

Division of Personnel

Reference Guide to Federal Family and Medical Leave & West Virginia Parental Leave Acts

Employee Relations Section
Revised: October 2018

DISCLAIMER

This booklet is intended to be used as a reference guide to federal Family and Medical Leave and the West Virginia Parental Leave Acts. The general information it contains should not be construed to supersede any law, rule, or policy. In the case of any inconsistencies, the statutory and regulatory provisions shall prevail. This version of the guide supersedes all previous versions. This booklet is written with the understanding that the West Virginia Division of Personnel is not engaged in rendering legal services. If legal advice or assistance is required, the services of an attorney should be sought. Supervisors should also refer to policies, rules and regulations as well as consult with the human resources office within his or her respective agency. For technical assistance concerning specific situations, employees and employers may contact the Division of Personnel's Employee Relations Section at (681) 313-2706.

Table of Contents

I. PURPOSE	3
II. DEFINITIONS	4
A. Definitions for the West Virginia Parental Leave Act (PLA)	4
B. Definitions for Family and Medical Leave Act (FMLA)	5
III. INTERPRETIVE MATERIAL	6
A. WEST VIRGINIA PARENTAL LEAVE ACT (PLA)	6
Entitlement	6
Reasons for Taking Leave	7
Calculating Leave	7
Returning from Leave	8
Maintenance of Health Benefits.....	8
Posting Requirements	8
B. FEDERAL FAMILY AND MEDICAL LEAVE ACT (FMLA)	8
(The full text of the regulations may be found at: www.dol.gov/whd/fmla/finalrule.htm)	8
Benefits Available.....	9
Employer Coverage	9
Eligibility	9
Entitlement.....	10
Concurrent Exhaustion of Leave.....	10
Military Caregiver FMLA.....	11
Calculating Leave	12
Spouses Working for the Same Employer	14
Military Exigency Leave.....	14
Immediate Family Member.....	15
Intermittent/Reduced Schedule Leave	15
Substitution of Paid Leave	16
Serious Health Condition.....	17
Medical Certification	18
Health Care Providers	20

Maintenance of Health Benefits.....	21
Other Benefits.....	21
Job Restoration.....	22
Employee Notice.....	23
Employer Notices.....	23
Other Provisions.....	25
IV. REFERENCES	26
V. FORMS INDEX AND BRIEF EXPLANATION OF PURPOSE	26
EMPLOYER CHECKLIST.....	29
EMPLOYEE CHECKLIST	31

I. PURPOSE

The purpose of this guide is to provide general information on the Parental Leave Act and the Family and Medical Leave Act, delineate the major differences between the two statutes, and to provide direction as to the proper administration of the two laws. This guide is an interpretation and does not provide any employee with absolute rights. Rather, its purpose is to provide employees and employers with possible applications of these Acts to individual situations. The prescribed forms for requesting leave under both Acts can be found in this guide.

In 1989, the Legislature found that there is a growing crisis in this country and in West Virginia affecting the stability of our families and that the family unit is being torn apart due to the need for families to have two income producing parents. In order to address this situation and to provide for the love, nurturing and education of our children, the Legislature enacted “The Parental Leave Act,” (PLA) codified as W. VA. CODE §21-5D-1 *et seq.* to provide employees with unpaid time away from work (after exhausting annual and personal leave) without risk of employment loss.

Later, in 1993, Congress enacted the federal Family and Medical Leave Act (FMLA), which similarly provides for family and medical leave to be taken by eligible employees for qualifying events. The FMLA is administered and enforced by the U.S. Department of Labor (DOL). Subsequent revisions were made in 2008 and 2013 introducing exigency leave and military caregiver leave.

In 2010, the Division of Personnel promulgated the Family and Medical Leave Act/ Parental Leave Act policy ([DOP-P23](#)) to achieve consistency among agencies regarding administration of leave. The policy established standards for the calculation method to be used and for the substitution of paid leave for qualifying absences.

In addition to the West Virginia Parental Leave Act (PLA) and FMLA, the *Administrative Rule* of the West Virginia Division of Personnel, W. VA. CODE R. §143-1-1 *et seq.*, also provides for leave, both paid and unpaid, if an employee meets eligibility requirements and requests the leave for a qualifying event. If an employee is eligible for leave under both FMLA and PLA, and/or the *Administrative Rule*, the employee is entitled to the greatest benefit or most generous rights provided under the different parts of each law or the *Administrative Rule*. The determination of the most generous benefit will be at the employee’s discretion. However, if the paid and/or unpaid leave qualifies under both the federal and State law, and/or the *Administrative Rule*, the leave entitlement under each will exhaust concurrently. Please contact the Division of Personnel, Employee Relations Section at (681) 313-2706 for more specific information.

II. DEFINITIONS

A. Definitions for the West Virginia Parental Leave Act (PLA)

1. **Dependent:** Any person who is living with or dependent upon the income of any employee whether related by blood or not.
2. **Employee:** Any individual, hired for permanent employment, who has worked for at least 12 consecutive weeks performing services for remuneration within this State for any department, division, board, bureau, agency, commission or other unit of State government, or any county board of education in the State. Employee does not include:
 - a. Individuals employed by persons who are not employers as defined by this law;
 - b. Elected public officials or the members of their immediate personal staffs;
 - c. Principal administrative officers of any department, division, board, bureau, agency, commission, or other unit of State government, or any county board of education in the State;
 - d. A person in a vocational rehabilitation facility certified under federal law who has been designated an evaluatee, trainee, or work activity client; or
 - e. Individuals employed by County Health Departments.
3. **Employer:** Any department, division, board, bureau, agency, commission, or other unit of State government and any county board of education in the State.
4. **Employment Benefits:** All benefits, other than salary or wages, provided or made available to employees by an employer, and includes group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a policy or practice of an employer or by an employee benefit plan as defined in the federal Employee Retirement Income Security Act of 1974.
5. **Health Care or Health Care Services:** Clinically-related preventive, diagnostic, treatment or rehabilitative services whether provided in the home, office, hospital, clinic, or any other suitable place, provided or prescribed by any health care provider or providers. Such services include, among others, drugs and medical supplies, appliances, laboratory, preventive, diagnostic, therapeutic and rehabilitative services, hospital care, nursing home and convalescent care, medical physicians, osteopathic physicians, chiropractic physicians, and such other surgical, dental, nursing, pharmaceutical, and podiatric services and supplies as may be prescribed by such health care providers.

