulations. Agencies are cautioned that provisions of the FMLA must be applied in the context of State leave policy, consistent with the Attendance Rules and negotiated agreements.

The information contained in this document summarizes our current understanding of the significant revisions to the FMLA regulations. Further guidance will be provided as issues are clarified.

In the interim, agencies should contact the Attendance and Leave Unit of this Department at 518-457-2295 if they require information when applying the revised regulations.

NEW MILITARY FAMILY LEAVE ENTITLEMENTS

Qualifying Exigency Leave

This new leave entitlement allows eligible employees to take up to 12 weeks of FMLA leave per calendar year for a qualifying exigency because the employee's spouse, son, daughter or parent meeting the definition of a covered military member is on active duty or has been notified of an impending call or order to federal active duty.

Qualifying Event

The FMLA regulations identify eight situations for which qualifying exigency leave may be taken by an eligible employee:

1. For "short-notice deployment" where a covered military member is notified of an impending call or order to active duty seven or fewer days from the date of deployment, in which case an eligible employee may take qualifying exigency leave for a

period of seven days beginning on the date when the covered military member is notified of the impending deployment;

2. To attend official ceremonies, events or programs sponsored by the military that are related to active duty or call to active duty of a covered military member, or in advance of or during deployment to attend similarly related family support or assistance programs or informational briefings sponsored or promoted by the military, military service organizations or the Red Cross;
3. For certain childcare and school activities necessitated by active duty or the call to active duty status of a covered military member, including to arrange for alternative childcare, provide childcare on an urgent, emergency (but not routine, regular or everyday) basis, enroll or transfer a child in a new school or day care facility, or attend meetings with school or day care staff due to circumstances arising from the deployment of the covered military member;
4. To make or update financial or legal arrangements to address a covered military member's absence while on active duty, and act as the covered military member's representative with respect to issues involving military service benefits;
5. To attend counseling provided by someone other than a health care provider due to active duty or call to active duty status of a covered military member;
6. To spend time with a covered military member who is on a short-term, temporary rest and recuperation leave during the period of deployment, limited to five days for each instance of rest and recuperation;
7. To attend certain post-deployment activities, such as arrival ceremonies and reintegration briefings and address issues arising from the death of a covered military member while on active duty status;
8. For additional activities arising out of a covered military member's active duty or call to active duty status where the employer and employee agree that such leave qualifies as an exigency and agree to both the timing and duration of the leave.

Eligible Employee

An eligible employee is one who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son or daughter of a servicemember who meets the definition of a covered military member.

A covered military member is an employee's spouse, son, daughter or parent in the National Guard or Reserves (or certain retired members of the Regular Armed Forces and retired Reserves) who is on active duty or has been notified of an impending call or order to active duty in the armed forces in support of a contingency operation.

Qualifying exigency leave is not available to family members of soldiers in the Regular Armed Forces, or where the call to active duty comes from a State rather than the federal government.

Amount of Leave to be Granted

Eligible employees are entitled to up to 12 weeks of FMLA qualifying exigency leave per calendar year. Employees cannot exceed a combined total of 12 weeks of FMLA leave per calendar year for all qualifying reasons combined, excluding military caregiver leave.

Leave is available for a continuous period of time or on an intermittent or reduced schedule basis as necessary.

Notice

An employee's obligation to provide notice of leave due to a qualifying exigency is triggered when the employee first seeks to take such leave. Where this leave is foreseeable, eligible employees must provide notice to the employer that is reasonable and practicable.

Documentation Provisions

The U.S. DOL has developed form WH-384 to enable the employer to obtain sufficient information to confirm the need for qualifying exigency leave. The first time an employee requests qualifying exigency leave under a specific set of orders, the employer may also require the employee to provide a copy of the covered military member's active duty orders.

If the qualifying exigency involves meeting with a third party, the form requires that the employee provide contact information for that third party and explain the nature of the meeting. The employer may contact the third party to verify the appointment schedule and nature of the meeting but no additional information can be requested.

The employer may also contact an appropriate unit of the Department of Defense to verify that a covered military member is on active duty or call to active duty status but no additional information can be requested.

Use of Leave Credits

FMLA leave is unpaid. However, employees may elect to charge appropriate leave credits during a period of FMLA leave. For example, an employee absent to make legal arrangements could elect to charge the absence to vacation or personal leave, but not to sick leave.

Military Caregiver Leave (effective January 28, 2008)

This new leave entitlement allows eligible employees to take up to 26 weeks of military caregiver leave under the FMLA in a single 12-month period to care for a covered family member with a serious illness or injury that was incurred in the line of duty while on active duty in the Regular Armed Forces, National Guard or Reserves.

Qualifying Event

Leave is available to care for a covered servicemember who sustained a serious injury or illness in the line of duty on active duty that renders the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

For this purpose a covered servicemember is a current member of the Regular Armed Forces, including a member of the National Guard or Reserves, or a member of the Regular Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy or is otherwise in outpatient status or on the temporary disability retired list.

Eligible employees may not take leave under this provision to care for former members of the Regular Armed Forces, former members of the National Guard or Reserves, and members on the permanent disability retired list.

Eligible Employee

An employee who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son, daughter or next of kin of a covered servicemember is eligible for leave for this purpose. The regulations define next of kin of a covered servicemember as the nearest blood relative other than the covered servicemember's spouse, parent, son or daughter in the following priority: blood relatives who have been granted legal custody, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the servicemember has specifically designated in writing another blood relative for purposes of military caregiver leave under the FMLA.

A husband and wife employed by the same employer are limited to a combined 26 week military caregiver leave in a single 12-month period per servicemember per injury.

Amount of Leave to be Granted

Eligible employees are entitled to up to 26 weeks of leave in a single 12-month period per covered servicemember per injury. Additional periods of up to 26 weeks of leave may be taken

in subsequent 12-month periods to care for a different servicemember or to care for the same servicemember who has a subsequent serious illness or injury.

To determine the single 12-month period, the regulations require that the 12-month period must be measured forward from the date an employee's first military caregiver leave to care for the covered servicemember begins.

During the designated 12-month period, employees are limited to a combined total of 26 weeks of FMLA leave for any qualifying reason. Employees continue to be limited to 12 weeks of FMLA leave per calendar year for reasons other than to care for a covered servicemember.

Leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition should be designated as military caregiver leave in the first instance.

Leave is available in a continuous block of time or on an intermittent or reduced schedule basis as required.

Notice

Where leave is foreseeable based on planned medical treatment for a serious injury or illness of a servicemember, the normal FMLA notice requirement of 30 days or as soon as possible applies. Where leave is unforeseen, the normal FMLA notice requirement of as soon as practicable under the facts and circumstances of the specific case applies.

Documentation Provisions

The U.S. DOL has developed form WH-385, Certification for Serious Injury or Illness of Covered Servicemember, to assist the employer in obtaining documentation of the need for military caregiver leave.

Any one of the following health care providers may complete this certification:

- A United States Department of Defense (DOD) health care provider
- A United States Department of Veterans Affairs (VA) health care provider
- A DOD TRICARE network authorized private health care provider or
- A DOD non-network TRICARE authorized private health care provider.

Satisfactory medical documentation also includes "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside.

The regulations prohibit recertification during the time period specified in the documentation, and prohibit second or third medical opinions in connection with leave requested for this purpose.

Use of Leave Credits

FMLA leave is unpaid. However, employees may elect to charge appropriate leave credits during a period of FMLA leave. For example, a State employee taking military caregiver leave to provide care for her wounded son is eligible to charge up to 15 days of absence in a calendar year to family sick leave and may also elect to charge other categories of leave credits.

KEY REVISIONS TO CURRENT FMLA PROVISIONS

Effective Date

The new regulations go into effect on January 16, 2009 and apply to FMLA leave on or after that date.

Eligibility for FMLA Leave

Service Requirements

In order to be eligible for FMLA leave, one of the requirements an employee must meet is to have been employed by the employer for at least 12 cumulative months or 52 cumulative weeks of service on the date the FMLA leave will begin. The new regulations clarify that, although the 12 months of employment do not have to be consecutive, employers are not required to count employment prior to a continuous break in service of seven years or more, unless the break in service was occasioned by the employee's fulfillment of military service obligations in the National Guard or Reserves, or unless a collective bargaining agreement affirmed the employer's intention to rehire the employee after the break in service.

However, New York State as an employer will continue its current policy of counting all State service regardless of the duration of any breaks in such service toward meeting the 12 months of service requirement. Accordingly, an employee's total State service must be counted when determining if the employee has completed the required 52 cumulative weeks of service, regardless of any breaks in service and regardless of the percentage of time paid during each of the 52 weeks if the employee was paid for any portion of that workweek. (For this purpose a workweek is the agency's workweek for payment of salary which is normally Thursday through Wednesday).

There is no change in the regulations that an employee must have worked a minimum of 1250 hours during the 52 consecutive weeks immediately preceding the date FMLA leave is to begin in order to be eligible for FMLA leave.

Note: For purposes of meeting the 1250 hour requirement, time spent on approved Employee Organization Leave (but not on Union Leave) must be counted, as must time the employee would have worked but for the performance of ordered military duty.

Period of Eligibility Determination

Eligibility is determined at the commencement of the first instance of leave for each FMLA-qualifying reason in the calendar year. Generally, for chronic medical conditions, all FMLA absences for the same qualifying reason are considered a single leave and the employee maintains eligibility for that reason for leave throughout the calendar year. For example, an employee with asthma may have several periods of absence during the calendar year for that same condition and need only meet the eligibility criteria for the first such absence in the calendar year. In contrast, an employee who has two episodes of flu during the calendar year must meet the eligibility criteria at the start of each period of absence.

Eligible Categories of Employees

Although not specifically addressed in the regulations, in accordance with State policy, the term "spouse" must be interpreted to include same-sex marriages that are legally performed in jurisdictions where they are legally recognized.

Qualifying Reasons

FMLA leave may now be taken for qualifying exigencies in connection with certain federal military activation of a family member and to care for a family member who is a servicemember as described under New Military Family Leave Entitlements above.

Definition of Serious Health Condition Under FMLA

The new regulations retain the six definitions of serious health condition that were already in effect and clarify three issues related to those definitions with respect to visits to health care professionals:

1. For employees taking leave under the "three consecutive calendar days of incapacity plus two visits to a healthcare provider" definition, the two visits must occur within 30 days of the period of initial incapacity, absent extenuating circumstances.

2. For employees taking leave under the "three consecutive calendar days of incapacity plus a regimen of continuing treatment" definition, the first visit to a health care professional must occur within 7 days of the initial incapacity.

3. The term "periodic visits to a healthcare provider" for chronic serious health conditions means at least two visits to a healthcare provider per year.

Use of Leave Credits for FMLA Leave

The new regulations provide that employees can be required to follow the employer's normal procedural requirements for use of paid leave, such as advance notice except in emergency situations. The regulations also remove the previous restriction on use of accrued overtime compensatory time for hours worked beyond 40 in a workweek for use of paid FMLA leave.

The Medical Facts section of Medical Certification forms WH-380E and WH-380F provides that the healthcare provider may include a diagnosis along with other relevant facts such as symptoms, regimen of continuing treatment, etc. Agencies cannot have a blanket policy of requiring that a diagnosis be provided in order for the medical certification to be deemed sufficient. So long as the documentation contains medical facts sufficient to confirm the employee's eligibility for FMLA leave, the agency cannot find the medical documentation deficient solely because it does not include a diagnosis. Questions about sufficiency of medical documentation should be discussed with the Attendance and Leave Unit.

While not a change, agencies are reminded of the following general provisions regarding an employee's use of leave credits under the FMLA:

The FMLA does not require an employer to authorize the use of paid sick leave in any circumstance where it would not otherwise be authorized. As a matter of State policy, when use of leave credits would be allowed under the Attendance Rules, employees may elect to use appropriate leave credits during a period of FMLA leave or may choose not to use credits at their option. The term "appropriate leave credits" means credits that are available for absences for that specific reason. For example, no more than 15 days of accrued sick leave may be used in any calendar year for illness in the family.

The FMLA permits employees to use accrued vacation and personal leave credits and to go on leave without pay during FMLA absences even when accrued sick leave credits are available. Agencies cannot require that employees first exhaust sick leave credits before using other credits as sick leave or that all credits be exhausted before going on leave without pay. (This supercedes the normal State policy that sick leave credits must be used first.)

Agencies should use the FMLA Medical Certification for all absences subject to the FMLA, regardless of whether or not the employee elects to charge leave credits. Employers may not request additional medical information to support an employee's choice to use accrued paid leave during a period of FMLA. The FMLA Medical Certification form contains sufficient

information on which to base approval of both the absence and the use of leave credits during that absence. Agencies should consult with the Attendance and Leave Unit regarding exceptional circumstances.

Amount of FMLA Leave to be Granted

Intermittent Leave

Under the new regulations, employees who take intermittent FMLA leave for planned medical treatment have a statutory obligation to make reasonable effort to schedule such planned medical treatment so as to not unduly disrupt workplace operations. Previously, their obligation to make such effort was triggered by a request of the employer.

