



DISCLAIMER

This guide is intended to be used as reference and procedural guidance with the understanding that the West Virginia Division of Personnel (DOP) is not engaged in rendering legal services. The general information contained should not be construed to supersede any law, rule, or policy. In the case of any inconsistencies, the statutory and regulatory provisions shall prevail.

If legal advice or assistance is required, the services of an attorney should be sought. Supervisors should also refer to the policies, rules, and regulations as well as consult with the human resources office within their respective agencies.

For technical assistance concerning specific situations, agencies, and employees may contact the Division of Personnel's Employee Relations Section at (304) 414-1853.

Purpose

State agencies should assist employees with returning to work as soon as possible after their healthcare providers certify their fitness to return to full or less than full duty. The information contained in this guide may be applied to employees on paid sick leave or medical leave of absence (MLOA) without pay due to an illness or injury, whether work or non-work-related. An employee's return to work will be according to applicable federal and State laws and the West Virginia Division of Personnel *Administrative Rule (143CSR1)*.

Coordination with Healthcare Provider

An employee on paid sick leave or a MLOA without pay can return to work only when an agency receives a written medical release authorizing such return from the employee's healthcare provider. Unless an agency has reason to believe an employee poses a direct threat to themselves or others, or the medical release authorizing the employee's return contradicts information known to or observed by the agency, an agency should not require an employee to undergo an independent medical examination.

The prescribed DOP Physician's/Practitioner's Statement (DOP-L3) or DOP Supplemental Certification of Health Care Provider for Employee's Serious Health Condition (DOP-L5) certifying the employee's need for leave must provide an anticipated release/return to work date or the date the employee will be re-evaluated. The agency's Human Resources (HR) office or leave coordinator is responsible for facilitating the employee's return with the employee, supervisor, and, if necessary, the healthcare provider to determine if the employee may safely perform the duties of the position they hold. All employee medical information is to be held in strict confidence in accordance with applicable federal and State laws. Medical inquiries are limited to those permitted under applicable State and federal law and must include a medical release signed by the employee. If the illness or a personal injury was compensable under workers' compensation as the result of covered employment with the State, the agency must also consult the workers' compensation carrier.



Unless the employee will be returned to full duty without restriction, the agency HR representative or leave coordinator should provide the healthcare provider with the following items for consideration of the employee's return:

- A functional job description or list of essential and ancillary job duties
- Any relevant environmental factors (e.g., cold, hot, noise levels, etc.) associated with the employee's job duties
- A list of potential job accommodations or alternate duty assignments (if available and known) or a request for suggested effective job accommodations

Return-to-Work Options

Based on the information in the healthcare provider's written medical release, the agency must determine if one or more options are available. Each will be discussed in more detail below.

- The employee may return to their prior position with no restrictions or modifications.
- The employee may return to their previous position at less than full duty or modified job duties for a limited time, in accordance with 14.4.h. of the [Administrative Rule](#).
- The employee may be temporarily transitioned into an alternate position in accordance with the [DOP Temporary Transition Policy \(DOP-P26\)](#).
- The interactive process to determine if the employee may return to their previous or comparable position with or without a temporary or permanent accommodation under the provisions of the Americans with Disabilities Act (ADA) should be initiated. Relevant information may be found by visiting [Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA](#), [Equal Employment Opportunity Commission \(EEOC\) Disability-Related Publications](#), and [Job Accommodation Network \(JAN\) Interactive Process](#) or contact the [West Virginia Office of Equal Opportunity](#).
- The employee may complete a work-hardening regimen established through consultation with a qualified rehabilitation specialist under workers' compensation and the employee's healthcare provider. Work hardening typically involves progressions through a series of jobs, each progressively more demanding.

Return and Reinstatement Following A Protected Leave

Employees who have sustained a compensable injury under workers' compensation must be returned to their former position upon demand and medical release. A request for reinstatement must be made in writing and transmitted by the United States Postal Service, return receipt requested, to the appointing authority for such reinstatement, provided that the position in which the employee sustained the compensable injury is available and the employee is not disabled from performing the duties of the position.



If the former position is unavailable, the employee shall be reinstated to another comparable available position with duties the employee is capable of performing. A comparable position shall mean a position comparable in wages, working conditions, and, to the extent reasonably practicable, duties to the position held at the time of injury.