6. Health Care Provider: A person, partnership, corporation, facility or institution licensed, certified or authorized by law to provide professional health care services in this State to an individual during this individual's medical care, treatment or confinement.
7. Parent: A biological, foster, or adoptive parent; a stepparent; or a legal guardian.
8. Serious Health Condition: A physical or mental illness, injury or impairment which involves:
 - a. Inpatient care in a hospital, hospice, or residential health care facility; or
 - b. Continuing treatment, health care, or continuing supervision by a health care provider.
9. Son or Daughter: An individual who is a biological, adopted, or foster child; a stepchild or a legal ward and is under 18 years of age or 18 years of age or older and incapable of self-care because of mental or physical disability.
10. Spouse: Any person legally married to an employee covered under this article.

B. Definitions for Family and Medical Leave Act (FMLA)

1. Covered Active Duty: For members of the Regular Armed Forces, covered active duty is duty during the deployment of the member with the Armed Forces to a foreign country. For members of the Regular components of the Armed Forces (National Guard and Reserves), covered active duty is duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation.
2. Military Member: (a) Current member of Regular Armed Forces, including members of 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 incurred in the line of duty on active duty, or injuries and illnesses that existed before the beginning of the member's active duty and were aggravated by service in the line of duty on active duty in the Armed Forces or, (b) a covered veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness as designated by the Secretary of Labor that was incurred by the member in line of duty on active duty in the Regular Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Regular Armed Forces) and who was a member of the Regular 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.
3. In loco parentis: Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

4. Intermittent and Reduced Schedule Leave: Leave that is taken in separate blocks of time for a single illness or injury. A reduced schedule leave reduces an employee’s usual number of working hours per workweek, or hours per workday.
5. Next of Kin of a Military Member: Blood relatives granted legal custody, brothers, sisters, grandparents, aunts, uncles, and first cousins (not fiancées). Service member may make a written designation of a specific blood relative as next of kin.
6. Parent: Biological, adoptive, step or foster father or mother or one who stood “in loco parentis” but not parent “in law.”
7. Son or Daughter (for non-military related leave): Biological, adopted, foster or step child, a legal ward or a child of a person standing “in loco parentis”, under the age 18. Adult children age 18 years or older and “incapable of self-care because of a mental or physical disability” at the time FMLA leave commences.
8. Son or Daughter (for military related leave): Biological, adopted, foster or step child, a legal ward or a child of a person standing “in loco parentis.” May be of any age.
9. Spouse: As defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:
 - a. Was entered into in a State that recognizes such marriages; or
 - b. If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

III. INTERPRETIVE MATERIAL

A. WEST VIRGINIA PARENTAL LEAVE ACT (PLA)

The full text of the West Virginia Parental Leave Act may be found at: [the West Virginia Division of Labor - The Parental Leave Act](#).

1. Entitlement

The Parental Leave Act provides that an employee shall be entitled to up to a total of 12 weeks of unpaid family leave following the exhaustion of all his or her annual leave during any 12-month period if they have been employed for at least 12 consecutive weeks (see

[A. Definitions for the West Virginia Parental Leave Act \(PLA\) of employee\).](#)

An employee may take family leave on a part-time basis and on a part-time leave schedule, but the period during which the number of workweeks of leave may be taken may not exceed 12 consecutive months, and such leave shall be scheduled so as not to unduly disrupt the operations of the employer.

The employer may provide employees with rights to family leave which are more generous to the employee than the rights provided under this law.

2. Reasons for Taking Leave

Eligible employees may take leave for the following reasons:

- a. The birth of a son or daughter of the employee. If a leave because of birth is foreseeable, the employee must provide the employer with 2 weeks written notice of the expected birth.
- b. Placement of a son or daughter with the employee for adoption. If a leave because of adoption is foreseeable, the employee must provide the employer with 2 weeks written notice of the adoption.
- c. To care for the employee's son, daughter, spouse, parent, or dependent who has a serious health condition.
 - (1) If an employee requests family leave to care for a family member with a serious health condition, he or she is required to provide to the employer certification of the family member's health condition by the health care provider using form [DOP-L3](#). Form [DOP-L6](#) may be used if additional information is needed.
 - (2) If leave under this section is foreseeable because of planned medical treatment or supervision, the employee:
 - (a) Shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider of the family member or dependent; and,
 - (b) Shall provide the employer with 2 weeks written notice of the treatment or supervision.

3. Calculating Leave

The 12-month period is a rolling 12-month period measured backward from the date of leave use and such leave may not exceed the equivalent number of work hours the employee is normally scheduled to work in a 12-week period (e.g., a full-time employee is eligible for

480 hours and a 50% part-time employee is eligible for 240 hours). As with FMLA, the workweek is the basis for an employee's 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 based on their normal work schedule. Family leave may be taken intermittently when medically necessary.

4. Returning from Leave

The position held by the employee immediately before the leave is commenced shall be held for a period not to exceed the 12-week period of the parental leave and the employee shall be returned to that position. The employer may employ a temporary employee according to the provisions of the Division of Personnel's *Administrative Rule* for the period of the employee's family leave.

See: [Division of Personnel, Administrative Rule 143CSR1](#)

No employer may, because an employee received family leave or medical leave, reduce or deny any employment benefit or seniority which accrued to the employee before his or her leave commenced.

Nothing in this law entitles any returning employee to the accrual of any seniority or employment benefits during any period of family leave. As such, employees will not accrue service tenure for leave accrual, annual increment, reduction-in-force, etc.

5. Maintenance of Health Benefits

The employer shall continue group health insurance coverage for an employee on family leave provided the employee pays the employer the premium costs of such group health insurance coverage.

6. Posting Requirements

No person may interfere with, restrain, or deny the exercise of any right provided by this law explaining employees' rights under this law. The poster may be found at: [Division of Labor - Parental Leave Act Poster](#)

B. FEDERAL FAMILY AND MEDICAL LEAVE ACT (FMLA)

The Family and Medical Leave Act of 1993 (FMLA) is a United States federal law requiring covered employers to provide employees job-protected and unpaid leave for qualified medical and family reasons. Qualified medical and family reasons include: personal or family illness, family military leave, pregnancy, adoption, or the foster care placement of a child. (The full text of the regulations may be found at: [U.S. Department of Labor - Family and Medical Leave Act](#)).