Impact of Work Schedule

The new regulations clarify that the FMLA leave entitlement for an employee who works a schedule that varies from week to week is based on the weekly average over the 12-month period preceding the leave (not just the prior 12 weeks). While we believe that this will have little effect on any individual agency, agencies are advised to contact the Attendance and Leave Unit if they have a question as to whether they have an employee with a schedule requiring this computation.

FMLA Leave and Overtime Worked

Where an employee would normally be required to work overtime, but cannot do so because of a FMLA-qualifying condition, under the amended regulations the employee may now be charged FMLA leave for the hours not worked. Whether or not the hours may be counted depends on whether the employee would have been required to work the overtime hours but for the taking of FMLA leave and therefore only applies to mandatory overtime not worked due to a FMLA-qualifying condition. Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

The recently enacted regulations give the following example: An employee is using intermittent leave. The employee is a 40 hour per week employee but during a particular week will be required to work one 8 hour overtime shift. That employee is actually being required to work 48 hours in that particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week. During that workweek, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek which equals 1/6 of a workweek.

Note: Agencies are advised to keep track of mandatory overtime assignments not worked due to an employee's FMLA-qualifying leave and to contact the Attendance and Leave Unit for guidance regarding computation of FMLA usage.

Lastly, the regulations make clear that an agency may not discriminate in the assignment of mandatory overtime because an employee takes FMLA leave. For example, an agency cannot schedule only FMLA leave takers for required overtime in order to deplete their FMLA leave entitlement, while allowing other employees to volunteer for overtime.

Requests for FMLA Leave

The new regulations clarify that employees must do the following:

1. The revised regulations make clear that an employee must provide the employer at least 30 calendar days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when the leave will begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. If such notice is not given, the regulations permit an agency to ask an employee why 30 days notice was not given and potentially delay FMLA leave until 30 days after the date the employee actually provided notice. **Agencies should consult with the Attendance and Leave Unit before they delay the start of any FMLA leave because of a failure to provide 30 days notice.** Agencies are also cautioned that even if FMLA leave is delayed, the employee may still be entitled to take leave under the Attendance Rules and applicable collective bargaining agreements.

2. Where leave is not foreseeable, the regulations clarify that employees must follow the employer's usual and customary notice and procedure for requesting leave, absent extenuating circumstances.

3. An employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, the anticipated timing of such leave and the duration of the leave. Depending on the situation, an employee may have to include or the employer can ask for certain information to demonstrate the existence of a FMLA-qualifying leave. Examples of such information include but are not limited to: whether the condition renders the employee unable to perform the essential functions of the job, whether the employee has been hospitalized overnight, whether the employee or family member is under the continuing care of a health care provider, and, if the leave is for a family member, whether the condition renders the family member unable to perform daily activities.

4. When an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave.

5. Employees must comply with the employer's usual and customary procedures regarding notification of absence (such as call-in procedures), except under unusual circumstances.

Designation of FMLA Leave

The revised regulations have modified the procedure by which leave for an FMLA qualifying condition is approved. The new regulations eliminate the provisional or preliminary designation of FMLA leave prior to receipt of medical documentation. Instead, upon receipt of an employee's request for FMLA leave, or upon the agency becoming aware that a leave may be FMLA-qualifying, the agency must notify the employee concerning their eligibility for leave. Upon receipt of satisfactory medical documentation, the agency must notify the employee of designation of the leave as FMLA-qualifying.

Notification of Eligibility

If an employee requests FMLA leave or an agency acquires knowledge that an employee's leave request may be FMLA-qualifying, the employer must provide the employee with a Notice of Eligibility and Rights and Responsibilities form which details the employee's eligibility for such leave, specific expectations, obligations and consequences of the employee's failure to meet those obligations. This form must be provided within 5 business days of acquiring knowledge that leave may be FMLA, absent extenuating circumstances. Agencies must use the U.S. DOL Form WH-381 (Notice of Eligibility and Rights and Responsibilities) which is attached hereto. If medical certification is being sought, an agency must also send either the U.S. DOL Form WH-380E (Employee Medical Certification) or the U.S. DOL Form WH-380F (Family Member Medical Certification) with the U.S. DOL Form WH-381. Employees have 15 calendar days to provide a completed Medical Certification form, absent extenuating circumstances.

Designation Notice

When an agency has enough information to determine whether the request for leave is FMLA-qualifying (such as following the receipt of a requested medical certification), the agency now has 5 business days to designate this leave as FMLA. This designation shall be accomplished by sending the employee a fully completed Designation Notice (U.S. DOL Form WH-382). The Designation Notice requires that the agency provide the employee with specific information such as the amount of FMLA leave that will be counted toward the employee's FMLA leave entitlement, if it is known at the time of the designation. If an agency will require a fitness for duty certification of the employee's ability to resume work, the agency must so indicate on the Designation Notice. Also, if an agency will require a fitness for duty certificate that specifically addresses an employee's ability to perform the essential functions of the employee's position, an agency must so indicate on the Designation Notice and provide a list of the essential functions of the employee's position.

If the absence has already begun, the effective date of the designation is the first day of absence, provided the designation is made within the time frames established by the regulations.

If the employee fails to submit the required medical certification or if the leave is determined not to qualify as FMLA leave, the employee's absence will fall under normal State policy for such absence.

If the information an agency provides to an employee in the Designation Notice changes (such as the employee exhausts his/her FMLA leave entitlement), the agency must provide written notice of such change within 5 business days of receipt of an employee's first notice of the need for leave subsequent to any change.

An agency must also notify an employee of the amount of leave counted against an employee's leave entitlement. If known at the time of FMLA designation, this amount of FMLA leave must be included in the Designation Notice. If not known at time of designation, then the agency must provide notice of the amount of leave counted against the employee's leave entitlement upon request by the employee but not more often than once every 30 days and only if leave was taken during that period. Such notice may be oral but must be confirmed in writing by the next payday unless that payday is less than one week after the oral notice. If it is less, then written notice must be sent by the following payday.

Employee Status Pending Designation

Although the provisional designation provision has been eliminated, agencies should consider an employee's leave tentatively covered by the FMLA once the agency notifies the employee of eligibility for FMLA leave and requests medical certification.

While the regulations are silent on the employee's status during the five-day period between the employee's notice of the need for leave and the employer's required Notification of Eligibility, agencies should be guided by the fact that most requested leaves may ultimately be designated as FMLA leave. Therefore it is not generally advisable to take actions that would need to be reversed if this period of leave is subsequently designated as FMLA leave.

Employees continue to be eligible for leave pursuant to the Attendance Rules and negotiated agreements during any period while awaiting designation of leave as FMLA qualifying, and any period for which the employee is found ineligible for FMLA leave.

Questions concerning employee status pending designation of FMLA leave should be referred to the Attendance and Leave Unit.

Retroactive Designation

Under the new regulations, an employer may retroactively designate leave as FMLA with appropriate notice to the employee, provided the employer's failure to timely designate leave

within the required time period does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated.

The effective date of a timely designation made within the required time period is the first day of absence, even where the absence has already begun. Accordingly, a designation made within the established designation period is not considered to be a retroactive designation, even though the effective date is the first day of an absence that has already begun.

Disputes

The regulations state that disputes as to whether leave qualifies as FMLA leave should be resolved through discussions between employer and employee, and that such discussions should be documented.

Second and third medical opinion provisions continue to apply. Where an agency requests a second or third opinion to determine if a request for leave is FMLA-qualifying, an employee remains tentatively entitled to the benefits of the FMLA. If the request for leave is ultimately found not to qualify under the FMLA, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under established leave policies.

Medical Certification of FMLA Leave

The regulations require use of separate medical certification forms for requests for leave for an employee's own serious health condition and requests for leave for the serious health condition of a family member.

Employers should request medical certification within 5 business days of notice of or commencement of leave. The employee continues to have 15 calendar days to provide medical certification following such request.

If an employer considers the medical certification to be deficient, the employer must provide the employee with **written** notice of the deficiencies and give the employee 7 calendar days, unless not practical under the circumstances, to correct the deficiencies in the certification. That notice must also advise the employee that FMLA leave may be denied if the employee fails to provide adequate certification.

A certification is incomplete if one or more of the applicable entries have not been completed. A certification is insufficient if the information provided is vague, ambiguous, or non-responsive.

The new regulations permit certain employer representatives, including human resources professionals, leave administrators and management officials (but not the direct supervisor) to contact the employee's health care provider to clarify and authenticate the medical certification provided by the employee. Prior to making any contact with the health care provider, the employer must first provide the employee an opportunity to cure any deficiencies in the certification. The employee is not required to permit his or her health care provider to communicate with the employer for purposes of clarification, but if such contact is not permitted and the employee does not otherwise clarify an unclear certification, the employer may deny the designation of FMLA leave. For purposes of authentication, an employee may be required to execute a HIPAA waiver.

Recertification

The revised regulations do not alter an agency's ability to request a recertification when the original circumstances under which leave was granted have changed or the employer has reason to doubt that the absence is FMLA-qualifying.

However, the revised regulations clarify an agency's ability to require certification for FMLA leave within a calendar leave year in other circumstances.

With respect to all leaves, regardless of whether they are continuous or intermittent, generally, an agency may not request a recertification more often than every 30 days and only in connection with an absence when no minimum duration for the condition is specified.

However, if the medical certification states that there is a minimum duration for the condition, the agency must wait until that minimum duration passes before requiring a recertification, unless the minimum duration specified in the documentation is more than six months in the calendar leave year. If the minimum duration is more than six months in the calendar leave year, the agency may request a recertification in connection with an absence after the six-month point, even for lifetime or chronic conditions.

These changes do not alter an agency's ability to require a new medical certification at the beginning of each calendar leave year for individuals who have conditions which will require leave in the next calendar year. Such annual certifications may be requested separate and apart from an absence.

Agencies are reminded that FMLA eligibility expires at the end of each calendar year and must be re-determined at the start of each new calendar year. Agencies must notify employees of eligibility and designate leave as appropriate at the start of each new calendar year.

Agency Responsibilities in Connection with FMLA Leave

Posting and Notice Requirements

The regulations clarify that electronic posting of the FMLA notice of employee rights and responsibilities that covered employers are required to post on their premises may be sufficient in certain circumstances, with paper posting for employees without electronic access. A copy of that notice, WH Publication 1420, Employee Rights and Responsibilities under the Family and Medical Leave Act, is attached.

Where the employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general FMLA notice in the language in which the employees are literate.

The general notice must also be included in employee handbooks or other materials about employee benefits. Employers who do not have an employee handbook must provide employees with a copy of the general notice at time of hire in either paper or electronic form.

Reinstatement Rights Under FMLA

Fitness for Duty Certification

Employer policies or practices requiring fitness for duty certification must be uniformly applied for all similarly-situated employees (i.e., same serious health condition, same occupation).

Whenever the employer intends to require the employee to provide a fitness for duty certification to return to work, the employee must be so notified in the Designation Notice. Where the employer requires that the certification notice specifically address the employee's ability to perform the essential functions of the employee's job, the Designation Notice must so specify and the employer must provide the employee with a list of these essential functions along with the Designation Notice.

The employer may contact the employee's healthcare provider to clarify and authenticate the fitness for duty certification but may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions may be required.

Intermittent Absence and Fitness for Duty Certification

Where reasonable job safety concerns exist regarding the employee's ability to perform his/her job duties based on the serious health condition for which the employee took leave, employers may now request, no more than once every 30 days, a fitness for duty certification before allowing an employee to return to work from intermittent leave. If the employer chooses

to require such certification, the employer must inform the employee at the time it issues the Designation Notice that for each instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness for duty certification unless one has already been submitted within the past 30 days.

The employer can set a different interval for requiring a fitness for duty certification but not more frequently than once every 30 days, as long as the employee is so notified in advance of the employee taking the intermittent leave.

Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others and should take into account the likelihood, nature and severity of the potential harm.

Questions concerning the employee's status in cases where a fitness for duty certification is not provided should be directed to the Attendance and Leave Unit.

Protections Provided by the FMLA and Enforcement Mechanisms

Failure to Properly Designate

The previous rule that required employers who failed to properly designate FMLA leave to offer an employee an additional 12 weeks of FMLA protected leave has been eliminated. The new regulations clarify that an employer may be liable if the employee suffered harm as the result of the employer's failure to properly designate FMLA leave.

The new regulations confirm that failure to provide the employee with the required written notice can be considered "interference" with the employee's FMLA rights.

The regulations also confirm that the remedy for interfering with an employee's FMLA rights may include liability "for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered."

NEW FORMS TO BE USED

As a matter of State policy, agencies are required to use the following forms developed by the U.S. DOL. Any additional information agencies need to provide to employees, such as Health Care Spending Account information for employees on FMLA leave (see Advisory Memo 2001-02), should be included in an attachment or in a cover letter.

