

### Disclaimer

The following sample policy is provided for illustrative and informational purposes only. It is not intended to provide specific legal advice. Employers should have any policies and/or procedures reviewed by legal counsel prior to implementation. When using this sample policy as a guide, employers should ensure that it includes specific company rules; and, as with all policies or procedures, has been reviewed by legal counsel.

## Family and Medical Leave Act Policy

The purpose of this policy is to provide employees with a general explanation of their FMLA rights. If you have any questions regarding your FMLA rights or this policy, please contact \_\_\_\_\_.

**Note.** The following states have their own family and medical leave provisions: California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin and the District of Columbia. Nothing in the FMLA supersedes a provision of state law that is more beneficial to the employee, and employers must comply with the more beneficial provisions. Employers in these states should take their state laws in consideration when developing their FMLA policy.

### General Provisions

The federal Family and Medical Leave Act (FMLA) provides eligible employees the opportunity to take unpaid, job-protected leave for certain specified reasons. The maximum amount of leave an employee may use is either 12 (standard FMLA) or 26 weeks (military FMLA) within a 12-month period depending on the reasons for the leave.

### Eligibility

Employees are eligible for FMLA leave if they:

1. **Have worked at least 12 months (52 weeks) for the Company.** The 12 months (52 weeks) does not have to be consecutive. Separate periods of employment will be counted, provided that the break in service does not exceed seven years. All periods of absence from work due to or necessitated by service in the uniformed services will be counted in determining FMLA eligibility. An employee will be considered to have been employed for an entire week if they were on the Company's payroll for any part of the workweek.
2. **Have worked at least 1,250 hours for the Company over the preceding 12 months.** The FMLA uses the same method for determining compensable as the federal Fair Labor Standards Act (FLSA).
3. **Are employed at a work site that has at least 50 employees within a 75 mile radius.** This distance is measured using the shortest means of surface transportation.

**Note.** There are special eligibility requirements for airline flight crewmembers and flight attendants.

### Basic FMLA Leave Entitlement

Eligible employees may take up to 12 weeks of unpaid leave during any 12-month period for the following reasons:

1. For incapacity due to pregnancy, prenatal medical care or child birth;
2. To care for the employee's child after birth, or placement for adoption or foster care;
3. To care for an immediate family member (spouse, child, or parent) with a serious health condition; or
4. For a serious health condition of the employee that makes the employee unable to perform the essential functions of his or her position.

As used above, a **serious health condition** is an illness, injury, impairment, or physical or mental condition that involves:

- Any period of incapacity or treatment connected with inpatient care (e.g., an overnight stay) in a hospital, hospice, or residential medical care facility; or
- A period of incapacity requiring absence of **more than three calendar days** from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
- Any period of incapacity due to pregnancy, or for prenatal care; or
- Any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or
- Any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

## Identifying the 12-Month Period

**Standard FMLA Leave.** The FMLA entitles eligible employees who work for covered employers to take unpaid, job-protected leave in a defined 12-month period for specified family and medical reasons. Generally, employers may select one of four options to establish the 12-month period to be uniformly applied to all employees taking FMLA leave.

An employer may use any of the following methods to establish the 12-month period:

1. **The calendar year** – 12-month period that runs from January 1 through December 31;
2. **Any fixed 12-months** – 12-month period such as a fiscal year (for example, October 1 through September 30), a year starting on an employee's anniversary date (for example, September 22 through September 21), or a 12-month period required by state law;
3. **The 12-month period measured forward** – 12-month period measured forward from the first date an employee takes FMLA leave. The next 12-month period would begin the first time FMLA leave is taken after completion of the prior 12-month period; or
4. **A "rolling" 12-month period measured backward** – 12-month period measured backward from the date an employee uses any FMLA leave. Under the "rolling" 12-month period, each time an employee takes FMLA leave, the remaining leave entitlement would be the balance of the 12 weeks which has not been used during the immediately preceding 12 months.