1. Benefits Available

The FMLA entitles eligible employees to take up to 12 weeks of unpaid, job protected leave in a 12-month period, for specified family and medical reasons including any “qualifying exigency” arising out of the active duty or call to active duty status of a spouse, son, daughter or parent. Further, the FMLA allows employees to take up to 26 weeks of unpaid leave in each 12-month period to care for family members who suffered a serious injury or illness while on active military and reserve duty.

2. Employer Coverage

The FMLA applies to all public agencies, including the State of West Virginia and its political subdivisions. The State of West Virginia or a political subdivision of the State of West Virginia constitutes a single public agency, and therefore, a single employer for purposes of determining employee eligibility.

3. Eligibility

To be eligible for FMLA benefits, an employee must:

- a. work for a covered employer (all public agencies are covered by the FMLA);
- b. have worked for the employer for a total of 12 months, including time worked as a temporary employee (the 12 months need not be consecutive);
- c. employment prior to a break in service of 7 years or more need not be counted toward the 12 months in most cases. All periods of absence from work due to or necessitated by the Uniformed Services Employment and Reemployment Rights Act (USERRA) covered service, for all military members, are counted in determining an employee’s eligibility;
- d. have worked at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave (this excludes time spent on paid annual and sick leave, paid holidays, any unpaid leaves of absence, and any unauthorized leave or suspensions, provided an employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours of service that would have been performed but for the period of military service. All periods of absence from work due to or necessitated by USERRA covered service, for all military members, are counted in determining an employee’s eligibility; and,
- e. work at a location where at least 50 employees are employed by the employer (e.g. the State or political subdivision) within 75 miles.

4. Entitlement

The employer must grant an eligible employee either unpaid leave; employee-chosen accrued, paid leave; or employer designated accrued, paid leave during any 12-month period for one or more of the following reasons:

a. Up to a total of 12 workweeks:

- (1) for the birth of a child and to bond with the newborn child of the employee (entitlement expires at the end of the 12-month period beginning on the date of the birth);
- (2) for placement with the employee of a son or daughter for adoption or foster care and to bond with the newly placed child within one year of placement (entitlement expires at the end of the 12-month period beginning on the date of the placement);
- (3) to care for an immediate family member (spouse, child, or parent) with a serious health condition;
- (4) to take medical leave when the employee is unable to work because of his or her own serious health condition; or,
- (5) for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty during the deployment to a foreign country or call to active duty status as a member of the National Guard, Reserves or Armed Forces.

b. A parent is entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the child:

- (1) has a disability as defined by the Americans with Disabilities Act (ADA);
- (2) is incapable of self-care due to that disability;
- (3) has a serious health condition; and
- (4) needs care due to the serious health condition.

Only when all four requirements are met is an eligible employee entitled to FMLA protected leave to care for his or her adult child.

5. Concurrent Exhaustion of Leave

Since subdivision 14.8(c) of the *Administrative Rule* provides a more generous unpaid medical leave benefit of up to a maximum of 6 months, the State benefit fulfills the entitlement provisions of the FMLA for an employee's own serious health condition and the leave entitlement under each will exhaust concurrently. A medical leave of absence may

only be taken intermittently when running concurrently with FMLA leave. Should an employee's entitlement to FMLA end during such an absence, and the employee has returned to work, an additional medical leave of absence may be available if the employee meets the eligibility requirements and has not exhausted the 6-month leave entitlement.

6. Military Caregiver FMLA

Up to a total of 26 workweeks of military caregiver FMLA leave for an eligible employee (spouse, parent, child, or next of kin of the military member) to care for a member or covered veteran who suffered a serious injury or illness in the line of duty while on active military duty for which he or she is undergoing medical treatment, recuperation, or therapy. A serious injury or illness for a covered veteran means an injury or illness that was incurred or aggravated by the member in the line of duty on active duty in the Armed Forces and manifested itself before or after the member became a veteran, and is:

- a. 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
- b. a physical or mental condition for which the covered veteran has received a VA 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 caregiver leave; OR
- c. a physical or mental condition that substantially impairs the veteran's ability to work because of a disability or disabilities related to military service, or would do so absent treatment; OR
- d. 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.

Any eligible employee who is a spouse, son, daughter, parent or next of kin may take leave to care for a military member unless such service member makes a single designation of next of kin. More information regarding military family leave entitlements may be found on the DOL website at: [U.S. DOL Fact Sheet #28A - Employee Protections under the Family and Medical Leave Act](#).

The following shall apply to military caregiver leave:

- a. the leave is based on a separate FMLA year beginning with the first date of caregiver leave and ending 12 months later irrespective of the employer's chosen method of calculation for other FMLA leave and can be taken intermittently or in a single block;

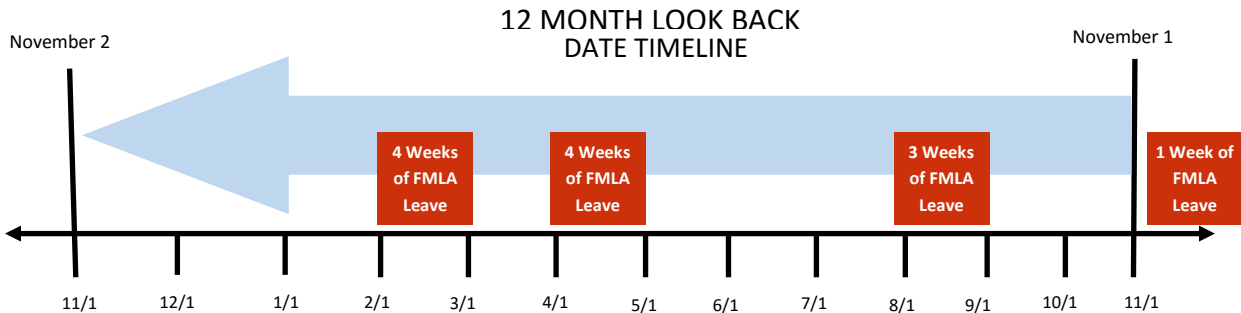
- b. if an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a military member during this single 12-month period, the remaining part of his or her 26 workweeks of leave entitlement cannot be carried over from year to year and is therefore forfeited;
- c. the entitlement is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different military members or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period;
- d. when an eligible employee takes leave to care for more than one military member or for a subsequent serious injury or illness of the same military member, and the single 12-month period corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period;
- e. the leave must not be designated and counted as both leave to care for a military member and leave to care for a family member with a serious health condition. In the case of leave that qualifies as both leave to care for a military member and leave to care for a family member with a serious health condition during the single 12-month period, the employer must designate such leave as leave to care for a military member in the first instance; or
- f. an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a single 12-month period, provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period. For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave but could not take 16 weeks of leave to care for a newborn child and 10 weeks of military caregiver leave.