Similarly, employees returning from leave protected under the federal Family and Medical Leave Act (FMLA) are entitled to return to their same or an equivalent position. An equivalent position must have substantially similar duties, responsibilities, pay, benefits, working conditions, privileges, and status to the employee's original position.

Approval of Return to Work

Unless the healthcare provider's written medical release returns the employee to full unrestricted duty, the employee must perform only those duties assigned to them and consistent with the healthcare provider's restrictions. The employee is responsible for immediately notifying their manager or supervisor if any assigned duties conflict with the healthcare provider's release or restrictions or if they experience difficulty performing the assigned duties.

Return to Work at Less than Full Duty

Any request to return to work at less than full duty or in an alternative position will be according to section 14.4.h. of the *Administrative Rule*.

Requests and approval to return at less than full duty or in an alternative position must be renewed every thirty (30) calendar days and are subject to the healthcare provider or medical practitioner statement requirement on each re-evaluation. The terms of the return shall be in writing. An employee may request to continue to work at less than full duty beyond the thirty (30) calendar day period, provided the request is submitted to the appointing authority at least five (5) days before the end of the thirty (30) calendar day period.

Prior to making a decision on an employee's request to return or continue to work at less than full duty or duty modifications, the appointing authority may require additional information from the employee's physician/practitioner regarding the employee's ability to perform the essential duties of their job, with or without accommodation.

The appointing authority may deny a request to return or continue to work at less than full duty or with restrictions under conditions including, but not limited to, the following:

- The employee cannot perform the essential duties of their job, with or without accommodation.
- The nature of the employee's job is such that it may aggravate the employee's medical condition.
- A significant risk of substantial harm to the health or safety of the employee or others cannot be eliminated or reduced by a reasonable accommodation.
- Approval of the request would seriously impair the conduct of the agency's business.



Return with a Temporary Transition to an Alternative Position

Agencies may consider returning an employee who is unable to return to their previous position with or without duty modification to an alternate position for a limited time in accordance with the DOP *Temporary Transition Policy* (DOP-P26). Agencies are not required to create a position. However, the agency must consider the reassignment to a vacant position in a lower or lateral classification that the employee is qualified and capable of performing.

The following conditions must be met for employees permitted to return to work in accordance with the *Temporary Transition Policy*:

- The transition and any requested extension must be approved by the Director of DOP upon written request by the appointing authority.
- The appointing authority must transition the employee into a vacant position in the appropriate classification or submit a Position Description Form (PDF) to reallocate a vacant position or the position the employee currently occupies.
- The employee must meet the minimum qualifications for the temporary position.
- The employee must retain his or her current salary or be brought to the minimum of the pay grade for the new classification, whichever is higher.
- The temporary transition must be for a minimum of thirty (30) calendar days and limited to the period of incapacity provided on the DOP physician's/practitioner's statement (DOP-L3 or DOP-L5) or workers' compensation form not to exceed six (6) months.

Salary Considerations

- **Workers' Compensation**

Employees who return to work before reaching maximum medical improvement from a workers' compensation compensable illness or injury may be eligible for temporary partial disability (TPD) or temporary partial rehabilitation (TPR) benefits. According to the WV Workers' Compensation program, such benefits may be available if an employee earns less than they earned in the position held when the compensable injury or illness was sustained. Employees approved to return to work on a reduced schedule, or receiving TPD or TPR benefits are not permitted to supplement their pay or workers' compensation benefits using their accrued vacation, personal, or sick leave.

Employee Options if Unable to Return or a Request to Return is Denied

Employees are responsible for informing the agency of the recovery process and their ability to perform modified or alternative work. The employee should notify their supervisor in advance of any medical evaluation.

An employee who is medically certified unable to return to work or who has been denied to return to less



than full duty has the following options:

- Continuation of paid, accrued sick leave and, upon exhaustion of sick leave, accrued annual leave, according to the provisions of Sections 14.3.h., 14.4.f., and 14.4.g. of the *Administrative Rule*.
- After exhausting accrued sick leave and annual leave (unless the employee has elected not to use sick leave for a personal injury received in the course of and resulting from covered employment with the State or its political subdivisions), the employee must apply for an MLOA without pay according to the provisions of Sections 14.8.c. of the *Administrative Rule*.

Please note, that qualifying paid and unpaid leave taken due to a personnel illness or injury runs concurrently with available FMLA and unpaid medical leave benefits. Please refer to the DOP's *Family and Medical Leave Act/Parental Leave Act* policy (DOP-P23) for information regarding appropriate notice to employees.