Attachments

Employee Rights and Responsibilities Under the Family and Medical Leave Act (WH Publication 1420)

Certification of Health Care Provider for Employee's Serious Health Condition (Form WH-380-E)

Certification of Health Care Provider for Family Member's Serious Health Condition (Form WH-380-F)

Notice of Eligibility and Rights and Responsibilities (Form WH-381)

Designation Notice (Form WH-382)

Certification of Qualifying Exigency for Military Family Leave (Form WH-384)

Certification for Serious Injury of Illness of Covered Servicemember for Military Family Leave (Form WH-385)

TO: Manual Holders
FROM: William E. Doyle, Director
Division of Staffing Services
SUBJECT: FMLA Notification About Employee Participation in the Health Care Spending Account
DATE: May 25, 2001

The Employee Benefits Management Unit of the Governor's Office of Employee Relations has requested that we provide you with the following information about the Health Care Spending Account, a new benefit program established in 2001. Those employees participating in this program who are absent on unpaid FMLA leave have the option of continuing Health Care Spending Account coverage, through post-tax contribution to the Account, or revoking coverage for the remainder of the calendar year. If an employee absent on unpaid FMLA leave does *not* make arrangements to continue participation, his or her coverage under the Health Care Spending Account will automatically terminate, effective the date of the employee's last contribution into the account. The Family and Medical Leave Act also requires the plan to permit an employee to be reinstated in the Health Care Spending Account upon return from unpaid FMLA leave on the same terms that existed prior to taking FMLA leave.

It is important that agencies provide written notice to employees about their right to continue or revoke coverage under the Health Care Spending Account when the employee requests unpaid FMLA leave. Accordingly, we recommend that agencies revise their FMLA notification letters to include a statement that notifies employees of their right to continue or discontinue coverage in the Health Care Spending Account while on unpaid FMLA leave and to be reinstated in the Health Care Spending Account during the same calendar year upon return from unpaid FMLA leave.

For agencies that use the sample memorandum E (1) or E (2) attached to Policy Bulletin 95-01 dated April 19, 1995 we would suggest that the following sentence be added:

- For Memorandum E (1), Sample Memorandum of Agency Response to an Employee Request for Family or Medical Leave add the following as 5 (d): If you wish to continue or revoke coverage in the Health Care Spending Account while on unpaid FMLA leave, contact your Health Benefits Administrator for information. If you do not make arrangements to continue participation, your coverage under the Health Care Spending Account will automatically terminate effective the date of your last contribution into the Account.

- For Memorandum E (2), Sample Memorandum on Agency Designation of Family or Medical Leave add the following statement as 3 (d): If you wish to continue or revoke

coverage in the Health Care Spending Account while on unpaid FMLA leave, contact your Health Benefits Administrator for information. If you do not make arrangements to continue participation, your coverage under the Health Care Spending Account will automatically terminate effective the date of your last contribution into the Account.

Finally, employees on paid FMLA leave have continued coverage under the Health Care Spending Account unless there is a reduction in salary such that the bi-weekly deduction cannot be taken.

Questions about FMLA notification may be directed to the Attendance and Leave Unit of the Department of Civil Service at (518) 457-2295.

To: Attendance and Leave Manual Recipients
From: Robert W. DuBois
Subject: Eligibility Guidelines for the Family and Medical Leave Act
Date: December 11, 1998

This bulletin supercedes the eligibility criteria in the following documents:

- Policy Bulletin 94-01 (pp.5, 6, 12, 13)
- Policy Bulletin 95-01 (p.1)
- Advisory Memorandum 95-04 (p. 2)
- General Information Bulletin 95-01 (pp. 3, 4, 6)
- General Information Bulletin 96-02 (no longer in effect)

This policy arises from clarification of the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work.

Agencies should be aware that, unlike leave benefits which are based in rule or negotiated agreement, the Department of Civil Service has no statutory authority for interpretation of the FMLA, a federal law which is administered by the U.S. Department of Labor. The policy set forth in this memorandum represents New York State's interpretation, as an employer, of the rights and obligations under the FMLA and its impact on benefits currently provided by law, rule, regulation and/or negotiated agreement. As issues are clarified by the Wage and Hour Division of the U.S. Department of Labor or by court decision we will provide additional information.

Policy

Effective January 1, 1999, for FMLA leaves commencing on or after the effective date of this policy change, Executive Branch employees will be deemed to have met the minimum service requirements to be eligible for FMLA leave only if:

The employee has been employed for at least 12 cumulative months on the date FMLA leave is to begin. An employee's total State service must be counted when determining if the employee has completed the required 52 cumulative weeks of service, regardless of any breaks in service and regardless of the percentage of time paid during each of the 52 weeks. A week counts toward the 52 weeks if the employee was paid for any portion that workweek. (For this purpose, a workweek is the agency's workweek for payment of salary, which is normally Thursday through Wednesday.)

and

The employee must have worked a minimum of 1250 hours during the 52 consecutive weeks immediately preceding the date FMLA leave is to begin. When counting the number of hours necessary to meet this 1250-hour threshold, the agency must include all hours the employee actually worked. The law does not include paid leave time such as holidays, vacation, sick leave, sick leave at half-pay, STD, workers' compensation leave, personal leave, military leave, leave for jury duty or witness leave, as time worked toward the 1250-hour minimum. For employees who are ineligible for overtime pay, hours worked for which the employee was not compensated count toward the 1250 hour requirement.

Once it has been determined that an employee has worked the 12 cumulative months, that eligibility criterion has been met for the remainder of the individual's career. However, agencies need to determine if an employee meets the 1250 hours of service requirement each time FMLA leave is designated or requested.

For example, an employee who had met the FMLA eligibility requirement of 1250 hours of service was placed on FMLA leave from June 1 through August 21, 1998, and charged this absence to sick leave and other leave credits. After exhausting his FMLA entitlement the employee continued to be absent on sick leave at half-pay. The employee continued to be absent and disabled as of January 1, 1999, but was not eligible for FMLA leave since he had not met the 1250-hour threshold.

An employee with a 37.5-hour basic workweek will have met the 1250-hour threshold by working 65 percent or more during the 52 weeks preceding the leave. For employees with a 40-hour basic workweek, the minimum is 61 percent.

In determining eligibility, it is important to ascertain whether part-time employees, regardless of their regular employment percentage, have met the 1250-hour threshold FMLA eligibility requirement (for example, by working additional hours beyond their normal work schedule.) For example, an employee with a 40-hour basic workweek, who works half-time and works 266 hours of overtime between July 1 and December 31, 1998, has worked sufficient hours to meet the threshold of 1250 hours of service as of January 1, 1999.

Each time an FMLA request is made, agencies should review whether the employee has met the 1250-hour threshold as of the date the leave is scheduled to begin to determine whether formerly ineligible employees have now met the eligibility criteria or, conversely, to determine if formerly eligible employees have lost eligibility (for example, as the result of extended leave.)

Agencies are encouraged to contact the Employee Relations Unit of this Department at (518) 457-2295 with any questions regarding implementation of the FMLA.

TO: Manual Recipients

FROM: Peter Elmendorf, Personnel Services Division

SUBJECT: Impact of Family and Medical Leave Act on Sections 71 and 73 of the Civil Service Law

The purpose of this memorandum is to clarify the impact of the Family and Medical Leave Act (FMLA) on the operation of Sections 71 and 73 of the Civil Service Law.

Section 71 of the Civil Service Law permits the termination of an employee who, as the result of a single occupational injury or illness, has been absent for one cumulative year or who is found to be permanently disabled. Periods of absence for that occupational injury or illness which have been designated as FMLA leave count toward the calculation of the cumulative year.

Similarly, Section 73 of the Civil Service Law permits the termination of an employee who has been absent for one continuous year due to non-occupational personal disability. Periods of that absence which have been designated as FMLA leave count toward the calculation of the continuous year.

However, an employee who is on leave due to a serious health condition should not be terminated pursuant to Section 71 or 73 while absent on FMLA leave.

Since eligible employees are entitled to up to 12 weeks of FMLA leave in each calendar year, this means that an employee must first have exhausted his/her 12-week FMLA entitlement in the current calendar year before being terminated.

Where an employee's continuous year of absence due to ordinary disability spans two calendar years, the employee should not be terminated under Section 73 during the first twelve weeks of the second calendar year since he/she would not yet have exhausted his/her FMLA leave entitlement for that calendar year. For example, an employee with a Monday through Friday work schedule who is continuously absent for ordinary disability beginning February 21, 1995, should not be terminated before March 22, 1996, even though he/she would have been absent one continuous year on February 21, 1996.

For purposes of Section 71, where leave may be intermittent, an employee whose intermittent leave spans more than one calendar year should not be terminated until he/she

1. has exhausted his/her FMLA leave entitlement in the current calendar year and
2. has reached the one cumulative year threshold or has been determined to be permanently disabled.

For example, an employee absent for a total of six months in 1994, five months in 1995, and again absent in 1996 should not be terminated under Section 71 in 1996 until he/she has reached the one cumulative year threshold and has exhausted his/her FMLA entitlement in 1996.

If this employee uses up his/her FMLA entitlement in 1996 for reasons other than the workers' compensation absence and then is absent because of a compensable injury or illness, he/she could be terminated as soon as he/she reaches the one cumulative year. Alternatively, if this employee uses four weeks of FMLA leave in 1996 for the compensable absence and then uses the remaining eight weeks of his/her 1996 FMLA entitlement to care for an ill family member, he/she could be separated if absent again in 1996 for the compensable illness or injury since the cumulative year threshold has been exceeded and the 1996 FMLA entitlement has been exhausted.

Agencies are reminded that each time an employee is granted FMLA leave, he/she must requalify in terms of having rendered 1250 hours of service within the 12-month period immediately preceding that period of FMLA leave. An employee must requalify for each period of FMLA leave even if such periods are part of a single continuous absence. (See *General Information Bulletin No. 95-01,* dated June 6, 1995, for a further discussion of this issue.)

Questions may be directed to the Employee Relations Section of the Department of Civil Service at (518) 457-2295 or 457-5167.

TO: State Departments and Agencies

FROM: Peter Elmendorf, Director
Personnel Services Division

SUBJECT: Update on the Family and Medical Leave Act

This Bulletin is a compilation of questions and answers concerning implementation of the Family and Medical Leave Act (FMLA) and supplements the guidance provided in Policy Bulletin 95-01 dated April 19, 1995. General Information Bulletins will be issued as additional questions are raised and clarified.

Agencies are reminded that, unlike leave benefits which are based on rule or negotiated agreement, the Department of Civil Service has no statutory authority for implementation of the FMLA, which is a federal law administered by the U.S. Department of Labor (DOL). The responses set forth in this Bulletin represent the Department of Civil Service's interpretation of the rights and obligations of employees and employers under the FMLA, and its impact on benefits currently provided by law, rule, regulation and/or negotiated agreement. Relevant sections of DOL's final regulations implementing the FMLA are cited in brackets at the end of each answer for your reference.

Question No. 1:

How are workweeks of FMLA leave calculated for employees who work on alternative work schedules?

Answer:

An employee is entitled to take up to 12 workweeks of FMLA leave per calendar year. A workweek is comprised of the number of days and hours in the employee's normal workweek. For example, an employee who normally works a 40-hour workweek of four ten-hour days is entitled to up to 12 workweeks of FMLA leave which equates to 48 ten-hour days or 480 hours. A part-time employee who normally works 20 hours a week (5 four-hour days) is eligible for up to 12 workweeks of FMLA leave which equates to 60 four-hour days or 240 hours. A part-time employee who normally works 20 hours a week (2 eight-hour days and one four-hour day) is eligible for up to 12 workweeks of FMLA leave (24 eight-hour days and 12 four-hour days or 240 hours).

If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period must be used to calculate the employee's normal workweek. [29 CFR § 825.205]

Question No. 2:

How is FMLA leave calculated where an employee uses it on an intermittent or reduced leave basis?

Answer:

The FMLA permits employees to take leave on an intermittent or reduced leave schedule under certain circumstances.

A full-time employee who normally works five days per week and who takes intermittent FMLA leave one day per week uses 1/5 of a week of FMLA leave.

When an employee reduces his/her hours worked because of an FMLA absence, the amount of FMLA leave used is calculated by subtracting the hours in the FMLA reduced leave schedule from the hours in the employee's normal work schedule. For example, a part-time employee who normally works 30 hours per week and works an FMLA reduced leave schedule of 20 hours per week has used ten hours of FMLA leave in the workweek (1/3 of a workweek). A full-time employee who normally works 40 hours per week and works an FMLA reduced leave schedule of 20 hours per week has used 20 hours of FMLA leave in the workweek (1/2 of a workweek). [29 CFR §§ 825.203, 825.205]

Question No. 3:

What happens when a holiday falls during a period of FMLA leave? Does it count as a day of FMLA leave used?