7. Calculating Leave

Under FMLA, the 12-month period may be based on a calendar year, any fixed 12-month "leave year", a 12-month period going forward from the date the leave begins, or a rolling 12-month period measured backward from the date of leave use.

The Division of Personnel Family and Medical Leave Act/ Parental Leave Act policy ([DOP-P23](#)) requires that agencies use the rolling 12-month period measured backward calculation method.

For example, an eligible employee requests two weeks of FMLA leave to begin on November 1st. The employer looks back 12 months (from November 1st back to the previous November 2nd) and sees that the employee had taken four weeks of FMLA leave beginning February 1st, four weeks beginning April 1st, and three weeks beginning August 1st. The employee has taken 11 weeks of FMLA leave in the 12-month period and only has one week of FMLA-protected leave available. After the employee takes the one week in November, the employee can next take FMLA leave beginning February 1st as the days of the previous February leave “roll off” the leave year.



Exception: the 12-month period for FMLA military caregiver leave must be based upon the first day the employee uses leave, measured forward.

- a. The workweek is the basis for an employee's 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. Thus, if an employee normally works a 50-hour workweek, the employee's statutory entitlement is not capped at 480 hours. Conversely, if an employee normally works a 30-hour workweek, the employee is not entitled to 480 hours of leave. The focus is always on the workweek, and the employee's "normal" workweek (hours/days per week) prior to the start of FMLA leave is the controlling factor;
- b. An employee on FMLA leave for an entire week in a week during which a holiday is observed is charged with a week of leave. If the leave is being taken in increments of less than a full week the holiday does not count as FMLA leave unless the employee was otherwise scheduled and expected to work;
- c. Missed overtime must be counted toward FMLA if the employee would otherwise be required to report for duty but for the taking of FMLA leave. If the serious health condition limits the employee to working 40 hours per week and the employee would otherwise be scheduled for hours in excess of 40, the employee would be charged FMLA leave for the hours scheduled in excess of 40;
- d. An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement and the employer may require sufficient documentation to support the request for leave. Expectant mothers may take FMLA leave before birth for prenatal care if she is unable to work; and

- e. A spouse may take FMLA leave to care for an expectant spouse if she is unable to work. Only a spouse may take FMLA leave to care for a pregnant mother before birth. This includes providing comfort to the expectant mother; see [Medical Certification](#) section (f) below.

8. Spouses Working for the Same Employer

Spouses employed by the same employer may be limited to a combined total of 12 workweeks of family leave for the following reasons:

- a. the birth of a son or daughter and bonding with the newborn child;
- b. for the placement of a son or daughter with the employee for adoption or foster care and bonding with the newly- placed child; and,
- c. to care for an employee's parent who has a serious health condition.

In addition, spouses employed by the same employer may be limited to a combined total of 26 workweeks of military caregiver leave.

This limitation does not apply to leave:

- a. for one's own serious health condition, such as with the recovery period following the birth of a child;
- b. to care for a spouse, son, or daughter with a serious health condition; or,
- c. for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on "covered active duty."

Where a spouse uses a portion of his or her leave for a FMLA-qualifying reason that is subject to the combined 12-workweek limit, that employee has the remainder of his or her 12 workweeks of entitlement for leave for a FMLA-qualifying reason that is not subject to the combined limit.

9. Military Exigency Leave

The qualifying exigency military FMLA leave of the employee (a spouse, son, daughter or parent of the military member) must be related to certain qualifying circumstances related to the military service. The FMLA defines a qualifying situation as one involving:

- a. short-notice deployment, meaning a call or order that is given no more than seven calendar days before deployment (employee can take up to 7 days beginning on the date of notification);

- b. military events and related activities, such as official military-sponsored ceremonies and family support and assistance programs related to the family member's call to duty;
- c. arrangement of alternative childcare or to provide urgent (not recurring and routine) childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement;
- d. school or daycare related activities necessitated by the active duty or call to active duty status of a covered military member;
- e. financial and legal arrangements relating to the family member's active duty;
- f. counseling for the employee or his or her minor child that isn't already covered by the FMLA;
- g. spending time with the military member on rest and recuperation breaks during deployment, for up to 15 calendar days per break;
- h. post-deployment activities such as arrival ceremonies and reintegration briefings or to address issues from the service member's death while on active duty;
- i. to care for a military member's parent who is incapable of self-care when the care is necessitated by the member's covered active duty. Such care may include arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility; or
- j. other purposes arising out of the call to duty, as agreed upon by the employee and employer.

10. Immediate Family Member

The definition of "immediate family member" under FMLA includes spouse, children, and parents. It is more restrictive than the definition found in subsection 3.43 of the Division of Personnel's *Administrative Rule*. [Division of Personnel, Administrative Rule 143CSR1](#)

Employers may request reasonable documentation of family relationship.

11. Intermittent/Reduced Schedule Leave

The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances, some of which require the employer's approval:

- a. when medically necessary to care for a seriously-ill family member or because of the employee's serious health condition;
- b. to care for a newborn or newly-placed adopted or foster care child, including bonding, but only with the employer's approval;
- c. for foreseeable medical treatment but must be scheduled so as not to unduly disrupt the employer's operations, subject to the approval of the employee's health care provider; and,
- d. for qualifying exigency military FMLA leave purposes.

Use of intermittent leave is subject to the employer's approval if FMLA leave is for the birth and care of a healthy child, or the placement for adoption or foster care of a healthy child.

If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a military member, including during a period of recovery, or if the employer agrees to permit intermittent leave or a reduced work schedule for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. The alternative position must have equivalent pay and benefits and when the employee no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced.

12. Substitution of Paid Leave

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. The appropriate designation of sick, family sick, and annual leave are explained more fully in the subsection below. Accrued compensatory time should also be used to cover the absence.

