



### Frequently Asked Questions

#### **1. Is the substitution of annual and/or sick leave required for federal Family and Medical Leave Act (FMLA) absences?**

Yes. According to Section II. D.2 of the Division of Personnel's FMLA-PLA Policy appropriate, available paid sick and annual leave *shall* be utilized to cover leave taken for FMLA qualifying events.

#### **2. Can an employee choose to use annual leave before using paid sick leave for FMLA absences?**

Yes. Although discretionary with the employer, an employee may elect to have FMLA absences charged to their accrued annual leave balances prior to using available paid sick leave. Annual leave used in lieu of or upon exhaustion of sick leave is no longer discretionary with the employer when requested for absences covered under the provisions of FMLA.

#### **3. Does sick and annual leave count as time worked for eligibility for FMLA and Medical Leave of Absences without pay (MLOA)?**

According to the United States Department of Labor (U.S. DOL), an employee must have **worked** at least 1,250 hours during the 12 months prior to the start of FMLA leave.

According to Section 14.8.c.1.A of the Division of Personnel's *Administrative Rule* (143CSR1), an employee must have **worked\*** for at least 1,040 hours, or fifty (50) percent of the normal work schedule for part-time permanent classified employees, during the twelve-month period immediately preceding the beginning of the leave.

\*Exception: Hours spent on a leave without pay while receiving temporary total disability benefits (TTD) or leave for military service, paid or unpaid, are considered time worked and do count towards eligibility for MLOA.

While it is paid, annual leave and sick leave are not considered work time, and thus do not count towards FMLA and MLOA eligibility requirements.



#### **4. Can an employer retroactively designate FMLA?**

According to the U.S. DOL, retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave (and notify the employee of the designation). The employer may be liable, however, if the employee can show that he or she has suffered harm or injury as a result of the failure to timely designate the leave as FMLA. Additionally, an employee and employer may agree to retroactively designate an absence as FMLA-protected.

#### **5. When an employee on unpaid FMLA returns to work, can they take an additional MLOA?**

If the employee was eligible for MLOA while taking unpaid FMLA, per Section II. D.2 of the Division of Personnel's FMLA-PLA Policy, the entitlement to both would exhaust concurrently. When the employee returns to work they have one more opportunity to take MLOA assuming they meet the eligibility requirements in Section 14.8.c.1.A of the Division of Personnel's *Administrative Rule 143CSR1*.

Example – Susan has been off work continuously for 3 ½ months for her own serious health condition. All of her paid leave was exhausted after one month and the last two and a half months were unpaid. Two months of her FMLA exhausted concurrently with her entitlement to MLOA and the last half-month was solely MLOA. Susan returned to work. Assuming Susan meets the eligibility requirements, she can take *one* more MLOA for a duration of as little as 15 minutes up to 3 ½ months. Assuming the additional MLOA is taken before she is eligible again for FMLA, the MLOA must be taken continuously because such leave may only be taken intermittently when running concurrently with FMLA leave.

#### **6. Under what scenario(s) is it possible to be eligible for FMLA but not MLOA for your own serious health condition?**

While the number of hours an employee must physically work in the previous 12 months for a MLOA is lower than the FMLA requirement of 1,250 hours, employees must be classified and have obtained permanent status (completion of a probationary period) in order to be eligible for a MLOA. An employee may be eligible for FMLA but not MLOA if the employee has already exhausted their MLOA entitlement in the previous 12-month period, has been declared permanently disabled, or is a temporary/seasonal employee ineligible for a MLOA.



**7. An employee's FMLA certification states they are expected to miss two to three full days per month due to their own serious health condition. The certification will not expire until the end of the year. However, the employee has been missing three to four full days per month. Can the employer require them to obtain recertification?**

According to the U.S. DOL, if circumstances described by the previous certification have changed *significantly* (e.g., the duration or frequency of the absence, the nature or severity of the illness or complications) then the increased duration of absence *might* constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. The additional absence *may* not be considered significant enough by the U.S. DOL to warrant the recertification.

**8. Does Parental Leave Act (PLA) leave run concurrently with FMLA?**

PLA runs concurrently only with qualifying unpaid FMLA leave. This means all applicable paid leave (family sick leave, annual leave, holiday leave, compensatory time) must be exhausted before PLA begins to exhaust concurrently with FMLA.

**9. Can an employee on an attendance improvement plan be required to submit documentation for FMLA absences covered under a valid certification?**

While an employee on an attendance improvement plan can be required to submit physician/practitioner statements for sick leave of less than three consecutive days, or scheduled shifts, absences relating to an existing FMLA certification may not require additional documentation. Recertification might be required if the frequency and duration has significantly changed or if fraud is suspected.

**10. Can an employee use sick or family sick leave to bond with their child?**

Unless the child has a qualifying serious health condition, only applicable paid leave (annual leave, holiday leave, compensatory time) and unpaid leave can be used for bonding.

**11. Are employees required to submit certification for adoption under FMLA or PLA?**

Under FMLA the employer's policy governs whether an employee must provide certification to request leave for adoption. FMLA does not require adoption certification nor does it preclude an



employer from requiring an employee to provide some type of certification when requesting leave for adoption. If an employer decides to require certification for such leave, it is up to the employer to determine what type of documentation is required and the requirement should be applied consistently.