Answer:

A holiday counts as a day of FMLA leave used, whether or not the agency is closed on that day. [29 CFR § 825.200(f)]

Question No. 4:

Must an employee always be incapacitated for a minimum of three consecutive days before the employee is deemed to have an FMLA-qualifying serious medical condition?

Answer:

No. For example, the three consecutive calendar day requirement does not apply to:

- cases involving inpatient care (an overnight stay in a hospital or other residential medical care facility)
- any period of incapacity due to pregnancy or for prenatal care
- any period of incapacity or treatment for a chronic serious health condition (such as asthma, which may cause episodic incapacity)
- any period of absence to receive multiple treatments for a condition that might otherwise, if untreated, result in incapacity of more than three consecutive calendar days.

(See page 2 and Appendix A of Policy Bulletin 95-01 for a more detailed description of a serious health condition.)
[29 CFR § 825.114]

Question No. 5:

What happens when the absence of an employee on FMLA leave spans two calendar years?

Answer:

An employee absent on intermittent FMLA leave for the same illness (personal or family) in 1994 and again in 1995 is eligible for up to 12 weeks of FMLA leave in each of those two years. An employee continuously absent on FMLA leave in 1994 whose absence continues uninterrupted into 1995 is eligible for up to 12 weeks of FMLA leave in 1994 and another 12 weeks beginning January 1, 1995, even though the absence is due to the same illness (personal or family). (This assumes that the employee meets all eligibility criteria for each period of FMLA leave.) [29 CFR § 825.200(c)]

Example: An employee becomes disabled on October 1, 1994, and continues to be absent due to this illness until March 31, 1995. The employee receives 12 weeks of FMLA leave in 1994 and another 12 weeks of FMLA leave beginning January 1, 1995.

Example: An employee becomes disabled on September 1, 1994, and continues to be absent due to this illness until March 31, 1995. The employee receives 12 weeks of FMLA leave followed by four weeks of undesignated absence charged to credits or leave without pay in 1994, and another 12 weeks of FMLA leave beginning January 1, 1995.

Question No. 6:

An employee met the FMLA eligibility requirement of rendering at least 1250 hours of service within the 12-month period immediately preceding his FMLA leave which began in April 1994. He had 12 weeks of FMLA leave from April 1994 through June 1994 and was in LWOP status from July 1994 through December 1994. He is still disabled as of January 1995 but, because of this continuous leave without pay, has not met the 1250 hour requirement during the 12-month period immediately preceding January 1995. Is he eligible to be granted another 12 weeks of FMLA leave as of January 1, 1995?

Answer:

No. Each time an employee is granted FMLA leave, he/she must requalify in terms of having rendered 1250 hours of service within the 12-month period immediately preceding that period of FMLA leave. An employee must requalify for each period of FMLA leave even if such periods are part of a single continuous absence. Had this employee met the 1250 hour requirement he would have been eligible for FMLA leave again as of January 1, 1995. [29 CFR § 825.110]

Question No. 7:

An employee has been absent continuously since before April 6, 1995. The agency intended to designate the leave as FMLA but had not yet done so because the interim regulations permitted designation at any point prior to the employee's return to work. What impact do the new regulations have on this case since they require that FMLA leave be designated within two workdays of the commencement of the leave, provided the employer has sufficient information?

Answer:

For continuous leaves which began before April 6, the designation rule as set forth in the Interim Final Rule applies. However, agencies that have not already done so

should immediately notify affected employees that they are designating such ongoing leave as FMLA leave retroactively to the date the leave began. (Agencies are reminded that the notice to the employee may be oral, but must be confirmed in writing no later than the following payday, unless the payday is less than one week after the oral notice, in which case it must be no later than the subsequent payday.) [29 CFR § 825.208(b)(2)]

Question No. 8:

An employee's absence began April 12, 1995. The agency intended to designate the leave as FMLA but has not yet done so. At what point can the agency designate the leave as FMLA?

Answer:

The new regulations apply to any absence that began on or after April 6, 1995. Where an agency knows that leave is for an FMLA reason, the agency cannot retroactively designate an absence which began after April 6 as FMLA leave. The first date the agency can designate as FMLA leave is the date of notice to the employee. (See pages 3-4 of Policy Bulletin 95-01 for more detailed information on designation of FMLA leave.) [29 CFR § 825.208]

Question No. 9:

Policy Bulletin 95-01 states that an employee cannot be limited to one 12-week period of FMLA leave for birth or placement of a son or daughter if the 12-month period immediately following childbirth, adoption or foster care placement spans two calendar years. If, prior to receipt of this bulletin, an employee was restricted by the agency to one 12-week FMLA leave for a qualifying absence that spanned two calendar years, is the agency now required to notify the employee of this change and, if so, how?

Answer:

All employees should be notified that eligible employees are entitled to up to 12 weeks of FMLA leave per calendar year for personal or family illness or for child care in connection with birth or placement for adoption or foster care. They should be further advised that child care leave must be taken within the 12 month period immediately following birth or placement for adoption or foster care. Employees who have

questions about their eligibility and entitlement should be encouraged to contact their Personnel Office.
[29 CFR §§ 825.200, 825.201, 825.300, 825.301]

Question No. 10:

An employee who gives birth on September 15, 1994, is out on FMLA leave through December 8, 1994. The employee returns to work on December 9, 1994. Is this employee eligible to take 12 weeks of FMLA leave for child care in 1995?

Answer:

Assuming the employee still meets the eligibility criteria, the employee is eligible for 12 weeks of FMLA in 1995 for child care as long as the leave is concluded within 12 months following birth, i.e., September 1995. Once the employee has exhausted this leave, she has exhausted her FMLA leave for calendar year 1995. [29 CFR § 825.201]

Question No. 11:

An employee who gives birth on September 15, 1994, is out on FMLA leave through December 18, 1994. The employee goes on LWOP on December 19, 1994, and is expected to return to work on June 1, 1995. Does the agency designate any of the absence in 1995 as FMLA? Since it is now past April 6, 1995 (effective date for final FMLA regulations) can the agency designate retroactive to January 1995?

Answer:

Assuming the employee still meets the eligibility criteria and is still absent, the agency should retroactively designate the first 12 weeks of absence in 1995 as FMLA leave.
[29 CFR § 825.201]

Question No. 12:

The new medical form attached to Policy Bulletin 95-01 does not permit the employer to request a diagnosis. Under the Attendance Rules and negotiated agreements, agencies can request medical documentation satisfactory to management (which includes a diagnosis) in order to use sick leave, other credits as sick leave, and sick leave at half-pay. Can we still require a diagnosis when an employee elects to charge such leave credits during an FMLA leave?

Answer:

Yes. While in most instances the documentation from the employee's physician will contain sufficient information both to grant FMLA leave and to approve use of leave credits, any time an employee chooses to use leave credits during an FMLA leave, the agency can require the employee to meet the standards set forth in the Rules and negotiated agreements for use of such credits -- including the requirement that more detailed medical documentation including a diagnosis be provided. The agency needs to make the distinction between documentation submitted to support a request for FMLA leave and documentation required to support use of credits during that leave. The two requirements must be kept completely separate. The agency needs to be very clear that submission of a diagnosis is not a condition of FMLA leave but is a condition of charging leave credits as sick leave.

On Attachments E1 and E2 to Policy Bulletin 95-01, it is recommended that the agency type in the following notation under block 4 on E1 and block 2 on E2:

> Provisions set forth in the Attendance Rules and negotiated agreements continue to govern your use of any paid leave.

Question No. 13:

An employee requests and is granted full-time FMLA leave. After being on FMLA leave for four weeks the employee (who still has eight weeks of FMLA leave entitlement remaining) submits a doctor's statement indicating that he can return to work on a half-time basis. The employee requests an FMLA reduced leave schedule. Is the agency compelled to approve this request and allow the employee to return to work on a part-time basis?

Answer:

Yes. The employee is entitled to FMLA leave on a reduced leave schedule where medically necessary for the balance of the 12 week FMLA leave entitlement. However, after the 12 weeks, an agency does not have to continue to provide a reduced schedule. An employee should be provided with written notice that he/she will be required to return full-time at the expiration of the FMLA leave. [29 CFR §§ 825.203, 825.117]

TO: State Departments and Agencies

FROM: George C. Sinnott, Commissioner

SUBJECT: Family and Medical Leave Act

Final regulations implementing the Family and Medical Leave Act of 1993 (FMLA) have been issued by the United States Department of Labor (DOL) and took effect on April 6, 1995.

The DOL made several amendments to the regulations, necessitating changes in the guidance provided in Policy Bulletin 94-01 dated January 31, 1994, on implementation of the Family and Medical Leave Act. As of April 6, 1995, this memorandum should be read in conjunction with Policy Bulletin 94-01 in your administration of the benefits provided by the FMLA. Please note that we are replacing Attachments A, B and E(1) and E(2) from Policy Bulletin 94-01. The other attachments (C and D) remain unchanged.

Agencies are encouraged to contact the Employee Relations Section of the Department of Civil Service at (518) 457-2295 with any questions regarding implementation of the FMLA.

Attachments

FMLA DEFINITIONS (pages 6-7 of 94-01 and Attachment A)

While the definitions of spouse, parent, son and daughter remain unchanged, the new regulations have been amended to confirm that an agency may require an employee to provide reasonable documentation to establish the existence of a family relationship. The documentation may be an official document, such as a birth certificate or court order, or a simple statement from the employee attesting to the relationship.

The final regulations make significant changes in the definition of a serious health condition. The regulations have been revised to clarify that, for a period of incapacity to qualify as a "serious health condition", it must be for more than three **consecutive** calendar days. The regulations further clarify that any period of incapacity **due to pregnancy**, or for prenatal care, qualifies as "continuing treatment." The regulations amend the definition of "serious health condition" to include chronic conditions such as asthma and diabetes, which extend over a period of time but result in episodic rather than continuing periods of disability which may be less than three days. The reference to long-term chronic conditions that are incurable is amended to require that the condition involve a period of incapacity which is permanent or long-term and for which treatment **may not** be effective. Further, the regulations have been amended to restrict the exclusion for voluntary treatments for which treatment is not medically necessary to cosmetic treatments where inpatient care is not required or complications do not develop. Finally, the regulations clarify that while absences for treatment for substance abuse are covered, absences resulting from use of the substance **are not**.

A copy of the full definition is attached to replace Attachment A of 94-01.

COMPARISONS OF FMLA LEAVE DEFINITIONS WITH ATTENDANCE RULES PROVISIONS AND NEGOTIATED AGREEMENTS

Pregnancy, Childbirth and Child Care (page 8 of 94-01)

Under the regulations, an employee cannot be limited to one 12-week period of FMLA leave for birth or placement of a son or daughter, if the 12-month period **immediately** following childbirth, adoption or foster care placement spans two calendar years. In such a case, the employee is eligible under FMLA for up to 12 weeks

of leave in each calendar year. **This is a change from our previous understanding of this entitlement.** However, it remains a requirement that the leave be concluded within the 12 months following birth or placement. For example, an employee who gives birth in October 1994 may receive 12 weeks of FMLA leave from October through December 1994. This employee is again eligible for up to 12 weeks of FMLA leave for child care beginning in January of 1995.

Similarly, an employee who takes 12 weeks of FMLA leave from June-August 1994, and is then on leave without pay through December 1994, is again eligible for up to 12 weeks of FMLA leave for child care beginning January 1995, provided the employee meets the 1250 hour eligibility requirement.

USE OF LEAVE CREDITS (page 10 of 94-01)

The new regulations clarify that employees eligible to earn compensatory time for hours worked in excess of 40 in a workweek cannot charge such credits during a period of FMLA leave.

Managerial/confidential employees are presently the only employees who may agree to earn compensatory time for hours worked over 40 rather than being paid overtime.

AMOUNT OF LEAVE TO BE GRANTED, AND PROCEDURES (pages 10-14 of 94-01)

The regulations clarify that, whether an employee requests leave to be continuous, intermittent or on a reduced schedule basis, the employee need only give notice **one** time, but must advise the agency "as soon as practicable" of any change in dates of scheduled leave or any extension of such leave. Employees can be required to attempt to schedule planned medical treatment so as not to unduly disrupt the agency's operations, subject to the approval of the employee's health care provider.

The final regulations require agencies to designate FMLA leave at the time leave is requested, whenever possible. Specifically, the final regulations confirm that designation of leave as FMLA leave must be made at the time the employee gives notice of the need for leave or the leave commences, provided the agency has the necessary information to make that determination. **Ordinarily this designation must occur within two business days of receipt of necessary information, absent extenuating circumstances.** If the

agency has sufficient information but fails to notify the employee that the leave is being designated as FMLA, the agency may not then designate the leave as FMLA retroactively, only prospectively as of the date of notice to the employee. **Notice may be oral but must be confirmed in writing no later than the next regular payday unless less than a week remains until payday.**

Where an agency has requested and is awaiting receipt of medical certification or other documentation, or is in the process of obtaining a second or third medical opinion, the agency should **provisionally designate** the leave as FMLA and the employee should be so notified. Upon confirmation that the leave is for an FMLA reason, the preliminary designation becomes final and the leave may be counted against FMLA leave. If the designation is withdrawn, the employee must be so notified in writing.