The paid leave shall run concurrently with the employee's entitlement to unpaid FMLA leave starting on the date the agency provides the required notice. The substitution of accrued sick leave for FMLA leave is limited by the provisions in the [Administrative Rule](#).

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.

Annual leave shall be used for:

- a. non-medical qualifying exigency military FMLA leave purposes;
- b. the employee's own serious health condition prior to or after exhaustion of paid sick leave;
- c. to care for an eligible family member prior to or after exhaustion of the 80 hours of family sick leave; or,
- d. to bond with a newborn child or a child placed for adoption or foster care within one year of birth or placement.

13. Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves:

- a. any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay in a hospital, hospice, or residential medical care facility);
- b. a period of incapacity requiring absence of more than three (3) consecutive full calendar days from work, school, or other regular daily activities, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
 - (1) treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist; or,
 - (2) 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.

In order to qualify for leave under this provision, the employee or family member must visit a health care provider within 7 days of the first day of incapacity and visit(s) must be in-person.

- c. any period of incapacity due to pregnancy, or for prenatal care;
- d. any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.). The employee must visit a health care provider at least 2 times per year to qualify under this provision;
- e. 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.);

- f. any absences to receive multiple treatments (including any period of recovery therefrom); and/or,
- g. by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than 3 consecutive days if left untreated (e.g. Dialysis, therapy, etc.).

14. Medical Certification

The need for leave for a serious health condition of the employee or the employee's immediate family member must be supported by a certification issued by a health care provider using either form [DOP-L3](#), [DOP-L5](#), [DOP-L6](#), or [DOP-L7-V](#). The employee must be permitted at least 15 calendar days to obtain the medical certification.

- a. Employees are required to provide a complete and sufficient certification. If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or decertification) after the employer has given the employee an opportunity to cure any deficiencies.
- b. To make such contact, the employer must use a health care provider, a human resource professional, a leave administrator, or a management official. **Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider.** Information beyond what is required on the certification form may not be solicited. Employers may send summaries of the employee's intermittent absences to the health care provider to confirm the absences are consistent with the condition.

If the certification is incomplete or insufficient:

- (1) the employer must give the employee a written notice stating what additional information is necessary to make the certification complete and sufficient.
- (2) The employee must provide the additional information to the employer within seven calendar days, in most circumstances.
- (3) A certification is considered "incomplete" if one or more of the applicable entries on the form have not been completed.
- (4) A certification is considered "insufficient" if the information provided is vague, unclear, or non-responsive.

If the employee's need for FMLA leave lasts beyond a single FMLA leave year, the employer may require the employee to provide a new medical certification in each new FMLA leave year.

- a. An employer who has reason to doubt the validity of a medical certification, may, at its own expense, require the employee to obtain a second medical certification from a health care provider. The employer may choose the health care provider for the second opinion, except that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider. If the second opinion differs from the original certification, the employer may require the employee to obtain a third certification from a healthcare provider selected by both the employee and employer. The opinion of the third health care provider is final and must be used by the employer. The employer is responsible for paying for the second and third opinions, including any reasonable travel expenses for the employee or family member. While waiting for the second (or third) opinion, the employee is provisionally entitled to FMLA leave.
- b. Qualifying Exigency Military FMLA Leave Certification - Employers can request certification by having the employee provide a copy of the service member's active-duty orders or using the prescribed form [DOP-L8](#). Employers may also verify with a third party that an employee met with the third party during qualifying exigency military FMLA leave. If the employee submits a complete certification supporting a request for leave, the employer may not request additional information as re-certification is not permitted.
- c. A copy of the military member's Rest and Recuperation leave orders, or other documentation issued by military setting forth the dates of the military member's leave is required.
- d. Military Caregiver Certification - Employer must accept "invitational travel orders" or "invitational travel authorizations" issued by the Department of Defense to family members as sufficient certification of the need for military caregiver leave, at least until the order or authorization's expiration date. Otherwise, form [DOP-L7](#) or [DOP-L7-V](#) is to be used to secure certification. Employers may seek authentication and clarification of the certification, receive second and third opinions, but may not seek re-certification unless the health care providers are not affiliated with DOD, VA, or TRICARE.
- e. Recertification - Employers may request recertification no more than once every 30 days for a chronic or permanent/long-term condition if no minimum period of incapacity is specified, or - if an extended period of incapacity was listed on the initial certification - until that period initially specified by the health care provider passes. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee.

- f. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence. Unless:
 - (1) the employee requests an extension of leave;
 - (2) the circumstances described by the previous certification have changed significantly; or
 - (3) The employer receives information that casts doubt on the continuing validity of the certification (i.e., leave abuse, suspected forgery, etc.). Further, employers can provide the health care provider with a record of absences and ask if the need for leave is consistent with the serious health condition. Requiring recertification for qualifying exigency military FMLA or military caregiver leave is not permitted.

- g. The medical certification provision that an employee is “needed to care for” a family member, military member, or covered veteran encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

15. Health Care Providers

Health care providers who are recognized by the Public Employees Insurance Agency’s group health plan’s benefits manager may provide certification of a serious health condition.

- a. The providers must be authorized to practice, and be performing within the scope of their practice, under State law.

- b. Generally included are: Doctor of Medicine or osteopathy; podiatrists, dentists, clinical psychologists, optometrists, and chiropractors; nurse practitioners, nurse-midwives, and clinical social workers; and Christian Science practitioners accredited by the Mother Church.

- c. The list of health care providers who are authorized to complete a certification for military caregiver leave for a covered servicemember is expanded to include health care providers, as defined in 29 CFR 825.125, who are not affiliated with DOD, VA, or TRICARE.

If an employer requests certification, an employee may submit documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers as sufficient certification of the covered veteran's serious injury or illness. The documentation is sufficient even if the employee is not the named caregiver on the document.

If an employee submits documentation of the servicemember's enrollment in the VA Program of Comprehensive Assistance for Family Caregivers, an employer may require the employee to provide additional information, such as confirmation of the familial relationship to the enrolled servicemember or documentation of the veteran's discharge date and status.

16. Maintenance of Health Benefits

The employer is required to 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.