Employers may select any of the four methods above to establish the 12-month period as long as the method is applied consistently and uniformly for all employees. The only exception is for a multi-state employer who has eligible employees in a state with a state family and medical leave statute that requires a specific method for determining the leave period. The employer may comply with the state provision for all employees within that state, and uniformly use one of the four methods described above for all other employees.

Before changing to a different method of calculating the 12-month period, an employer must first give all employees at least 60 days' notice of the intended change; and the transition must take place in such a way that the employees retain the full benefit of their leave entitlement under whichever method affords the greatest benefit to the employee. If an employer fails to select one of the 12-month period methods discussed above, the employer must use the 12-month period method that is the most beneficial to the employee. Under no circumstances may an employer change the 12-month period to avoid the requirements of the FMLA.

**Military FMLA.** The single 12-month period for military caregiver leave begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12-month period established by the employer for other FMLA leave reasons.

An eligible employee is limited to a combined total of 26 workweeks of leave for any FMLA-qualifying reasons during the single 12-month period. Up to 12 of the 26 weeks may be for an FMLA-qualifying reason other than military caregiver leave. For example, if an employee uses 10 weeks of FMLA leave for his or her own serious health condition during the single 12-month period, the employee has up to 16 weeks of FMLA leave left for military caregiver leave.

Military caregiver leave is available to an eligible employee once per servicemember, per serious injury or illness. However, an eligible employee may take an additional 26 weeks of leave in a different 12-month period to care for the same servicemember if he or she has another serious injury or illness. For example, if an eligible employee takes military caregiver leave to care for a current servicemember who sustained severe burns, the employee would be entitled to an additional 26 weeks of caregiver leave in a different 12-month period if the same servicemember is later diagnosed with a traumatic brain injury that was incurred in the same incident as the burns.

An eligible employee may also take military caregiver leave to care for more than one current servicemember or covered veteran with a serious injury or illness at the same time, but the employee is limited to a total of 26 weeks of military caregiver leave in any single 12-month period. Additionally, an eligible employee may be able to take military caregiver leave for the same family member with the same serious injury or illness both when the family member is a current servicemember and when the family member is a veteran.

## Use of Leave

An employee does not need to use his or her leave entitlement in one block. When medically necessary, leave may be taken intermittently (in small blocks of time) or on a reduced leave schedule (reducing the employee's usual weekly or daily schedule). Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Military Family leave due to qualifying exigencies may also be taken on an intermittent basis.

Leave to care for or bond with a newborn child or a newly placed adopted or foster child may only be taken intermittently with the employer's approval and must conclude within 12 months after the birth or placement.

## Use of Paid and Unpaid Leave

FMLA leave may be either paid, unpaid, or a combination of paid and unpaid leave. Whenever an employee requests leave for an FMLA covered event, the employee will be required to exhaust all accrued sick leave, personal leave, and annual leave for which they are eligible prior to being placed in unpaid leave status. Whether the leave is paid or unpaid, it will be counted toward the employee's 12-week entitlement in any given year.

## Maximum Amount of Leave

An employee has a total of 12 unpaid weeks for all FMLA leaves in any fiscal year; however, an employee may have a total of 26 unpaid weeks in a single 12-month period if the FMLA leave is to act as a caregiver for a military family member.

If both husband and wife are employed by the employer, FMLA leave is limited to a combined total of 12 weeks in a 12-month period when leave is taken for the following reasons:

- The birth, adoption or foster care placement of a child.
- To care for the employee's parent with a serious health condition.

If leave is taken for other reasons, such as the employee's own serious health condition or to care for a child with a serious health condition, the husband and wife can each use up to 12 weeks of leave individually. When the husband and wife both use a portion of the total 12-week FMLA leave entitlement for the birth of a child, placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks of FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a parent, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

## Employee Responsibilities

Employees should notify their manager and soon as they realize the need for FMLA leave. If the need to take FMLA leave is foreseeable (e.g., the birth of a child), the employee must give the employer at least 30 days prior notice of the need to take leave. When 30 days is not possible, the employee must give the notice as soon as practicable (generally within 1 or 2 business days of learning of the need for leave).