- Upon exhaustion of available accrued paid leave, an employee may be eligible to receive donated leave according to the provisions of the *Legislative Rule 143CSR2*, Leave Donation Program. The Leave Donation Program allows employees to voluntarily donate accrued annual leave to a designated employee suffering a medical emergency. The medical emergency must require the employee to be off work for a minimum of 10 consecutive, full working days after all the employee's paid leave is exhausted. Employees who are recipients of donated leave are considered on a leave without pay status in accordance with the DOP's *Administrative Rule*. Participation in the Leave Donation Program does not relieve an employee of the responsibility of applying and receiving approval for an appropriate leave of absence without pay. Additional information about the program may be found on the DOP website at [Leave Donation Program](#).
- Upon exhaustion of accrued paid leave, FMLA, and, if applicable, MLOA leave, an employee may apply for an unpaid personal leave of absence in accordance with subsection 14.8.a. of the *Administrative Rule*. Personal leaves of absence without pay are granted at the discretion of the agency's appointing authority.

Employee Refusal of Work

If an employee refuses to return to their former position or alternative assignment after being certified by their healthcare provider to perform such a job, or after exhausting paid and unpaid leave, the agency must make an employment determination based on all available administrative and medical information.

NOTE: An exception may apply to employees who have not yet exhausted their FMLA leave entitlement and those receiving workers' compensation benefits. 1) Employees entitled to FMLA leave may voluntarily accept less than full duty or alternative assignments while recuperating but may not be required to do so. 2) Employees eligible to receive TTD, TPR, or TPR workers' compensation benefits may not be dismissed regardless of whether or not paid and unpaid leave has been exhausted unless the dismissal is for a separate dischargeable offense. A separate dischargeable offense is defined as misconduct by the injured employee unrelated to the injury or the absence from work resulting from the injury.



A written offer of the return to employment must clearly state the following:

- The position being offered and the duties of the position.
- The agency's agreement to any limitations or conditions set out in the healthcare provider's certification of the employee's fitness to return to work.
- The position's essential functions.
- The position's wage, working hours, and location.
- The date the agency expects the employee to return to work.

Coordination with Other Provisions of Law and Rule

Nothing in such agency-specific programs or procedures shall enhance or diminish the provisions of any federal or State law or any properly promulgated administrative rule.

Any return-to-work program must be coordinated with various federal and State laws and the DOP's *Administrative Rule*. Any illness or injury, whether work-related or not, may entitle the employee to the protections of any one or more of the following federal/State laws and the DOP's *Administrative Rule*:

- **Family and Medical Leave Act (FMLA):** Agencies must ensure that their return-to-work programs or policy is carefully coordinated with their obligations under FMLA. If the employee returns to work at the end of an approved FMLA leave, they are afforded certain rights to reinstatement to their same or an equivalent position. NOTE: The FMLA defines an equivalent position as virtually identical to an employee's former position in terms of pay, benefits, and working conditions. Further, identical working conditions include substantially similar duties and responsibilities requiring substantially equivalent skill, effort, responsibility, and authority. Also, the position should be in the same or geographically proximate work site, be on the same shift or similar work schedule, and have the same or equivalent opportunity for discretionary and non-discretionary increases.

In accordance with the DOP *Family and Medical Leave Act/Parental Leave Act* policy (DOP-P23), an employer must designate an employee's paid sick and annual leave and medical leave of absence (MLOA) without pay due to injury or illness as running concurrently with the employee's FMLA leave entitlement. Employees entitled to FMLA leave may voluntarily accept less than full duty or alternative assignments while recuperating but may not be required to do so. The terms of the acceptance shall be in writing in accordance with Section 14.4.h. of the *Administrative Rule*.

Employees returning to work following FMLA leave have the right to be reinstated to their original job or an equivalent job, provided they can perform the job's essential functions and are not "key" employees as defined by the FMLA. For further guidance, refer to the DOP [Family and Medical Leave Act/Parental Leave Act policy \(DOP-P23\)](#).