The regulations permit retroactive designation of ongoing leave as FMLA when an agency learns **after** leave has begun that a leave is for FMLA qualifying reasons, such as, when an employee gives notice of the need for an extension of leave because a previously non-qualifying medical condition has turned into a serious qualifying condition.

The regulations provide for two exceptions to the prohibition against retroactively designating leave as FMLA leave after the employee returns to work. These exceptions are as follows:

1. If an employee is out for an FMLA qualifying reason and the agency does not learn of the reason for the leave until the employee returns to work, the agency may designate the leave as FMLA leave, **within two business days of the employee's return to work** (including a provisional designation subject to confirmation upon the receipt of medical certification if required by the agency)

2. If the agency has provisionally designated the leave under FMLA and is awaiting medical certification or other confirming documentation, or the employee and employer are in the process of obtaining second or third medical opinions.

The regulations similarly require an employee to give notice that a leave is requested as FMLA leave within two work days after returning to work.

While confirming that information on which a designation is based cannot be obtained from sources other than the employee, the regulations clarify that information may be obtained from spokespersons for the employee where the employee is incapacitated or designates a spokesperson, such as a parent, spouse, adult child or doctor. Where an employee does not provide information regarding the reason for the leave, the leave may be denied.

In cases of intermittent absence, notice of designation as FMLA leave need only be given once in each six month period, in response to the first notice of designation from the employee of the need for leave, provided the notice given at the beginning of the six-month period clarifies requirements regarding medical certification and return to work certification.

Work-Related Disability (page 14 of 94-01)

When workers' compensation leave and FMLA leave run concurrently and an agency offers an employee a limited duty assignment which the employee refuses, the employee is placed on the appropriate leave without pay status (so long as the State Insurance Fund continues to deem the absence to be compensable) and cannot charge credits or use sick leave at half-pay. (For example, consistent with current program administration, CSEA-represented employees continue on workers' compensation disability leave without pay.)

The FMLA regulations modify administration of workers' compensation benefits only for Council 82 represented employees. If they refuse light duty, they must be placed on FMLA leave without pay rather than on ordinary leave without pay for the balance of their 12-week entitlement in order to ensure continuation of health insurance.

MEDICAL CERTIFICATION (pages 14-16 of 94-01)

When the leave is foreseeable and 30 days notice has been provided, the employee should provide medical certification **before** leave begins. When not possible, the regulations confirm that the employee must submit medical certification within the time frame requested by the agency, which must allow at least 15 calendar days after the agency's request, unless it is not practicable under the circumstances to do so. Ordinarily, the agency's request for medical certification would occur at the time leave is originally requested; however, the 15 day limit also applies to

recertifications. The regulations permit the agency to make a provisional designation of leave as FMLA leave in cases where required medical certification was not provided prior to commencement of the leave or where the agency is waiting for a second or third medical opinion; the agency may then confirm or withdraw the designation depending upon the documentation even if the employee has returned to work.

The regulations have been amended to provide that a health care provider representing the agency may contact the employee's health care provider with the employee's permission for the purposes of **clarifying** the information in the medical certification and authenticity. However, an employer may **not seek additional information** regarding the employee's condition.

Where second or third medical opinions are required, the agency must reimburse an employee for any expenses incurred in obtaining the required second or third opinion. (Second and third opinions are not permitted in connection with recertifications.)

The regulations add clinical social workers to the list of health care providers. The regulations also recognize health care providers performing within the scope of their legally authorized practice in a country other than the United States.

The optional medical certification form (Attachment B of 94-01) has been modified to allow agencies to obtain information from health care providers to verify that an employee has a serious health condition without requiring unnecessary information. Specific changes include elimination of the diagnosis section, and the requirement to identify which part of the FMLA definition of serious health condition applies and what medical facts support the definition. The revised form stresses that information sought relates only to the condition for which the employee is taking FMLA leave. A copy is attached. **(Be sure that if you use your own form rather than the Attachment it does not ask for more information.)**

<u>REINSTATEMENT RIGHTS</u> (page 18 of 94-01)

The agency may require the employee to give reasonable notice (generally at least two business days) of changed circumstances resulting in an earlier than anticipated return from FMLA leave (or the need to extend the leave).

Definition of a Serious Health Condition

§825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health

condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(iv) 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. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a

health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Certification of Health Care Provider
(Family and Medical Leave Act of 1993)

1. Employee's Name:

2. Patient's Name (if different from employee):

3. The attached sheet describes what is meant by a **"serious health condition"** under the Family and Medical Leave Act. Does the patient's condition[1] qualify under any of the categories described? If so, please check the applicable category.

(1)___ (2)___ (3)___ (4)___ (5)___ (6)___ , or None of the above _____

4. Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5.a. State the approximate **date** the condition commenced, and the probable **duration** of the condition (and also the probable duration of the patient's present **incapacity**[2] if different):

b. Will it be necessary for the employee to take work only **intermittently or to work on a less than full schedule** as a result of the condition (including for treatment described in Item 6 below)? _____

If yes, give the probable duration:

c. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated[2] and the likely duration and frequency of **episodes of incapacity**[2]:

6.a. If additional **treatments** will be required for the condition, provide an estimate of the probable number of such treatments:

If the patient will be absent from work or other daily activities because of treatment on an **intermittent** or **part-time** basis, also provide an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

b. If any of these treatments will be provided by **another provider of health services** (e.g., physical therapist), please state the nature of the treatments:

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[1] Here and elsewhere on this form, the information sought relates **only** to the condition for which the employee is requesting FMLA leave.

[2] **"Incapacity,"** for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

c. If a **regimen of continuing treatment** by the patient is required under your supervision, provide a ge 1 description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

7.a. If medical leave is required for the employee's **absence from work** because of the **employee's own condition** (including absences due to pregnancy or a chronic condition), is the employee **unable to perform work** of any kind? _____

b. If able to perform some work, is the employee **unable to perform any one or more of the essential functions of the employee's job** (the employee or the employer should supply you with information about the essential job functions)? _____ If yes, please list the essential functions the employee is unable to perform:

c. If neither a. nor b. applies, is it necessary for the employee to be **absent from work for treatment?** _____

8.a. If leave is required to **care for a family member** of the employee with a serious health condition, **does the patient require assistance** for basic medical or personal needs or safety, or for transportation?_____

b. If no, would the employee's presence to provide **psychological comfort** be beneficial to the patient or assist in the patient's recovery?_____

c. If the patient will need care only **intermittently** or on a part-time basis, please indicate the probable **duration** of this need:

_____ _____
(Signature of Health Care Provider) (Type of Practice)

_____ _____
(Address) (Telephone number)

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

_____ _____
(Employee signature) (date)

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[2] or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

(a) A period of incapacity[2] of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity[2] relating to the same condition), that also involves:

(1) **Treatment[3] two or more times** by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; *or*

(2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment**[4] under the supervision of the health care provider.

3. Pregnancy

Any period of incapacity due to **pregnancy**, or for **prenatal care.**

4. Chronic Conditions Requiring Treatments

A **chronic condition** which:

(1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an **extended period of time** (including recurring episodes of a single underlying condition); and

(3) May cause **episodic** rather than a continuing period of incapacity[2] (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision

A period of **incapacity**[2] 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**

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[3] Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

[4] A regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. 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.

receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for **restorative surgery** after an accident or other injury, **or** for a condition that **would likely result in a period of incapacity[2] of more than three consecutive calendar days in the absence of medical intervention or treatment**, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

Sample Memorandum

Agency Response to Employee Request for Family or Medical Leave

TO: _____
(Employee's name)

FROM: _____
(Name of appropriate agency representative)

SUBJECT: Request for Family/Medical Leave

On __(date)__, you notified us of your need to take family/medical leave due to:

☐ The birth of your child, or the placement of a child with you for adoption or foster care; or

☐ A serious personal health condition that makes you unable to perform the essential functions of your job; or

☐ A serious health condition affecting your ☐ spouse, ☐ child, ☐ parent, for which you are needed to provide care.

You notified us that you need this leave beginning __(date)__ and that you expect leave to continue until on or about __(date)__.

Except as explained below, you have a right under FMLA for up to 12 weeks of unpaid leave in a 12 month period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (check appropriate boxes; explain where indicated)

1. You are ☐ eligible ☐ not eligible for leave under the FMLA. (If not eligible, see #9.)

2. The requested leave ☐ will ☐ will not be counted against your annual FMLA leave entitlement. (If not eligible, please see #9.)

3. You ☐ will ☐ will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by __(date)__ (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used the following conditions will apply: (Explain)

5(a). If you normally pay a portion of the premiums for your health insurance, these payments must be made during the period of FMLA leave. If you remain on the payroll, your premium deductions will automatically continue. If you are on leave without pay, information on continuing premium payments will be sent to you by the Employee Benefits Division, NYS Department of Civil Service, after we have notified the Division of your FMLA leave.

If you make direct premium payments while on unpaid FMLA leave, you have a 30-day grace period in which to make payment. If payment has not been made timely, your group health insurance will be canceled.

The State will not pay your share of the premiums for your health insurance while you are on leave.

(b). The State will continue to pay the full share premium cost for your dental and vision coverages while you are on FMLA leave.

(c). If you wish to continue paying the premium for your life and/or accident and sickness coverage while on unpaid FMLA leave, contact your Health Benefits Administrator for information.

6. You ☐ will ☐ will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certificate is not received, your return to work may be delayed until such certification is provided.

7. While on leave, you ☐ will ☐ will not be required to furnish us with periodic reports every _____ **(indicate interval of periodic reports, as appropriate for the particular leave situation)** of your status and intent to return to work. If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you ☐ will ☐ will not be required to notify us at least two work days prior to the date you intend to report to work.

8. You ☐ will ☐ will not be required to furnish recertification relating to a serious health condition. **(Explain below, if necessary, including the interval between certifications.)**

9. Although your request was not approved as FMLA leave, you may be eligible for leave under the Attendance Rules. Contact the Personnel Office to discuss your situation.

Sample Memorandum

Agency Designation of Family or Medical Leave

TO: _____
(Employee's name)

FROM: _____
(Name of appropriate agency representative)

SUBJECT: Designation of Family/Medical Leave

We have designated your absence which began on __(date)__ and is expected to continue until on or about __(date)__ as Family and Medical Leave (FMLA) due to:

☐ The birth of your child, or the placement of a child with you for adoption or foster care; or

☐ A serious personal health condition that makes you unable to perform the essential functions of your job; or

☐ A serious health condition affecting your ☐ spouse, ☐ child, ☐ parent, for which you are needed to provide care.

Leave under the FMLA may be designated for up to 12 weeks of paid/unpaid leave each calendar year for the reasons listed above. Your health benefits must be maintained during any period of unpaid FMLA leave under the same conditions as would apply if you continued to work and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you will be required to reimburse the State for the share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (check boxes where appropriate)

1. ☐ The designated leave will be counted against your annual FMLA entitlement. As of __(date)__ you have used ___ weeks of your 12-week annual entitlement for calendar year _____.

2. ☐ You may choose to substitute accrued paid leave for unpaid FMLA leave. Please contact (name) at (phone number) to discuss use of credits.

3. ☐ (a) If you normally pay a portion of the premiums for your health insurance, these payments must be made during the period of FMLA leave. If you remain on the payroll, your premium deductions will automatically continue. If you are on leave without pay, information on continuing premium

payments will be sent to you by the Employee Benefits Division, NYS Department of Civil Service, after we have notified the Division of your FMLA leave. If you make direct premium payments while on unpaid FMLA leave, you have a 30-day grace period in which to make payment. If payment has not been made timely, your group health insurance will be canceled. The State will not pay your share of the premiums for your health insurance while you are on leave.

☐ (b) The State will continue to pay the full share premium cost for your dental and vision coverages while you are on FMLA leave.

☐ (c) If you wish to continue paying the premium for your life and/or accident and sickness coverage while on unpaid FMLA leave, contact your Health Benefits Administrator for information.

4. ☐ (a) You will be required to present a fitness-for-duty certificate prior to being restored to employment. If such certificate is not received, your return to work may be delayed until such certification is provided.

☐ (b) You will *not* be required to present a fitness-for-duty certificate prior to being restored to employment.

5. ☐ (a) While on leave, you will be required to furnish us with periodic reports every _____ **(indicate interval of periodic reports, as appropriate for the particular leave situation)** of your status and intent to return to work.

☐ (b) While on leave, you will *not* be required to furnish us with periodic reports of your status and intent to return to work.

6. ☐ (a) If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two work days prior to the date you intend to report to work.

☐ (b) If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you will *not* be required to notify us at least two work days prior to the date you intend to report to work.