- a. Where required, arrangements will need to be made for employees taking unpaid FMLA leave to pay their proportionate share of health insurance premiums. Such payments may be made under any arrangement voluntarily agreed to by the employer and employee.
- b. The 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.
 - (1) 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.
 - (2) As provided in the FMLA regulations, 29 CFR 825.213, the employer may recover premiums it paid to maintain health insurance coverage and other benefits for an employee who fails to return to work from FMLA leave.

17. Other Benefits

Certain types of earned benefits, such as tenure, paid leave, and annual increment pay do not accrue during periods of unpaid FMLA leave, unless such earned benefits are specifically provided by State law or *Administrative Rule*. For other elected benefits, such as optional life insurance coverage for which the employee typically pays through payroll deduction, the employer and the employee may make arrangements to continue benefits during periods of unpaid FMLA leave.

18. Job Restoration

On return from FMLA leave, an employee must be restored to his or her original job, or to a job “equivalent” to the employee’s former position in terms of pay, benefits, and other employment terms and conditions and must entail substantially equivalent skill, effort, responsibility and authority.

- a. Employers may obtain fitness-for-duty certifications for employees returning from leave. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions.
- b. Employees on intermittent leave may be asked for fitness-for-duty certifications when there are reasonable safety concerns, defined as a reasonable belief of a significant risk of harm to the employee or others, considering the nature and severity of the potential harm and likelihood of occurrence. These certifications cannot be required more often than once every 30 days and employers cannot obtain second or third opinions on fitness for duty. Employers may, however, require an employee to take a medical exam at the employer’s expense after the employee has returned from FMLA leave.
- c. The Division of Personnel’s Functional Capacity Assessment form may be used for fitness- for-duty certification. The form may be downloaded on the Division of Personnel web site at: [DOP - Return to Work Guidelines](#).
- d. If the employee is unable to perform an essential function of his or her position because of a physical or mental condition, the employee has no entitlement to restoration to another position; however, the employer’s obligations may be governed by the ADA. It is strongly recommended that you contact Employee Relations in such circumstances.
- e. “Key” Employee Exception - Under specified and limited circumstances where restoration to employment will cause “substantial and grievous economic injury” to its operations, an employer may refuse to reinstate certain highly-paid, salaried, “key” employees.
 - (1) A “key” employee is a salaried, FMLA-eligible employee who is among the highest paid 10 percent of employees within 75 miles of the employee’s worksite.
 - (2) The term “salaried” means “paid on a salary basis”, as determined in DOL’s regulations defining employees who may qualify as exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act.

19. Employee Notice

Eligible employees seeking to use FMLA leave are required to provide:

- a. 30-day advance notice of the need to take FMLA leave when the need is foreseeable (i.e., expected birth, placement for adoption or foster care, or planned medical treatment);
- b. notice “as soon as practicable” (usually the same day or the next business day unless there are unusual circumstances) when the need to take FMLA leave is not foreseeable (i.e., because of a lack of knowledge, change in circumstances, or medical emergency);
- c. notice in compliance with the employer’s call-in procedure when reporting an absence under intermittent FMLA leave, unless there are unusual circumstances; and,
- d. sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons, i.e., the reason for taking leave; if applicable, the family member for whom the leave is requested; the nature of the injury, impairment, or physical or mental condition that necessitates the leave; and the anticipated duration of the leave (the employee need not mention FMLA when requesting leave to meet this requirement but is required to explain why the leave is needed).

Refusal to comply with procedure or to provide necessary documentation may result in the absence being charged as unauthorized leave and disciplinary action being taken.

20. Employer Notices

Employers must post and keep posted on its premises, in conspicuous places where employees are employed, a notice approved by the Secretary of the DOL explaining rights and responsibilities under FMLA.

- a. An employer that willfully violates this posting requirement may be subject to a civil monetary penalty for each separate offense. Penalties are adjusted for inflation each year. For more information on the penalty adjustments visit the DOL website.

The poster approved by the DOL may be found at:

www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf.

- b. In addition to the posted notice, employers must provide the same notice in employee handbooks or distribute a copy of the FMLA policy upon hire.
- c. When an employee requests FMLA leave, or when the employer acquires knowledge that an employee’s leave may be for a FMLA-qualifying reason, employers must

provide written eligibility notice to the employee within 5 business days. Notice should be accomplished using the prescribed Notice of Eligibility and Rights and Responsibilities form [DOP-L9](#), which includes all of the information required under FMLA.

Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period.

All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period. Employers may want to notify an employee automatically in the following situations that time off may be protected under FMLA and/or PLA:

- a. The employee takes three consecutive days off from work and requires continuing or repeated medical care;
- b. The employee is off work for three days or more due to workers' compensation injury;
- c. The employee requires follow-up treatment for a previous illness or injury that was a serious health condition;
- d. The employee has occasional absences due to a chronic condition;
- e. The employee needs time off due to the illness of a family member; and/or,
- f. The employee is taking time off in relation to qualifying exigency or military caregiver leave.

When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within 5 business days absent extenuating circumstances.

Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. Notice should be accomplished using the prescribed [DOP-L10](#) form which includes all of the information required under FMLA.

This form should also be used for subsequent notification of changes (e.g., exhaustion of FMLA leave entitlement).

Failure to follow the notice requirements may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable 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.

21. Other Provisions

- a. FMLA does not affect any other federal or State law which prohibits discrimination, nor supersede any State law (i.e., the West Virginia Parental Leave Act) or lawfully promulgated rule (i.e., the *Administrative Rule* of the Division of Personnel) which may provide greater family or medical leave protection.
- b. If an employee is eligible for leave under both FMLA and PLA, and/or the *Administrative Rule*, the employee is entitled to the greatest benefit or most generous rights provided under the different parts of each law or the *Administrative Rule*.
- c. The determination of the most generous benefit will be at the employee's discretion.
- d. Employers may deny a "perfect attendance" award to an employee who does not have perfect attendance because of FMLA leave but only if employees taking non-FMLA medical and/or sick leave are treated in the same manner. For example, if employees who are on medical leave of absence without pay as provided in the *Administrative Rule* are denied perfect attendance awards then employees who take unpaid FMLA leave may be denied such awards.
- e. An employee may voluntarily accept (not as a condition of employment) a light duty assignment while recovering from a serious health condition. An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.
- f. Employers are encouraged to develop policies prohibiting employees from working for secondary employers while on medical-related leave of absence with or without pay. Such restriction must apply to all types of medical-related leave as FMLA leave may not be treated differently in this regard.