- **West Virginia Workers' Compensation Act:** This law mandates that an employee who has suffered a compensable injury be returned to their former position, if available, or to a comparable position provided they are not disabled from performing the essential functions of the position. An employee who returns to an alternative job may have reduced earnings compared to what they earned before the work-related injury or illness. According to the WV Workers' Compensation law, individuals who accept an alternative position are no longer eligible to receive temporary total disability benefits; however, they may be eligible to receive temporary partial disability or temporary partial rehabilitation benefits. An employee who refuses an alternative assignment after being certified by their healthcare provider to perform such work may no longer be eligible to receive workers' compensation benefits. However, they may still be eligible for unpaid FMLA leave and retain reinstatement rights provided the 12-week FMLA leave entitlement has not been exhausted.
- **[Americans with Disabilities Act \(ADA\)](#):** The ADA is a federal nondiscrimination statute designed to remove barriers that prevent qualified individuals with disabilities from enjoying the same employment opportunities available to persons without disabilities. Where an individual's disability impedes job performance, an employer must make reasonable accommodations to help the individual overcome the particular impediment unless doing so would impose an undue hardship. Return-to-work programs usually are consistent with the requirements of the ADA since making reasonable accommodations for employees' disabilities is an integral part of a return-to-work program.
- **[Pregnant Workers Fairness Act \(PWFA\)](#)** federal and State PWFAs require covered employers to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions unless the accommodation will cause the employer an “undue hardship.” The PWFA only applies to workplace accommodations. Additional **[Pregnancy Discrimination and Pregnancy-Related Disability Discrimination](#)** laws enforced by the Equal Employment Opportunity Commission (EEOC) make it illegal to fire or otherwise discriminate against workers based on pregnancy, childbirth, or related medical conditions.
- **West Virginia Human Rights Act:** West Virginia disability discrimination statute similar to the ADA. While the definition of disability under both Acts is the same, the West Virginia Supreme Court is not obligated to follow federal case law in this area. Although federal case law is persuasive, it is not determinative.

Sample documents and letters provided below are intended to be used as guides only and will require modification to suit specific situations and to conform to agency policies. The samples are not all-inclusive and do not represent all possible options for managing attendance and return to work-scenarios. Requests for technical assistance may be directed to the West Virginia Division of Personnel, Employee Relations Section at (304) 414-1853 or dopemprelations@wv.gov.



Sample Request for Medical Information

Dear Dr. [name]:

[Employee name], a patient of yours, is employed as a [classification] with the [agency/office]. The [agency/office] has received your [statement/evaluation] dated [date], wherein you indicated [employee name] [insert relevant information]. Enclosed, please find a signed release authorizing [you/your office] to provide information concerning [his/her/their] capacity to perform the job duties and work-related requirements of the position which [he/she/they] holds, including any permanent or temporary restrictions or need for a work accommodation to enable [him/her/them] to perform these functions. The [agency/office] will use this information to determine if permanent or temporary accommodations to the work environment, schedule, or duties are available.

The enclosed Functional Capacity Evaluation form authorizing [you/your office] to provide this information includes a summary of the duties and responsibilities of [employee name]'s position. Please describe in detail any limitations or restrictions on [his/her/their] ability to perform the essential functions of the position and list any assistive devices, equipment, or any accommodation you believe would enable [employee name] to perform [his/her/their] duties and responsibilities.

To ensure confidentiality, please reply directly to me at [fax/email]. If you prefer, your response may also be returned using the enclosed self-addressed, postage-paid envelope. If you have any questions or require additional information, please contact me at [telephone number].

Sincerely,

[Authorized signature]

[Printed name]

[Job title]

NOTE: Requests for medical information **MUST** be performed by a human resource professional, leave administrator, or other designee. Under **NO** circumstances may the employee's immediate supervisor contact the employee's healthcare provider.



Sample Employee Authorization for the Release of Medical Information

Instructions: Agencies may use the forms provided below or equivalent forms to obtain the employee's authorization for the release of medical information and/or Functional Capacity Evaluation (Form FCE-2) by the medical provider. The agency must sign and retain the employee's release authorization. If using Form FCE-2, the employee must also complete and sign the Employee Authorization for the Release of Medical Information section of Form FCE-2 provided to the healthcare provider for completion.

I, [employee name], hereby authorize [healthcare provider] to furnish written confirmation to my employer, [agency name, address, and title of agency representative], regarding my functional capacity to perform the work-related requirements, essential and ancillary functions of my job duties, including any limitations or restrictions on my ability to perform the functions of my position, an estimated length of incapacity or date for re-evaluation and any devices, equipment, or accommodations I require to enable me to perform these functions.