7. ☐ (a) You will be required to furnish recertification relating to a serious health condition. **(Explain below, if necessary, including the interval between certifications.)**

☐ (b) You will *not* be required to furnish recertification relating to a serious health condition.

File this material in the section of the manual referenced above.

TO: State Departments and Agencies

FROM: Josephine L. Gambino, Commissioner

SUBJECT: The Family and Medical Leave Act of 1993

This bulletin replaces Policy Bulletin 93-06, dated August 5, 1993 and provides more detailed guidelines on New York State's implementation of the Family and Medical Leave Act (FMLA) which was signed into law on February 5, 1993.

Agencies are encouraged to contact the Employee Relations Section of the Department of Civil Service at (518) 457-2295 with any questions regarding implementation of the FMLA. Agencies should be aware, however, that, unlike leave benefits which are based in rule or negotiated agreement, the Department of Civil Service has no statutory authority for implementation of the FMLA, a federal law which is administered by the U.S. Department of Labor. The policies and procedures set forth in this memorandum represent New York State's interpretation, as an employer, of the rights and obligations under the FMLA and its impact on benefits currently provided by law, rule, regulation and/or negotiated agreement. As issues are clarified by the Wage and Hour Division of the U.S. Department of Labor or by court decision, we will provide additional information.

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INTRODUCTION

The Family and Medical Leave Act (FMLA) is intended to balance the demands of the workplace with the needs of families. By providing workers faced with family obligations or serious family or personal illness with reasonable amounts of leave, the FMLA encourages stability in the family and productivity in the workplace.

The FMLA gives eligible employees of a covered employer the right to take unpaid leave, or paid leave charged to appropriate leave credits under certain circumstances, for a period of up to 12 workweeks in a 12-month period due to: 1) the birth of a child or the placement of a child for adoption or foster care; 2) the employee's need to care for a family member (child, spouse, or parent) with a serious health condition; or 3) the employee's own serious health condition which makes the employee unable to do his or her job. Under certain conditions, FMLA leave may be taken on an intermittent basis. Employees are also entitled to continuation of health and certain other insurances, provided the employee pays his or her share of the premium during this period of leave.

The employer has a right to 30 days' advance notice from the employee, where practicable. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or member of the family. The employer may also require medical documentation from an employee absent due to personal illness as a condition of return to work.

New entitlements for State employees as a result of the FMLA are the following:

- Leave for foster care placement.
- Health insurance coverage at employee share cost during periods of FMLA leave without pay.
- Mandatory leave for certain absences in connection with family illness.

Additionally, the FMLA contains procedural requirements that impact on employee absences requiring agencies to make changes in their current procedures.

EFFECTIVE DATES

FMLA is effective for employees covered under collective bargaining agreements on February 5, 1994, and for non-represented employees on August 5, 1993. (Non-represented employees include Managerial/Confidential employees and other Executive Branch employees not assigned to bargaining units.)

BASIC ELIGIBILITY REQUIREMENTS

Public employers are covered by FMLA regardless of the number of individuals they employ. In addition, each state constitutes a single employer for FMLA purposes. Executive Branch employees are covered by the provisions of the FMLA regardless of negotiating unit status, jurisdictional class, appointment type, etc. Attendance Rules coverage is not a criteria for coverage under the FMLA. To be eligible to be granted leave under the FMLA, however, employees must meet certain minimum service requirements as detailed below.

Since New York State is to be treated as a single employer for purposes of determining whether an employee meets the service requirements for establishing eligibility under FMLA, service in any combination of agencies is to be counted. In addition, the FMLA does not require that an employee have continuous service; the FMLA only requires a minimum amount of service over a period of time as follows:

- **an eligible employee** is one who has been employed for at least 12 cumulative months (52 cumulative weeks) and has performed a minimum of 1250 hours of service during the 12 consecutive months immediately preceding the date the leave is requested to begin.

Executive Branch employees will be deemed to have met these minimum service requirements to request FMLA leave if:

- the employee will have been employed for at least 12 cumulative months (including periods of short-term disability leave [STD] and sick leave at half-pay) on the date FMLA leave is to begin. An employee's total State service must be counted when determining if the employee has completed the required 52 cumulative weeks of service, regardless of any breaks in service and

regardless of the percentage of time paid during each of the 52 weeks;

AND

- the employee must have been paid for a minimum of 1250 hours during the 52 weeks immediately preceding the date FMLA leave is to begin.

Once it has been determined that an employee has worked the 12 cumulative months, that eligibility criterion has been met for the remainder of the individual's career. However, agencies need to determine if an employee meets the 1,250 hours of service requirement **each** time the employee **requests or is placed** on FMLA leave.

When counting the number of hours necessary to meet these minimum hourly requirements, the agency must include all hours the employee was paid and:

- worked (his/her schedule, extra hours outside the schedule or overtime);
- charged leave credits (except donated leave credits);
- was absent on paid leave (e.g., jury leave, military leave, any type of workers' compensation leave);
- was absent on sick leave at half-pay;
- was absent on STD;
- was absent on VR time.

To avoid having to calculate actual hours for every employee each time FMLA leave is granted, agencies should note the following. Any employee with a 37.5 hour basic workweek will have met the 1250 hour threshold by being continuously on the payroll at 65 percent or more, in one of the statuses described above, during the 52 weeks preceding the leave. For employees with a 40-hour basic workweek, that minimum is 61 percent.

In determining eligibility, it is important to ascertain whether part-time employees, regardless of their regular employment percentage, have met the 1250-hour threshold FMLA eligibility requirement (for example, by working additional hours beyond their normal work schedule).

Each time an FMLA request is made agencies should review eligibility as of the date the leave is scheduled to begin to

determine whether formerly ineligible employees have now met the eligibility criteria or, conversely, to determine if formerly eligible employees have lost eligibility (for example, as the result of extended leave without pay).

The FMLA permits an employer to deny restoration of employment to certain designated "key" employees (those among the highest paid ten percent of employees at a work site) if "substantial and grievous economic injury to the employer would result." It is important to note that the economic injury must result from the employee's restoration to employment -- not from the employee's absence. The United States Department of Labor recognizes that such a test is extremely difficult to meet. It is anticipated, therefore, that this provision would be invoked only in exceptional cases. Cases where agency management wishes to invoke this provision must be reviewed and approved by the Governor's Office of Employee Relations.

CATEGORIES OF FMLA LEAVE

Leave may be requested under FMLA for the following reasons:

1. For the birth, adoption or foster placement of a child.

2. For personal illness resulting from a serious health condition that makes the employee unable to perform the functions of his or her job. (This includes a serious health condition that results from an on-the-job injury.)

3. To care for an employee's spouse, parent, son or daughter with a serious health condition.

FMLA DEFINITIONS

The FMLA contains the following definitions:

1. A serious health condition means an illness, injury, impairment or physical or medical condition that involves:

   a. Any period of incapacity or treatment in connection with or consequent to inpatient care in a hospital, hospice, or residential medical care facility

b. Any period of incapacity requiring absence from work, school or other regular daily activities of more than three calendar days, that also involves continuing treatment by (or supervision of) a health care provider; or

c. Continuing treatment by or under the supervision of a health care provider for a chronic or long-term health condition that is incurable or so serious that if not treated would result in a period of incapacity of more than three calendar days; or

d. Ongoing prenatal care and treatment.

It should be noted that routine preventive physical exams, apart from prenatal exams, do not meet the FMLA definition of continuing treatment for a serious health condition. See **Attachment A** for the full definition of a serious health condition as it appears in the FMLA.

2. A child is a biological, adopted or foster child, a stepchild, a 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 physical or mental disability.

3. A parent is a biological or adoptive parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a child.

4. A spouse is a husband or wife as recognized under State law for purposes of marriage, including common law marriages where recognized. (New York State recognizes only those common law marriages which originated in states that recognize their legal status.)

COMPARISONS OF FMLA LEAVE DEFINITIONS WITH ATTENDANCE RULES PROVISIONS AND NEGOTIATED AGREEMENTS

New York State currently provides leave benefits which can be used for many of the same reasons for which FMLA is available. The following are examples of leave entitlements under FMLA and how they relate to current State policy.

Foster Care

Under FMLA, leave must be granted for official placement of a foster child, as well as for adoption and for child care in connection with childbirth. Leave for foster placement is a new entitlement for State employees; current State policy provides a seven-month leave in connection with adoption or child care following childbirth, but does not provide a similar leave for foster care placement. Therefore, covered employees requesting leave for foster placement are eligible only for the 12-week leave authorized by the FMLA.

Pregnancy, Childbirth and Child Care

With respect to leave for disability in connection with pregnancy and childbirth and leave for child care following childbirth or in connection with adoption, FMLA should be designated to run concurrently with leave pursuant to State policy for the employee's available entitlement to FMLA leave. Once that FMLA entitlement is exhausted, the eligible employee may continue on leave pursuant to State policy.

Under New York State's child care leave policies, mandatory leave is granted for up to seven months beginning with the date of birth. In the case of adoption, leave may commence at any point from placement to the actual date the adoption is finalized; the leave is mandatory for seven months from the date it begins. Under the FMLA, an employee may choose to begin his/her 12-week child care leave at any point within the first 12 months following birth or placement. Such leave must end, however, within this same 12-month period. Since New York State is designating leaves to run concurrently, however, generally FMLA will be exhausted within the seven-month period of mandatory leave under New York State policy.

Serious Health Condition

The FMLA definition of a serious health condition is generally more restrictive than the reasons an employee can use sick leave (or other credits as sick leave) under the Attendance Rules. Therefore, there will be occasions when an employee is on sick leave when it is not countable toward the 12-week entitlement under FMLA. In other situations where the nature of the disability meets the FMLA definition of a serious health condition, an employee on sick leave under the Rules would also have his/her absence count

against the 12-week FMLA entitlement. The agency makes the determination as to whether the absence qualifies as an FMLA absence whether or not the employee makes a request. (See Amount of Leave to be Granted and Use of Leave Credits.)

Family Illness

Leave for family illness under FMLA differs from family sick leave under the Attendance Rules in both definition of a qualifying medical condition (as described above) and in the categories of family members the employee can be granted leave to care for (refer to the chart below which summarizes the differences in categories of relatives).

Eligibility for Leave for Illness in Family

Relationship	New York State Family Sick Leave (FSL)	Federal Family and Medical Leave Act (FMLA)
Spouse	Yes	Yes
Spousal Equivalent	Only if residing with employee	No, regardless of residence
Child Under 18 or Impaired	Yes	Yes
Child Over 18, not Impaired	Yes	No
Foster Child or Child *in Loco Parentis*	Only if residing with employee	Yes, regardless of residence
Parents	Yes	Yes
Parent-in-Law	Yes	No
Foster Parent or Parent *in Loco Parentis*	Only if residing with employee	Yes, regardless of residence
Other Relatives or Relatives-in-Law	Yes	No

USE OF LEAVE CREDITS

FMLA leave is unpaid except where employees exercise their option to substitute use of appropriate leave credits. The FMLA does not require an employer to authorize the use of paid sick leave in any circumstance when it would not otherwise authorize it. As a matter of State policy, when use of leave credits would be allowed under the Rules, employees may elect to use appropriate leave credits during a period of FMLA leave or may choose not to use credits at their option. The term "appropriate leave credits" means credits that are available for absences for that specific reason. For example, no more than 15 days of accrued sick leave may be used in any calendar year for illness in the family, although an employee may elect to use accrued vacation, personal leave and holiday leave to cover the remainder of his/her absence. It is expected that agencies will assist employees in determining the best use of their available accruals depending on their particular situation.

AMOUNT OF LEAVE TO BE GRANTED

Note: For employees who first became covered by FMLA on August 5, 1993, no absences prior to August 5 counted against the 12-week FMLA entitlement for the period August 5, 1993--December 31, 1993, even if the absences were for the same reason that FMLA leave was requested during that period. Similarly for employees who first become covered by FMLA on February 5, 1994, no absences prior to February 5, 1994, count against the 12-week FMLA entitlement for the period February 5, 1994--December 31, 1994, even if the absences were for the same reason that FMLA leave is being requested during this period.

The FMLA entitles employees to up to 12 weeks of leave in a 12-month period as defined by the employer. For employees covered by this memorandum, the calendar year has been designated as the 12-month period. This means that State employees are eligible for up to 12 weeks of leave for qualifying events under FMLA each calendar year.

Employees who first became covered under the FMLA on August 5, 1993, were eligible for up to 12 weeks of FMLA leave between August 5, 1993, and December 31, 1993, and are now eligible for 12 weeks of FMLA leave on a calendar year basis. Employees who first

become covered under the FMLA on February 5, 1994, will be eligible for up to 12 weeks of FMLA leave between February 5, 1994, and December 31, 1994. Thereafter, all eligible employees will be eligible for up to 12 weeks of FMLA leave in each calendar year.