If the need for leave is not foreseeable, this information must be provided as soon as practical and in compliance with the employer's normal call-in procedures, absent unusual circumstances.

When submitting a request for leave, the employee must provide sufficient information for the employer to determine if the leave might qualify as FMLA leave, and also provide information on the anticipated date when the leave would start as well as the duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the

employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

## Employer Responsibilities

When an employee requests FMLA leave or the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. The eligibility notice must state whether the employee is eligible for FMLA leave, and if the employee is not eligible, must state at least one reason why the employee is not eligible.

Each time the eligibility notice is provided, the employer must also provide the employee with a written notice detailing the employee's rights and responsibilities.

Employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

## Medical Certification

Medical certification will be required for any request for use of FMLA leave for an employee's own serious health condition or to take care of a family member with a serious health condition. It is the employee's responsibility to provide complete medical certification within 15 calendar days of the request or to provide a reasonable explanation of the delay. Failure to provide the requested certification may result in the denial of continuation of leave.

If the employer has reason to question the medical certification, the employer, at its own expense, may elect to seek a second opinion from a health care provider of their choosing. If the second opinion conflicts with the first opinion, a third opinion may be obtained at the employer's expense from a health care provider mutually chosen by the employee and the employer. The third opinion will be controlling. The employee will be considered provisionally entitled to leave pending the second and/or third opinion.

## Recertification

The employer may request recertification for the serious health condition of the employee or the employee's family member no more frequently than every 30 days and only when circumstances have changed significantly, or if the employer receives information casting doubt on the reason given for the absence, or if the employee seeks an extension of his or her leave. Otherwise, the employer may request recertification for the serious health condition of the employee or the employee's family member every six months in connection with an FMLA absence. The employer may provide the employee's health care provider with the employee's attendance records and ask whether need for leave is consistent with the employee's serious health condition.

## Maintenance of Health Benefits

The employer will maintain group health insurance coverage, including family coverage, for an employee on FMLA leave on the same terms as if the employee continued to work.

Where appropriate, arrangements will need to be made for employees taking unpaid FMLA leave to pay their share of health insurance premiums. For example, if the group health plan involves co-payments by the employer and the employee, an employee on unpaid FMLA leave must make arrangements to pay his or her normal portion of the insurance premiums to maintain insurance coverage, as must the employer. Such payments may be made under any arrangement voluntarily agreed to by the employer and employee.

An employer's obligation to maintain health benefits under FMLA stops if and when an employee informs the employer of an intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is exhausted. The employer's obligation also stops if the employee's premium payment is more than 30 days late and the employer has given the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received.

In some circumstances, the employer may recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave.

## Fitness-for-Duty Certification

As a condition of restoring an employee whose FMLA leave was due to the employee's own serious health condition, the employee will be required to provide a certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate in the fitness-for-duty certification process as in the initial certification process and is responsible for any associated costs.

## Job Restoration

Upon returning from FMLA leave, eligible employees will typically be restored to their original job or to an equivalent job with equivalent pay, benefits, and other employment terms and conditions.

## Failure to Return after FMLA Leave

Any employee who fails to return to work as scheduled after FMLA leave or exceeds the 12-week FMLA entitlement (or in the case of military caregiver leave, the 26-week FMLA entitlement), will be subject to the Company's standard leave of absence and attendance policies. This may result in termination of employment if the employee has no other Company-provided leave available to him/her that applies to the continued absence. Likewise, following the conclusion of the FMLA leave, the Company's obligation to maintain the employee's group health plan benefits ends (subject to any applicable COBRA rights).

## Military Family Leave Entitlement

Notwithstanding the basic FMLA leave entitlements discussed previously, the FMLA also provides for two special military family leave entitlements:

1. To permit an eligible employee who is the spouse, son, daughter, parent, or next of kin of a current servicemember with a serious injury or illness incurred in the line of duty on active duty to take up to 26 workweeks of FMLA leave during a single 12-month period to care for the servicemember (Military Caregiver Leave); and

2. To allow an eligible employee whose spouse, son, daughter, or parent is a member of the National Guard or Reserves to take up to 12 workweeks of leave for qualifying exigencies arising out of the military member's active duty or call to active duty in support of a contingency operation (Qualifying Exigency Leave).