IV. REFERENCES

- A. West Virginia Parental Leave Act, W. VA. CODE §21-5D-1 *t seq.*
- B. Family and Medical Leave Act, 29 USC 2601 *et seq.*
- C. United States Department of Labor, Family and Medical Leave Act Regulations, 29 CFR 825
- D. United States Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2013-1.
- E. West Virginia Division of Personnel, *Administrative Rule*, W. VA. CODE R. §143-1-14.8(b)
- F. West Virginia Division of Personnel Family and Medical Leave Act / Parental Leave Act policy
- G. (DOP-P23)

V. FORMS INDEX AND BRIEF EXPLANATION OF PURPOSE

A. EMPLOYER CHECKLIST

This checklist may be used when the employer becomes aware that an employee is taking or plans to take leave from work for reasons that may qualify under FMLA (click [Eligibility](#)) and/or PLA (click [2. Reasons for Taking Leave](#)).

B. EMPLOYEE CHECKLIST

This checklist may be used by an employee when he or she plans to request leave from work for reasons that may qualify under FMLA (click [Eligibility](#)) and/or PLA (click [2. Reasons for Taking Leave](#)).

C. APPLICATION FOR LEAVE WITH PAY - Form DOP -L1

Use this form to apply for different types of leave with pay, such as annual, jury, sick, and family sick. It is not used for paid leave under FMLA. If the employee has already submitted a DOP-L1 and DOP-L3 certification form and there is sufficient information to determine FMLA eligibility further certification is not necessary to make a designation.

D. APPLICATION FOR LEAVE OF ABSENCE WITHOUT PAY - Form DOP -L2

Use this form to apply for personal, military or education leave without pay.

E. PHYSICIAN'S/PRACTITIONER'S STATEMENT - Form DOP -L3

Use this form when requesting sick leave for an absence of more than three (3) consecutive work days, a medical leave of absence without pay under the Division of Personnel's *Administrative Rule* (W. VA. CODE R. §143-1-1 *et seq.*), and/or leave with or without pay under FMLA and/or PLA. Subject to the recertification provisions of FMLA forms DOP-L5 or DOP-L6, as applicable, may be required if additional information is needed. This form may also be used for a release to return to work and/or to comply with leave restriction requirements. Form DOP-L7, DOP-L-7-V or DOP-L8, as applicable, is required when requesting military FMLA leave.

F. APPLICATION FOR LEAVE OF ABSENCE FOR FEDERAL FAMILY and MEDICAL LEAVE ACT, STATE PARENTAL LEAVE ACT, and/or MEDICAL LEAVE OF ABSENCE WITHOUT PAY - Form DOP -L4

Use this form to apply for a medical leave of absence without pay, FMLA leave with or without pay, or PLA leave. A completed and current DOP-L3, DOP-L5, DOP-L6, DOP-L7, and/or DOP-L8 certification, as applicable, must be included with this application or be on file. Form DOP-L7 or DOP- L8, as applicable, is required when requesting military FMLA leave.

G. SUPPLEMENTAL CERTIFICATION OF HEALTH CARE PROVIDER FOR EMPLOYEE'S SERIOUS HEALTH CONDITION - Form DOP -L5

Subject to the recertification provisions of FMLA, this form should only be used when form DOP-L3 provides insufficient information from the health care provider concerning an employee's request for FMLA leave and/or a medical leave of absence without pay for his or her own serious health condition. Form DOP-L6 should be used to obtain supplemental information, if necessary, concerning a request for leave for a family member's serious health condition. If an employee has already submitted a DOP-L3 certification form and there is sufficient information to determine FMLA eligibility, further certification should not be needed to make a designation.

H. SUPPLEMENTAL CERTIFICATION OF HEALTH CARE PROVIDER FOR FAMILY MEMBER'S SERIOUS HEALTH CONDITION - Form DOP -L6

Subject to the recertification provisions of FMLA, this form should only be used when form DOP-L3 provides insufficient information from the health care provider concerning an employee's request for FMLA and/or PLA leave for a family member's serious health

condition. If an employee has already submitted a DOP-L3 certification form and there is sufficient information to determine FMLA/PLA eligibility, further certification should not be needed to make a designation.

I. CERTIFICATION FOR A SERIOUS INJURY OR ILLNESS OF A MILITARY MEMBER (for FMLA Military Family Leave) - Form DOP -L7

Use this form to obtain medical certification about a military member when the employee has requested leave to care for the service member.

J. CERTIFICATION FOR A SERIOUS INJURY OR ILLNESS OF A CURRENT SERVICEMEMBER (for FMLA Military Family Leave) - Form DOP-L7-V

Use this form to obtain medical certification about a current servicemember when the employee has requested leave to care for the service member.

K. CERTIFICATION OF QUALIFYING EXIGENCY FOR MILITARY FAMILY LEAVE Form - DOP-L8

Use this form for certifying the need for military exigency leave under FMLA.

L. NOTICE OF ELIGIBILITY AND RIGHTS & RESPONSIBILITIES (for FMLA and/or PLA) - Form DOP-L9

Use this form to provide the required notice to an employee when they request FMLA leave or when the employer acquires knowledge that an employee's leave may be for a FMLA- and/or PLA-qualifying reason. The notice must be provided within 5 business days. See Employer Notices for more information.

M. DESIGNATION NOTICE for FMLA and/or PLA - Form DOP-L10

When the employer has enough information to determine whether the leave is being taken for a FMLA- or PLA-qualifying reason (e.g., after receiving a certification), use this form to notify the employee whether the leave will be designated and will be counted as FMLA/PLA leave. This must be done within 5 business days absent extenuating circumstances.