While the PLA statute does not address certification for birth or adoption, the Division of Personnel has advised using the FMLA guidelines regarding documentation.

**12. When is an employer required to tell an employee about leave rights available under FMLA, MLOA and PLA?**

For FMLA and PLA, the employer must provide the employee with a notice of rights and responsibilities within five (5) business days of the employee notifying the employer of the need for FMLA leave.

For MLOA, the Appointing Authority shall at least fifteen (15) days prior to, if possible, but no later than five (5) days following the expiration of the employee's sick leave, mail to the employee a written notice of the employee's right to a medical leave of absence without pay and informing him or her that the leave will not be granted if he or she fails to apply within the time limits specified in the *Administrative Rule*.

**13. Are employees *required* to use FMLA for absences due to a qualifying condition or event?**

According to Section III. B. of the Division of Personnel's FMLA-PLA Policy (DOP-P23), when employees request FMLA leave, or the Appointing Authority acquires knowledge that leave requested may be for a qualifying purpose, it is the Appointing Authority's responsibility to notify employees of eligibility to take leave and inform them of their rights and responsibilities and that paid and unpaid leave requested for the qualifying condition or event WILL be designated as FMLA and deducted from their FMLA leave entitlement. The policy is consistent with the requirements established in the federal FMLA regulations, 29 CFR 825.300.

**14. If an employee takes six weeks for their own qualifying medical condition and later requests 12 weeks FMLA to care for a family member, are they eligible since the request is for a separate qualifying event?**



While employees may have more than one FMLA qualifying absence, the cumulative amount of leave that may be taken in a 12-month period is 12 weeks. However, up to 26 weeks of FMLA leave may be available for qualifying military caregiver leave.

**15. Can someone freeze their accrued leave and choose to go off payroll on an unpaid MLOA or FMLA?**

In order to be eligible for MLOA, Section 14.8.c.1.A.3 of the Division of Personnel's *Administrative Rule* requires that the employee exhaust all available sick and annual leave or elect not to use sick and annual leave for a personal injury or illness received in the course of and resulting from covered employment with the State or its political subdivisions in accordance with W. Va. Code § 23-4-1.

If an employer acquires knowledge that leave requested may be for a FMLA qualifying purpose, it is their responsibility to notify employees of eligibility to take leave and inform them of their rights and responsibilities and that leave is designated and will be counted as FMLA, including the amount of paid leave counted against FMLA leave entitlement. The Division of Personnel Family and Medical Leave Act / Parental Leave Act policy (DOP-P23) requires that appropriate, available paid sick and annual leave be utilized to cover leave taken for FMLA-qualifying events. Paid sick leave may only be used for the employee's own serious health condition; the 80 hours of paid family sick leave may be used for a family member. Upon exhaustion of the appropriate paid sick leave, annual leave shall be used to cover additional absences.

**16. Can a family member provide notice of the need to take FMLA for an employee who is incapacitated?**

Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally.

**17. Are employees on intermittent FMLA required to notify their employer of each absence?**

Employees approved for FMLA are required to comply with all procedural requirements for requesting leave as established by agencies. This includes call-in/reporting procedures for all absences. To qualify for protection under the provisions of FMLA, employees should specify if the absence is necessary due to the FMLA certified need or for a different reason (i.e. separate illness/incapacitation of themselves or immediate family member).



**18. Are scheduled overtime hours deducted against an employee's FMLA leave?**

The workweek is the basis for an employee's FMLA leave entitlement and is not phrased in terms of a particular number of days or hours of leave, but rather as 12 workweeks of leave. If overtime hours are part of an employee's usual and normal workweek, and the employee is unable to work overtime hours because of a FMLA qualifying reason, then any overtime hours not worked may be counted against the employee's FMLA leave entitlement so long as the employer designates the absence as FMLA leave. Conversely, if overtime is part of the employee's usual and normal workweek, additional hours of FMLA leave would be available.

**19. Are employees required to disclose their diagnosis to obtain approval for FMLA leave?**

Employees are not required to share the medical diagnosis, but sufficient information should be provided to indicate the leave is due to a FMLA-protected serious health condition (for example, stating that you have been seen by a physician, prescribed antibiotics, and advised to stay home for four days). Agencies are required to use the Division of Personnel's prescribed forms when requesting medical certification for FMLA leave.

**20. Does an absence of more than three (3) consecutive days automatically qualify as FMLA leave?**

An absence of more than three (3) consecutive days is an indicator the leave could qualify as FMLA, but other conditions must be met. According to the U.S. DOL, one of the qualifying reasons for FMLA leave for an eligible employee is continuing treatment by a health care provider and any one or more of the following:

A period of incapacity of more than three (3) consecutive days, *and* any subsequent treatment or period of incapacity relating to the same condition, that also involves:

- Two or more in-person visits to a health care provider for treatment within 30 days of the first day of incapacity unless extenuating circumstances exist. The first visit must be within seven days of the first day of incapacity; *or*,
- At least one in-person visit to a health care provider for treatment within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of the health care provider. For example, the health provider might prescribe



a course of prescription medication (e.g. an antibiotic) or therapy requiring special equipment.

For more FAQ's on FMLA, visit the U.S. Department of Labor:

<https://www.dol.gov/whd/fmla/fmla-faqs.htm>