An employee is entitled to a total of 12 weeks of leave in each calendar year for any qualifying circumstance or combination of circumstances. For example, an employee who has used eight weeks of FMLA leave in a calendar year to care for an ill parent has only four weeks of FMLA leave eligibility remaining in that calendar year should that employee require leave for other covered reasons. However, nothing in the FMLA diminishes an employee's eligibility for leave pursuant to the Attendance Rules although, in most cases, the employee will be using FMLA leave and leave pursuant to the Rules concurrently.

Under FMLA, a husband and wife who are employed by New York State are only entitled to take a combined total of 12 weeks for birth, adoption or foster care placement of a child. If each spouse took six weeks of leave following placement of a foster care child, for example, each could later use six weeks due to a personal illness or to care for a child or parent with a serious health condition.

The 12 weeks of FMLA leave may be taken on a continuous or on an intermittent basis, for both personal illness and illness of covered family members based on the medical necessity for the absence. However, leave in connection with child care following childbirth, adoption and foster placement is continuous, unless agency permission is granted to take such leave on an intermittent basis. Whenever leave is taken on an intermittent basis, it may be used in units as small as 1/4 hour. When counting leave taken on an intermittent basis, agencies need to count in hours and equate these to portions of a workweek.

The first 12 weeks of absence in a calendar year for FMLA-qualifying reasons normally will be deemed to be leave under FMLA by the appointing authority and the employee must be so notified. For example, an employee who has used ten days of family sick leave in the calendar year for the serious health condition of a child (as defined under FMLA) should have been notified that he/she has used two weeks of his/her 12-week FMLA entitlement in that calendar year, even if the family sick leave was not specifically requested as FMLA leave. (This notice must have been provided to the

employee prior to return to work from the designated FMLA absence. Once employees have returned to work, no retroactive designation can be made.) However, if the ten days of family sick leave used was for reasons which do not meet FMLA criteria (for example, routine medical appointments) that employee still has 12 weeks of FMLA eligibility remaining in that calendar year despite having used 10 days of family sick leave.

The amount of FMLA leave granted to part-time employees is based on their regularly scheduled workweek. For example, an employee who normally works 30 hours per week has used one week of entitlement after being absent for his/her entire week's schedule. This employee, when absent on an intermittent basis, has also used one week of entitlement when his/her intermittent absences total 30 hours.

PROCEDURES

Each time an employee requests leave the agency must determine the following:

(1) the circumstances constitute a qualifying FMLA event as identified in Categories of FMLA Leave. When an employee requests leave, the agency determines if the request is a qualifying event under FMLA based on the verbal or written information the employee provides, even if the employee does not specifically request the leave as FMLA leave. Normally, this determination will be made at the point the request is made. If the information provided is insufficient or unclear, the agency may request additional information in order to make the determination. See Medical Certification for additional information. In every case, the agency must inform the employee that the leave has been designated as FMLA **before** the leave ends and the employee returns to work.

It is always the employer's responsibility to designate leave as FMLA whether or not the employee specifically requested the leave as FMLA. It is New York State policy that the first 12 weeks in each calendar year of qualifying absence be designated as FMLA.

(2) the employee will have been employed for 12 cumulative months as of the date the leave is scheduled to begin, as explained under Basic Eligibility Requirements.

(3) the employee has met the requirement of completing 1250 hours of service within the 52 consecutive week period immediately preceding the date leave is to begin, as described under Basic Eligibility Requirements.

(4) the amount of FMLA leave the eligible employee can be granted for this period of absence. If the absence falls entirely within one calendar year, the employee is entitled to 12 weeks minus any FMLA leave already used within that year. If the period of absence spans two calendar years, the employee must be granted the remaining balance for the current year and may access the next year's full 12-week entitlement as soon as that year begins.

Notification

FMLA requires that when the need for leave is foreseeable, for example in cases of birth, placement for foster care or adoption or planned medical treatment, the agency may require that the employee provide 30 calendar days' advance notice prior to the commencement of leave. Agencies should be aware, however, of State policy which may impact on this process. For example, New York State policy on leave for childbirth, child care and adoption makes the granting of leave mandatory for the eligible employee whether or not prior notice is given.

If the agency requires the 30-day advance notification allowed under the FMLA (for absences other than those for childbirth, child care or adoption) and the employee fails to meet this requirement, with no reasonable excuse, the FMLA permits leave to be delayed until 30 days after the employee makes the request.

When the need for FMLA leave is not foreseeable, for example in the case of medical emergencies or change in circumstances, the FMLA requires notification to the employer "as soon as practicable," which is defined as within one or two workdays of the employee's knowledge of the need for leave. However, nothing exempts the employee from following normal agency call-in procedures to report his/her absence, separate and apart from the time limits which apply to requesting FMLA leave.

Agencies cannot impose notification requirements which are more restrictive than those required under the FMLA. Agencies should discuss the circumstances of any FMLA leave request with the

Employee Relations Section before seeking to delay the start of a requested leave due to insufficient notification.

Agencies are required to provide notice that leave has been designated as FMLA leave prior to the employee's return to work. When chronic illness results in long-term intermittent absence, agencies should give advance notice to the employee that all absences for that qualifying event will be designated FMLA leave. Each time an employee is absent after receiving that initial notice, the agency should provide written notice advising the employee that the absence was counted against the employee's entitlement.

Pay Status

Employees have the option of requesting leave with pay charged to appropriate accruals or leave without pay and must indicate the chosen option at the time request for leave is made. An employee who elects not to use leave credits during a period of requested FMLA leave remains eligible to request use of leave credits under the Attendance Rules following exhaustion of his/her entitlement to leave under FMLA. For example, an employee who requests 12 weeks of unpaid leave under FMLA remains eligible, at the conclusion of the 12-week period, to request use of vacation, personal leave, holiday leave and available family sick leave, if appropriate, for absence beyond the 12-week period. See Use of Leave Credits above.

Work-Related Disability

Pursuant to State policy, disability absences in connection with a job-related accident, which also meet the definition of a serious health condition under FMLA, should be designated as FMLA leave and employees should be so notified. Although the medical certification form used for other FMLA absences is still appropriate for agency use, the employee and his/her health care provider must continue to submit all required State Insurance Fund and Workers' Compensation Board forms pursuant to New York State Workers' Compensation Law.

MEDICAL CERTIFICATION

Medical certification to support an FMLA leave request may be required if the employee is informed that such medical documentation is necessary. An updated sample medical certification form is attached (**Attachment B**) which agencies can have employees submit when requesting leave pursuant to the FMLA. Agencies also can continue to use any internal form(s) which

provide comparable information so long as such form does not require more information than that of the sample form attached.

The FMLA allows the employer to require medical recertification every 30 days. More frequent medical recertification can only be requested if:

- the employee requests an extension of leave;
- the circumstances described in the original medical certification have significantly changed (e.g., complications of the illness, etc.);
- the employer has information that casts doubt on the validity of the certification;
- the employee is unable to return to work following the granting of FMLA leave.

The following are the health care providers currently listed in the FMLA regulations as acceptable for providing any required medical certifications: Doctor of Medicine, Doctor of Osteopathy, Podiatrist, Dentist, Optometrist, Psychologist, Chiropractor, Nurse Practitioner, Nurse Midwife, Christian Science Practitioner. If the United States Department of Labor amends this list, we will advise you accordingly.

Any medical information submitted with an FMLA leave request must be treated in a confidential manner in accordance with regular agency procedures and the Americans With Disabilities Act (ADA).

In the majority of cases, the agency will be able to verify the need for FMLA leave based on the completed medical certification form provided by the employee at the time request for leave is made. In those exceptional cases where the agency has a valid reason to question whether an employee has a "serious health condition," the Employee Health Service of the New York State Department of Civil Service will assist the agency in obtaining a second opinion.

If an employee has filed a request for FMLA leave and the employer has questioned the medical certification submitted by the employee, the employer may have the request reviewed by the Employee Health Service (EHS). The employee's request must be transmitted to EHS along with a completed PS-707, Agency Request for Medical Examination. Upon receipt of this information, EHS will conduct an evaluation of the medical documentation supporting

the employee's request and render an opinion as to whether the individual meets the FMLA criteria.

If the basis of the request is a family member's medical condition, EHS will render an opinion following review of the medical documentation submitted. If the employee's FMLA request is based upon his or her own medical condition, EHS may schedule a medical examination. The medical examination may be conducted at the EHS medical examination center, or at an EHS consultant physician's office.

Based upon available medical documentation and/or examination results, the EHS physician will render an opinion as to whether the medical criteria for FMLA leave are met. EHS will notify the employing agency of this opinion. The employing agency can then make the administrative decision to approve or disapprove the employee's FMLA leave request.

Should the employee wish to appeal an FMLA disapproval decision, a third opinion may be obtained from a physician who is jointly chosen by the employer and the employee. The EHS maintains a list of physicians who can be contacted to perform this function. The decision of the third physician is binding on both parties. In both the second and third opinion reviews, the cost of the medical examination must be paid for by the agency.

Included as **Attachment C** is the procedure to be followed when requesting EHS assistance. This procedure will be incorporated in State Personnel Management Manual Section 2620.

RECORDKEEPING

Agencies will need to keep an ongoing record of all FMLA leave granted to an employee throughout each calendar year. Copies of the notifications to the employee that leave is deemed to be pursuant to FMLA should also be retained with leave accrual records. Agencies may choose to modify time records, for example, to add a space for "FMLA Leave Used" each calendar year or develop some other mechanism for accumulating leave use data. When an employee moves between agencies, FMLA leave information needs to be transferred along with accrual balances.

INSURANCE CONTINUATION

The FMLA also affects an employee's health insurance and other insurance benefits. The FMLA requires continuation of existing benefits during the period of FMLA leave for employees who are otherwise eligible for these benefits. This means that if an employee is enrolled for health, dental, vision or life insurance coverages, these benefits must continue during the FMLA leave period if the employee wishes to continue them and the employee is required to pay the same cost he/she would pay while in active work status. (If the employee pays no cost for a benefit in active status [e.g., dental coverage], the benefit must continue during the FMLA period at no cost.) Detailed information on benefit requirements and how you report benefit transactions for FMLA leaves without pay are explained in the memorandum of August 16, 1993, to State Agency Health Benefit Administrators from the Employee Benefits Division of this Department.

POSTING AND NOTICE REQUIREMENTS

Employers are required to post notices in conspicuous places on their premises describing the provisions of the FMLA and providing information concerning the process for filing complaints of violations of the Act with the Wage and Hour Division. Failure to post may result in monetary fines. A sample posting notice is attached (**Attachment D**) and may be reproduced. As long as all of the same information is included, agencies may create their own posting notices.

Agency handbooks and other written information about leave rights must be updated to include information about the FMLA.

Whenever an employee requests FMLA leave or the agency designates a period of absence as FMLA leave, the agency is required to provide written notice to the employee describing all the employee's rights and obligations under the FMLA. The United States Department of Labor has prepared sample memoranda that we have revised and may be used for this purpose (see **Attachment E**). Agencies are free to use these memoranda or prepare their own as long as all of the required information is included. Additionally, agencies should continue to provide the routine information that accompanies an employee's request for or placement on leave without pay.

REINSTATEMENT RIGHTS

Employees returning to work from FMLA leave are entitled to be returned to the same or an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

The only limitations on an employer's obligation to reinstate an employee are that the employee does not have greater rights than he/she would have had he/she been at work. It is our understanding, therefore, that placement on FMLA leave does not continue employment beyond the point it would otherwise have terminated by operation of law, rule or regulation. Examples include layoff, expiration of a temporary position, expiration of a season for seasonal employees, termination during probationary period, disciplinary termination or disability termination under Section 71 (for occupational injury) or Section 73 (for nonoccupational injury).

ENFORCEMENT MECHANISMS

Employees who believe their rights under FMLA have been violated can file a complaint with the United States Department of Labor or file a private lawsuit. Complaints can be filed at any local office of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

The FMLA regulations contain a section on protection of employee rights which states, in summary, that:

- no one may interfere with an employee's rights under the FMLA;
- violations of the FMLA or the regulations constitute interference;
- employers are prohibited from discriminating against employees who use FMLA leave such as counting leave as a negative factor in employment actions (for example, absences under FMLA cannot be counted under agency absenteeism control programs);
- employees cannot waive their rights under FMLA; and
- individuals are protected from retaliation for opposing unlawful practices under the FMLA.

Definition of a Serious Health Condition

According to the Family and Medical Leave Act, a "serious health condition" (825.114) means:

(a) an illness, injury, impairment, or physical or mental condition that involves:

(1) Any period of incapacity or treatment in connection with or consequent to inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility;

(2) Any period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or

(3) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days; or for prenatal care.

(b) "Continuing treatment by a health care provider" means one or more of the following:

(1) The employee or family member in question is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider.

(2) The employee or family member is treated for the injury or illness two or more times by a provider of health care services *(e.g.*, physical therapist) under orders of, or on referral by, a health care provider, *or* is treated for the injury or illness by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider--for example, a course of medication or therapy--to resolve the health condition.