A **covered servicemember** is:

- A current servicemember of the Armed Forces, including a member of the National Guard or Reserves, with a serious injury or illness incurred in the line of duty for which the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list; or
- A "covered veteran" who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

A **covered veteran** is an individual who was discharged under conditions other than dishonorable during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. The period between October 28, 2009 and March 8, 2013 is excluded in determining this five-year period.

The FMLA definitions of **serious injury or illness** for current servicemembers and veterans are distinct from the FMLA definition of **serious health condition**.

- For current servicemembers, **serious injury or illness** means an injury or illness that was incurred by the member in the line of duty while on active duty in the Armed Forces or that existed before the beginning of active duty and was aggravated by such service, that may render them medically unfit to perform the duties of their office, grade, rank or rating.
- For covered veterans, **serious injury or illness** means an injury or illness that was incurred in the line of duty while on active duty in the Armed Forces or that existed before the beginning of active duty and was aggravated by such service and manifested itself before or after the individual assumed veteran status, and is:
  - (1) A continuation of a serious injury or illness that was incurred or aggravated when they were a member of the Armed Forces and rendered them unable to perform the duties of their office, grade, rank or rating;
  - (2) A physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50% or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave;
  - (3) A physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would be so absent treatment; or
  - (4) 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.

### [Military Caregiver Leave](#)

Military Caregiver Leave allows up to 26 weeks of unpaid leave in a single 12-month period to be granted to an eligible employee to provide care to an injured covered servicemember who is the eligible employee's spouse, son, daughter, parent, or eligible next of kin.



To be eligible for Military Caregiver Leave (in addition to the eligibility requirements covered previously), the employee must be a spouse, son, daughter, parent, or next of kin of the covered servicemember.

Unless the servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of Military Caregiver Leave policy, ***next of kin*** means the nearest blood relative of the servicemember, other than the servicemember's spouse, parent, son, or daughter, in the following order of priority:

- Blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions;
- Brothers and sisters;
- Grandparents;
- Aunts and uncles; and
- First cousins.

The "single 12-month period" begins on the first day leave is taken to care for a covered servicemember and ends 12 months thereafter, regardless of the method used to determine leave availability for other FMLA-qualifying reasons. If an employee does not exhaust his or her 26 workweeks of Military Caregiver Leave during this "single 12-month period," the remainder is forfeited.

Military Caregiver Leave applies on a per-injury basis for each servicemember. Consequently, an eligible employee may take separate periods of caregiver leave for each and every covered servicemember, and/or for each and every serious injury or illness of the same covered servicemember. A total of no more than 26 workweeks of Military Caregiver Leave, however, may be taken within any "single 12-month period."

Within the "single 12-month period" described above, an eligible employee may take a combined total of 26 weeks of FMLA leave including up to 12 weeks of leave for any other FMLA-qualifying reason (i.e., birth or adoption of a child, serious health condition of the employee or close family member, or a qualifying exigency). For example, during the "single 12-month period," an eligible employee may take up to 16 weeks of FMLA leave to care for a covered servicemember when combined with up to 10 weeks of FMLA leave to care for a newborn child.

An employee seeking Military Caregiver Leave may be required to provide appropriate certification from the employee and/or covered servicemember and completed by an authorized health care provider within 15 days. Military Caregiver Leave is subject to the other provisions in our FMLA Leave Policy (requirements regarding employee eligibility, appropriate notice of the need for leave, use of accrued paid leave, etc.). Military Caregiver Leave will be governed by, and handled in accordance with, the FMLA and applicable regulations, and nothing within this policy should be construed to be inconsistent with those regulations.