I, [employee name], understand that I may revoke this authorization at any time by sending a written statement to [employer name and address]. The statement must identify this authorization by referring to its signed date (below) and include the date on which this authorization is no longer in force. I understand that if I revoke this authorization, my employer may still use and disclose information for which action has already been taken in reliance on this authorization.

Employee's Signature

Date

Employee's Printed Name

Date

Agency Representative Signature

Date



Sample Temporary Transition Due to Limited Duty

[Date]

[Name]
[Address]

Via [Hand Delivery / Certified Mail No. _____]

Dear [Mr./Ms. Last Name]:

The purpose of this letter is to confirm in writing, pending approval by the Division of Personnel (DOP), your selection to temporarily serve in the capacity of [classification] in the [agency/department name].

Contingent upon formal approval by the DOP, your temporary transition is anticipated to become effective [date]. Your annual salary will remain the same while serving in this temporary capacity without a reduction in pay. This temporary classification transition is being implemented [Reason: placement on limited duty due to temporary illness or injury, as verified by a DOP-L3 or DOP-L5].

It is anticipated that your temporary classification transition will remain in effect for a period of [specific time]. Upon completion of this assignment, you will be returned to your previous job classification.

In accordance with DOP *Temporary Transition* policy DOP-P26, service in a temporary capacity will be for a period of no less than thirty (30) days and no more than six (6) months. If an extension becomes necessary due to business necessity, you will be advised in writing. Extensions are only granted if the employee on limited duty is not medically released to full duty at the end of the first six months and only with the express written authorization of the Director of DOP not to exceed one additional six (6) month period.

Please sign below indicating your understanding of the terms and conditions of this temporary classification transition. Feel free to contact me if you have any questions.

Sincerely,

[Appropriate Signature Authority]
[Job Title]

I have received a copy and am aware of the contents of the foregoing letter and the DOP *Temporary Transition* policy, DOP-P26. I understand approval of a temporary classification transition is contingent upon approval by the DOP as provided in the DOP *Administrative Rule*, W. Va. Code R. § 143-1-4.8. I have been advised to contact my Supervisor, Agency Human Resources, or the DOP Employee Relations Section at 304-414-1853 for any questions or concerns regarding the contents of this letter or the Policy.

Employee Signature

Date



Sample Return at Less Than Full Duty Denial Letter

[Date]

[Name]
[Address]

Via [Hand Delivery / Certified Mail No. _____]

Dear [Mr./Ms. Last Name]:

Our records indicate that in accordance with subsection 14.4.h. of the Division of Personnel's *Administrative Rule*, W. VA. CODE R. §143-1-1 *et seq.*, you were approved [or requested] to return to work at less than full duty your position as [title], for a period of thirty (30) days on [date]. The [agency/department name] has considered your request. However, due to [Reason light duty cannot be extended (see 14.4.h.2.)], the [agency/department name] is unable to permit you to continue working [or return] at less than full duty.

Therefore, you are expected to return to your regularly scheduled duties of [employee's job title] on [date], immediately providing the enclosed Physician's/practitioners form DOP-L3, completed by your physician, and releasing you to return to full, unrestricted duty. If your physician does not release you to resume your regularly scheduled duties, you may exercise the following options (*if applicable*):

- You may request accrued sick leave and annual leave in lieu of sick leave until such time as your physician releases you to return to full duty. A physician's/practitioner's statement verifying your incapacity is required for any absence beyond three (3) consecutive scheduled working days or scheduled shifts.
- In accordance with the provisions of the federal Family and Medical Leave Act (FMLA), an eligible employee is entitled to up to 12 weeks of unpaid leave in a 12-month period for a serious health condition that makes the employee unable to perform the essential functions of their job.
- After exhausting accrued leave, you may request a leave of absence without pay in accordance with section 14.8 of the *Administrative Rule*.

Please be advised, that any FMLA entitlement you may have will run concurrently with your State paid leave, and upon exhaustion of paid leave, your entitlement to medical leave of absence without pay.

Should you have any questions regarding the information in this letter, you may contact [contact] or your supervisor, [employee's supervisor name] at [telephone number].

Sincerely,

[Authorized Signature]
[Job Title]

Enclosure (*enclose a copy of the DOP-L3 form and/or FMLA forms*)
c: [Employee's Supervisor]