(3) The employee or family member is under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured. Examples include persons with Alzheimer's, persons who have suffered a severe stroke, or persons in the terminal stages of a disease who may not be receiving active medical treatment.

(c) Voluntary or cosmetic treatments (such as most treatments for orthodontia or acne) which are not medically necessary are not "serious health conditions," unless inpatient hospital care is required. Restorative dental surgery after an accident, or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Treatments for allergies or stress, or for substance abuse, are serious health conditions if all the conditions of the regulation are met. Prenatal care is included as a serious health condition. Routine preventive physical examinations are excluded.

(d) The scope of "serious health condition" is further clarified by the requirements of the Act that the health care provider may be required to certify: in the case of family medical leave, that the "employee is needed to care for" the family member; in the case of medical leave, that "the employee is unable to perform the functions of the position of the employee"; and, in addition, in the case of leave taken "intermittently or on a reduced leave schedule," the medical necessity for such leave.

Certification of Physician
or Practitioner
(Family and Medical Leave Act of 1993)

MEDICAL CERTIFICATION FORM

Attachm
Policy Bulletin No.

1. Employee's Name	2. Patient's Name (If other than employee)

3. Diagnosis

4. Date condition commenced	5. Probable duration of condition

6. Regimen of treatment to be prescribed (indicate number of visits, general nature and duration of treatment, including referral to other provider of health services. Include schedule of visits or treatment, if it is medically necessary for the employee to be off work on an intermittent basis or to work less than the employee's normal schedule of hours per day or days per week.)

a. By Physician or Practitioner

b. By another provider of health services, if referred by Physician or Practitioner

If this certification relates to care for the employee's seriously-ill family member, skip items 7, 8 and 9 and proceed to items 13 thru 20 on reverse side. Otherwise, continue below.

Check **Yes** or **No** in the boxes below, as appropriate

7. Is inpatient hospitalization of the employee required? ☐ Yes ☐ No

8. Is employee able to perform work of any kind? (If **"No"**, skip item 9) ☐ Yes ☐ No

9. Is employee able to perform the functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee) ☐ Yes ☐ No

10. Signature of Physician or Practitioner	11. Date	12. Type of Practice (Field of Specialization, if any)

For certification relating to care for the employee's seriously-ill family member, complete items 13 thru 17 below as they apply to the family member and proceed to item 20.

13. Is inpatient hospitalization of the family member (patient) required? ☐ Yes ☐ No

14. Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety or transportation? ☐ Yes ☐ No

15. After review of the employee's signed statement (**See item 17 below**), is the employee's presence necessary or would it be beneficial for the care of the patient? (This may include psychological comfort.) ☐ Yes ☐ No

16. Estimate the period of time care is needed or the employee's presence would be beneficial.

Item 17 is to be completed by the employee needing family leave

17. When Family Leave is needed to care for a seriously-ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced leave schedule.

18. Employee Signature		19. Date
20. Signature of Physician or Practitioner	21. Date	22. Type of Practice (Field of Specialization, if any)

EHS Procedure for FMLA Second Opinion Request

.1 BACKGROUND

.110 General Information

The Family and Medical Leave Act (FMLA) was signed into law on February 5, 1993. The effective date of the Act for non-represented employees is August 5, 1993, and February 5, 1994 for employees covered under a collective bargaining agreement.

Employees may request FMLA leave to care for the employee's seriously-ill spouse, son, daughter, or due to the employee's own serious health condition that makes the employee unable to do the duties of his or her position. (See Attendance and Leave Manual Policy Bulletin No. 94-01 for general information on the kinds of circumstances under which FMLA leave must be granted, determining eligibility and the procedures to be followed when such leave is requested.) Where an employee requests FMLA leave to care for a seriously-ill family member or because of the employee's own serious health condition, employers may require such request to be supported by a medical certification issued by the health care provider of the employee or the employee's ill family member. (See Medical Certification Form, Attachment B, Policy Bulletin No. 94-01.)

If an employee submits an incomplete medical certification, agencies must so advise the employee and provide him or her with a reasonable opportunity to provide the missing information. If the employee submits a complete certification signed by a health care provider, an agency may NOT request additional information from the health care provider. If an agency has a valid reason to doubt the validity of a medical certification, they may request the Employee Health Service (EHS) to render a second medical opinion. In the case of a request to care for a seriously-ill family member, EHS, based on its review of the medical certification submitted, will provide an opinion as to whether the family member has a "serious health condition" and whether the employee is "needed to care for" the family member, as those are defined under the FMLA.

In the case of a request for leave due to the employee's own serious health condition, EHS may schedule a medical examination if necessary to determine if the employee has a "serious health condition" which prevents him or her from performing the essential duties of his or her position.

.112 Location - Medical examinations are conducted at the EHS Medical Examination Center and at the Office of EHS consulting physicians located at Amityville, Binghamton, Buffalo, Elmira, New York City, Plattsburgh, Poughkeepsie, Rochester, Stony Brook, Syracuse, Utica, Watertown and White Plains.

.4 PROCEDURES

.411 FMLA requests will be processed under "Agency Referral Examinations" procedures.. See SPMM Section 2620 (A) and Attendance and Leave Manual Policy Bulletin No. 94-01.

A. In addition to the required information listed in Item 2620 (A), the request must include Form WH-380, Medical Certification Form or its equivalent.

B. This informaiton will allow EHS to render an opinion as to whether the employee's request for leave qualifies under the FMLA. EHS will notify the employee and the employing agency of their opinion. The employing agency makes the administrative decision to approve or disapprove the employee's FMLA leave request.

C. If the opinion of EHS and the employee's health care provider differ, the employee may request that the employer obtain certification from a third health care provider at the agency's expense. EHS will provide the agency with a list of physicians who are available to render third opinions. The third opinion provider must be agreed to by both the employee and the employing agency.

D. The decision of the third opinion provider is binding on both parties.

POSTING NOTICE

Attachment D
Policy Bulletin No. 94-01

YOUR RIGHTS
UNDER THE
FAMILY AND MEDICAL LEAVE ACT OF 1993

Under FMLA New York State provides up to 12 weeks of paid or unpaid leave (at the employee's option) to "eligible" employees for certain family and medical reasons each calendar year. Employees are eligible if they have worked for the State for at least one year, and for 1250 hours over the previous 12 months.

REASONS FOR TAKING LEAVE: Unpaid leave must be granted for any of the following reasons:

- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's option, use of leave credits may be substituted for unpaid leave for any absences the employee would otherwise be allowed to charge leave.

ADVANCE NOTICE AND MEDICAL CERTIFICATION: The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days' advance notice when the leave is "foreseeable."
  An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

JOB BENEFITS AND PROTECTION:

- For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan," if the employee wishes to continue it.
- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

UNLAWFUL ACTS BY EMPLOYERS: FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA;
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

ENFORCEMENT:

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or ollective bargaining agreement which provides greater family or medical leave rights.

FOR ADDITIONAL INFORMATION: Contact your personnel office for further information. In addition, you may also want to contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government Department of Labor.

Sample Memorandum

Agency Response to Employee Request for Family or Medical Leave

TO: _____
(Employee's name)

FROM: _____
(Name of appropriate agency representative)

SUBJECT: Request for Family/Medical Leave

On (date), you notified us of your need to take leave under the Family and Medical Leave Act (FMLA) due to:

- ☐ The birth of a child, or the placement of a child for adoption or foster care; or
- ☐ A serious personal health condition; or
- ☐ A serious health condition affecting your spouse, child, parent, for which you are needed to provide care.

You notified us that you need this leave beginning on (date) and that you expect leave to continue until on or about (date).

Leave under the FMLA may be granted for up to 12 weeks of paid/unpaid leave each calendar year for the reasons listed above. Your health benefits must be maintained during any period of unpaid FMLA leave under the same conditions as would apply if you continued to work and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you will be required to reimburse the State for the share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (check boxes where appropriate)

1. ☐ (a) You are qualified to request leave under the FMLA.

☐ (b) You are *not* qualified to request leave under the FMLA because _____. Please go directly to item number 9.

2. ☐ (a) The requested leave will be counted against your annual FMLA entitlement. As of (date) you have used ___ weeks of your 12-week annual entitlement for calendar year _____.

☐ (b) The requested leave will *not* be counted against your annual FMLA entitlement because _____. Please go directly to item number 9.

3. ☐ (a) You will be required to furnish medical certification of a serious health condition. You must furnish certification by (insert date) (must be at least 15 days after you are notified of this requirement) or:

☐ We may delay the commencement of your leave until the certification is submitted.

☐ We may disapprove your absence.

☐ (b) You will *not* be required to furnish medical certification of a serious health condition.

4. ☐ You may choose to substitute accrued paid leave for unpaid FMLA leave. Please contact (name) at (phone number) to discuss use of credits.

5. ☐ (a) If you normally pay a portion of the premiums for your health insurance, these payments must be made during the period of FMLA leave. If you remain on the payroll, your premium deductions will automatically continue. If you are on leave without pay, information on continuing premium payments will be sent to you by the Employee Benefits Division, NYS Department of Civil Service, after we have notified the Division of your FMLA leave.

If you make direct premium payments while on unpaid FMLA leave, you have a 30-day grace period in which to make payment. If payment has not been made timely, your group health insurance will be canceled.

The State will not pay your share of the premiums for your health insurance while you are on leave.

☐ (b) The State will continue to pay the full share premium cost for your dental and vision coverages while you are on FMLA leave.

☐ (c) If you wish to continue paying the premium for your life and/or accident and sickness coverage while on unpaid FMLA leave, contact your Health Benefits Administrator for information.

6. ☐ (a) You will be required to present a fitness-for-duty certificate prior to being restored to employment. If such certificate is not received, your return to work may be delayed until such certification is provided.

☐ (b) You will *not* be required to present a fitness-for-duty certificate prior to being restored to employment.

7. ☐ (a) You will be required to furnish us with periodic reports of your status and intent to return to work every 30 days while on FMLA leave.

☐ (b) You will *not* be required to furnish us with periodic reports of your status and intent to return to work every 30 days while on FMLA leave.

8. ☐ (a) Since your absence is due to a serious health condition, you will be required to furnish medical recertification every 30 days confirming continuation of the condition.

☐ (b) You will *not* be required to furnish medical recertification every 30 days relating to the serious health condition.

9. ☐ Although your request was not approved as FMLA leave, you may be eligible for leave under the Attendance Rules. Contact the Personnel Office to discuss your situation.

Sample Memorandum

Agency Designation of Family or Medical Leave

TO: _____
(Employee's name)

FROM: _____
(Name of appropriate agency representative)

SUBJECT: Designation of Family/Medical Leave

We have designated your absence which began on (date) as Family and Medical Leave (FMLA) (check boxes where appropriate).

☐ The birth of a child, or the placement of a child for adoption or foster care; or

☐ A serious personal health condition; or

☐ A serious health condition affecting your spouse, child, parent, for which you are needed to provide care.

Leave under the FMLA may be designated for up to 12 weeks of paid/unpaid leave each calendar year for the reasons listed above. Your health benefits must be maintained during any period of unpaid FMLA leave under the same conditions as would apply if you continued to work and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you will be required to reimburse the State for the share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (check boxes where appropriate)

1. ☐ The designated leave will be counted against your annual FMLA entitlement. As of (date) you have used ___ weeks of your 12-week annual entitlement for calendar year _____.

2. ☐ You may choose to substitute accrued paid leave for unpaid FMLA leave. Please contact (name) at (phone number) to discuss use of credits.

3. ☐ (a) If you normally pay a portion of the premiums for your health insurance, these payments must be made during the period of FMLA leave. If you remain on the payroll, your premium deductions will automatically continue

If you are on leave without pay, information on continuing premium payments will be sent to you by the Employee Benefits Division, NYS Department of Civil Service, after we have notified the Division of your FMLA leave.

If you make direct premium payments while on unpaid FMLA leave, you have a 30-day grace period in which to make payment. If payment has not been made timely, your group health insurance will be canceled.

The State will not pay your share of the premiums for your health insurance while you are on leave.

☐ (b) The State will continue to pay the full share premium cost for your dental and vision coverages while you are on FMLA leave.

☐ (c) If you wish to continue paying the premium for your life and/or accident and sickness coverage while on unpaid FMLA leave, contact your Health Benefits Administrator for information.

4. ☐ (a) You will be required to present a fitness-for-duty certificate prior to being restored to employment. If such certificate is not received, your return to work may be delayed until such certification is provided.

☐ (b) You will *not* be required to present a fitness-for-duty certificate prior to being restored to employment.

5. ☐ (a) You will be required to furnish us with periodic reports of your status and intent to return to work every 30 days while on FMLA leave.

☐ (b) You will *not* be required to furnish us with periodic reports of your status and intent to return to work every 30 days while on FMLA leave.

6. ☐ (a) Since your absence is due to a serious health condition, you will be required to furnish medical recertification every 30 days confirming continuation of the condition.

☐ (b) You will *not* be required to furnish medical recertification every 30 days relating to the serious health condition.