N. EMPLOYER CHECKLIST

Family and Medical Leave Act (FMLA) and/or Parental Leave Act (PLA)

Employee Name: _____ Date: _____

This checklist may be used when the employer becomes aware that an employee is taking or plans to take leave from work for reasons that may qualify under the federal Family and Medical Leave Act (FMLA) and/or State Parental Leave Act (PLA). *If you are not familiar with the requirements of FMLA or PLA, it is recommended you read the [III. INTERPRETIVE MATERIAL](#) in this guide or contact *Employee Relations at (681) 313-2706.**

If the employee does not qualify for FMLA and/or PLA he or she may qualify for medical and/or personal leave of absence without pay as provided in the West Virginia Division of Personnel *Administrative Rule*, W. Va. CODE R. §143-1-1 *et seq.*, subsection 14.8. The Rule is found at: [Division of Personnel, Administrative Rule 143CSR1](#)

- Ask the employee to complete the prescribed FMLA/PLA application for leave of absence form [DOP-L4](#). An employee's failure to submit a written request does not relieve the employer from responsibility to grant leave under federal law.
- Review the employee's Eligibility for FMLA/PLA leave, including calculation of entitlement already exhausted.
- Once eligibility is determined, provide a written notice of eligibility within five (5) business days using the prescribed FMLA/PLA Notice of Eligibility and Rights & Responsibilities form [DOP-L9](#).
- Ask the employee to complete the appropriate certification form for the requested leave and return it within fifteen (15) calendar days. If the employee submits a DOP-L3 certification form and there is sufficient information to determine FMLA/PLA eligibility, further certification should not be necessary. Do not ask for more information than the certification provides. See FORMS INDEX AND BRIEF EXPLANATION section for the appropriate form. If the leave is for the birth of a child or the placement for adoption or foster care, request sufficient documentation to support the request for leave.

N. EMPLOYER CHECKLIST (continued)

Family and Medical Leave Act (FMLA) and/or Parental Leave Act (PLA)

- If the leave will be Intermittent/Reduced Schedule Leave, work with the employee to reach a mutually satisfactory schedule and/or to clarify the schedule of absences as much as possible and consider accommodating the employee by changing work assignments or schedule. Use of intermittent leave is subject to the employer's approval if FMLA leave is for the birth and care of a healthy child, or the placement for adoption or foster care of a healthy child.
- Review the certification form(s) when received and notify the employee by completing the prescribed FMLA/PLA Designation Notice form [DOP-L10](#) within five (5) business days that the time off will or will not be considered covered under FMLA/PLA. If this decision is tentative, indicate what additional information is needed.
- When a tentative decision becomes final, is reversed based on new evidence, or is updated due to changed circumstances, notify the employee by completing another Designation Notice, form [DOP-L10](#).
- During the leave, monitor the FMLA/PLA hours used as well as payment of health insurance premiums (if any) and other optional insurance premiums.
- Ask for medical recertification as appropriate (typically not more often than every 30 days). This request need not be in writing but should be documented.
- At least two weeks in advance of the end of the leave, ask the employee for a status report and whether they intend to return to work on schedule. Based upon the employee's response:
- If the employee was absent due to an illness or injury, and the nature of the problem was such that it is questionable whether they are fully capable of performing their job functions, and a fitness for duty certification using the functional capacity form found at [DOP - Return to Work Guidelines](#) Form [DOP-L3](#) and/or [Fitness for Duty certification](#) may be used as release to return to work. No release is necessary if the employee was off due to the incapacity of a family member.
- Resolve reinstatement issues.
- When employee returns to work, re-enroll him or her in any insurance coverages that may have lapsed and any new coverages that became available during the absence.
- If the employee clearly states that he or she does not intend to return to work, give termination/disability/COBRA information as appropriate and pursue recovery of premiums paid by the employer to maintain health insurance coverage and other benefits. for Family and Medical Leave Act (FMLA) and/or Parental Leave Act (PLA)

EMPLOYEE CHECKLIST

Family and Medical Leave Act (FMLA) and/or Parental Leave Act (PLA)

You may use this checklist when you plan to request leave from work for reasons which may qualify under the federal Family Medical Leave Act (Eligibility) and/or the State Parental Leave Act (2. Reasons for Taking Leave). You may also want to review the [EMPLOYER CHECKLIST](#) and [III. INTERPRETIVE MATERIAL](#) in this guide to better understand the approval and follow-up process. If you have questions, call your agency leave/benefits coordinator, agency Human Resources office, and/or DOP's Employee Relations section at (681) 313-2706.

- Submit a written, signed, and dated application for leave of absence using form [DOP-L4](#). Provide at least 30 days' notice or, if the need for leave was not foreseeable, as soon as possible. Make a reasonable effort to schedule any planned treatment and/or absence so as not to unnecessarily disrupt the employer's operations.
- Notify your supervisor and your agency leave/benefits coordinator and/or Human Resources office of your intention to take a leave of absence and provide a copy of your request form for approval.
- A determination will be made whether:
 - 1) your leave qualifies under FMLA/PLA;
 - 2) you have disability benefits for which you may file a claim; and/or,
 - 3) you need to file a Workers Compensation claim.
- Upon request from the leave/benefits coordinator, have your health care provider complete the appropriate certification form, which will vary depending on the reason you are taking leave (see FORMS INDEX AND BRIEF EXPLANATION section for an explanation of each certification form). If the leave is for the birth of a child or the placement for adoption or foster care your employer may request sufficient documentation to support the request for leave.
- If your leave will be intermittent (see FMLA and/or PLA for explanation), work with your agency leave/benefits coordinator and/or Human Resources office to reach a mutually satisfactory schedule and/or to clarify the schedule of absences as much as possible, and to discuss accommodations such as changing work assignments or schedule. Use of intermittent leave is subject to the employer's approval if FMLA leave is for the birth and care of a healthy child, or the placement for adoption or foster care of a healthy child.

EMPLOYEE CHECKLIST (continued)

- Have your health care provider supply medical updates to your agency leave/benefits coordinator and/or Human Resources office if required.
- If you are on unpaid leave for part or all of your absence, you will receive information and instructions for continuation of medical insurance and other insurance coverage.
- If your leave is for birth or adoption under FMLA and you want to add the child to your insurance, obtain the necessary form(s) from your benefits coordinator.
- If you need an extension of your medical leave, submit a written request to your agency leave/benefits coordinator and/or Human Resources office.
- Contact your agency leave/benefits coordinator and/or Human Resources office and/or supervisor in advance to confirm the date you will return to work.
- Prior to returning to work, have your health care provider complete a form [DOP-L3](#) if the reason for your leave was your own serious health condition. If there was a request to have a functional capacity evaluation performed with your FMLA designation, provide such certification before returning.
- Work with your agency leave/benefits coordinator and/or Human Resources office to accommodate work restrictions if necessary.

Your return to work may be delayed if you do not provide all documentation referenced above.