### Qualifying Exigency Leave

Eligible employees may take FMLA leave for a qualifying exigency, in which a military member (active duty, Reserve or National Guard) is on covered active duty or called to covered active duty status. The military member must be the employee's spouse, son, daughter or parent. Covered active duty applies when the military member is deployed to duty in a foreign country.



Qualifying Exigency Leave is available under the following circumstances:

1. Short-notice deployment. To address any issue that arises out of short notice (within seven days or less) of an impending call or order to covered active duty.
2. Military events and related activities. To attend any official military ceremony, program, or event related to covered active duty or call to covered active duty status or to attend certain family support or assistance programs and informational briefings.
3. Childcare and school activities. To arrange for alternative childcare; to provide childcare on an urgent, immediate need basis; to enroll in or transfer to a new school or daycare facility; or to attend meetings with staff at a school or daycare facility.
4. Financial and legal arrangements. To make or update various financial or legal arrangements; or to act as the covered military member's representative before a federal, state, or local agency in connection with service benefits.
5. Counseling. To attend counseling (by someone other than a health care provider) for the employee, for the military member, or for a child or dependent when necessary as a result of duty under a call or order to covered active duty.
6. Temporary rest and recuperation. To spend time with a military member who is on short-term, temporary rest and recuperation leave during the period of deployment. Eligible employees may take up to 15 calendar days of leave for each instance of rest and recuperation.
7. Post-deployment activities. To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of up to 90 days following termination of the military member's active duty status. This also encompasses leave to address issues that arise from the death of a military member while on active duty status.
8. Parental care. To care for the military member's parent who is incapable of self-care. The parent must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age.
9. Mutually agreed leave. Other events that arise from the military member's duty under a call or order to active duty, provided that the Company and the employee agree that such leave shall qualify as an exigency and agree to both the timing and duration of such leave.

Qualifying Exigency Leave may be combined with leave for other FMLA-qualifying reasons; however, under no circumstances may the combined total exceed 12 weeks in any 12-month period (with the exception of Military Caregiver Leave as set forth above).

An employee seeking Qualifying Exigency Leave may be required to submit appropriate supporting documentation in the form of a copy of the military member's active duty or rest and recuperation orders or other military documentation indicating the appropriate military status and the dates of active duty status, along with a statement setting forth the nature and details of the specific exigency, the amount of leave needed and the employee's relationship to the military member, within 15 days.

### Limited Nature of This Policy

This Policy should not be construed to confer any express or implied contractual relationship or rights to any employee not expressly provided for by FMLA. The employer reserves the right to modify this or

any other policy as necessary, in its sole discretion to the extent permitted by law. State or local leave laws may also apply.

### **The FMLA and Same-Sex Spouses**

On June 26, 2013, in *U.S. v. Windsor*, 570 U.S. 12, 133 S. Ct. 2675 (2013), the U.S. Supreme Court struck down section 3 of the Defense of Marriage Act (DOMA) as unconstitutional under the Due Process Clause of the Fifth Amendment. Immediately following the decision in *Windsor*, the U.S. Department of Labor (DOL) announced what the then-current definition of “spouse” under the Family and Medical Leave Act (FMLA) allowed, given the decision: Eligible employees could take leave under the FMLA to care for a same-sex spouse, but only if the employee resided in a state that recognized same-sex marriage. This has been commonly referred to as the “state of residence” rule.

In order to provide FMLA rights to all legally married same-sex couples consistent with the decision in *Windsor*, the DOL issued a Final Rule on February 25, 2015, revising the definition of spouse under the FMLA. The Final Rule amends the definition of spouse in 29 C.F.R. §§ 825.102 and 825.122(b) to include all individuals in legal marriages, regardless of where they live. More specifically, the definition of spouse is now a husband or wife as defined or recognized in the state where the individual was married (“place of celebration”) rather than where the individual resides, and specifically includes individuals in same-sex and common law marriages. The Final Rule also defines spouse to include a husband or wife in a marriage that was validly entered into outside of the United States if it could have been entered into in at least one state. The new Final Rule went into effect on March 27, 2015.