

DEPARTMENT OF HUMAN RESOURCES

4.3 POLICY ON FAMILY AND MEDICAL LEAVE ACT

(a) Purpose and Scope

- (1) **Purpose.** The purpose of this policy is to establish uniform practices for the administration of leave from work for employees under the Family and Medical Leave Act.
- (2) **Scope**
 - (A) This policy applies to:
 - (i) employees who are paid through the Central Payroll Bureau of the Comptroller; and
 - (ii) employees of the State Board of Law Examiners, the Thurgood Marshall State Law Library, the Commission on Judicial Disabilities, and the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure.
 - (B) This policy does not apply to:
 - (i) locally funded employees in the Circuit Courts;
 - (ii) employees of the Attorney Grievance Commission and the Client Protection Fund;
 - (iii) employees of the Register of Wills or the Orphans' Court; and
 - (iv) judges and commissioners.

(b) Definitions

- (1) **Administrative Head:**
 - (A) For the Appellate Courts, the Clerk of the Court for all employees under the Clerk's supervision, and the Chief Judge for all other employees, in the appellate court where the employee works;
 - (B) For the Circuit Courts, the Clerk of the Court for all employees under the Clerk's supervision and the County Administrative Judge for all state employees under his or her supervision;
 - (C) The Chief Judge of the District Court for employees of that Court, the Chief Clerk, or the Administrative Clerk or Administrative Commissioner for all employees under his or her supervision;
 - (D) For the Administrative Office of the Courts (AOC), the State Court Administrator;
 - (E) For any units, the head of the unit where the employee works; or,
 - (F) Any person who serves as the authorized designee, by express written designation, of any of the foregoing persons.
- (2) **Child** – Biological child, adopted child, foster child, stepchild, or child of a person standing in loco parentis.
- (3) **Health Care Provider:**
 - (A) A doctor-of-medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices;
 - (B) A podiatrist, dentist, clinical psychologist, optometrist, or chiropractor authorized to practice in any state and performing within the scope of his or her practice as defined under that state's law;

- (C) A nurse practitioner, physician’s assistant, nurse-midwife, or clinical social worker who is authorized to practice under any state’s law and who is performing within the scope of his or her practice as defined under that state’s law;
- (D) A Christian Science practitioner listed with the First Church of Christ Scientist in Boston, Massachusetts;
- (E) Any health care provider from whom an employer or a group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits;
- (F) A health care provider as defined above who practices in a country other than the United States, who is licensed to practice in accordance with the laws and regulations of that country; and,
- (G) For non-FMLA purposes, any health care provider accepted by the State Court Administrator.

(4) Judiciary Human Resources Department (JHRD) – The department within the AOC that is responsible for, but not limited to, the following functions for State employees in the Maryland Judiciary: human resources policy development, administration, and interpretation; recruitment; employment and orientation services; employee benefits; position classification and salary administration; and employer-employee relations.

(5) Military Caregiver Leave – Leave allowing a covered spouse, child, parent, or nearest blood relative of a current service member in the Regular Armed Forces, National Guard or Reserves, or a veteran, to use up to 26 weeks to care for the current service member who has incurred a serious injury or illness in the line of duty while on active duty, or to care for a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness that was incurred or aggravated in the line of duty while on active duty at any time during the five years preceding the date of treatment and that manifested itself before, or after the member became a veteran.

(6) Military Exigency Leave – Leave allowing a covered spouse, parent, or child of an active duty service member or current member of the National Guard or Reserves to take up to 12 weeks of leave due to a qualifying exigency resulting from the covered family member’s active military duty or federal call to active duty status in support of a contingency operation. It includes non-medical, non-routine activities such as:

- (A) Short-notice deployment activities;
- (B) Military events and related activities;
- (C) Childcare and school activities;
- (D) Financial and legal arrangements;
- (E) Counseling;
- (F) Rest and recuperation;
- (G) Post-deployment activities; and,
- (H) Additional activities.

(7) Overtime – For purposes of this policy, the number of hours worked that are beyond the employee’s normal work schedule.

- (8) **Parent** – Biological parent, adoptive parent, foster parent, stepparent, or person standing in loco parentis to a child.
- (9) **Serious Health Condition** – For FMLA purposes means an illness, injury, impairment, or physical or mental condition that involves:
- (A) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility including any period of incapacity, or any subsequent treatment in connection with such inpatient care; or,
 - (B) Continuing treatment by a health care provider for a serious health condition which involves any one or more of the following:
 - (i) A period of incapacity (i.e. an inability to work) of more than three full consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:
 - (I) Treatment two or more times by a health care provider or by a provider of health care services (e.g. physical therapist) under orders of, or on referral by, a health care provider; or
 - (II) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the health care provider’s supervision. (Please note that a regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed rest, drinking fluids, exercises, and other similar activities that can be initiated without visits to a health care provider is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.);
 - (ii) Any period of absence or incapacity due to pregnancy, or for prenatal care (the father or partner may not use FMLA for prenatal care if not married to the mother);
 - (iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition which:
 - (I) Requires periodic visits for treatment by a health care provider and,
 - (II) Continues over an extended period of time (including recurring episodes of a single underlying condition); and,
 - (III) May cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, migraines, etc.);
 - (iv) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. (The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.);
 - (v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis);

- (vi) Treatment, including but not limited to examinations, to determine if a serious health condition exists, and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

(10) Unit – The State Board of Law Examiners, the Thurgood Marshall State Law Library, the Commission on Judicial Disabilities, the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure.

(c) Duration

With the exception for reasons described in Subsection (4)(D) below, the FMLA provides a 12-week period of paid or unpaid protected absence per “rolling” 12-month period for a serious health condition of the employee and certain family members of the employee. For FMLA purposes, if an employee’s normal work week consists of 40 hours, then a “week” equals 40 hours. If an employee’s normal work week consists of 25 hours, then a “week” equals 25 hours; and so forth. A Judiciary employee is required to use paid leave concurrently with a FMLA covered absence if such leave is available to the employee, to include annual, compensatory, personal, and sick leave, or any other paid leave that is available to the employee.

(d) Calculation

A “rolling” 12-month period shall be used to calculate an employee’s FMLA entitlement. Under the “rolling” 12-month period, each time an employee takes FMLA leave, the remaining leave entitlement would be the balance of the 12 weeks which has not been used during the immediately preceding 12 months.

(e) Compliance with Policy Required

An employee using paid leave during a FMLA absence must comply with the requirements of this policy. If an employee exhausts all paid leave while on a FMLA covered absence, then the employee will be placed in a leave-without-pay status.

(f) Qualifying Reasons for Protected Absence

The FMLA provides an employee with a protected absence for:

- (1)** The birth of a child and to care for the newborn, or the placement of a child for adoption or foster care with the employee;
- (2)** To care for the employee’s spouse, parent, or child under age 18, or an adult child who is incapable of self-care due to a disability as defined by the Americans with Disabilities Act (ADA);

- (3) The employee’s own serious health condition that prevents the employee from performing his or her job functions;
- (4) Military Caregiver Leave (in the case of care-giver leave, an employee may be eligible for a protected absence of up to 26 weeks): and,
- (5) Military Exigency Leave.

(g) Additional Qualifying Requirements

To qualify under the FMLA, in addition to there being a qualifying reason:

- (1) The employee must have worked at least a total of 12 months for the state of Maryland. The time of employment may be separated by a break in service as long as the amount of time worked totals at least 12 months. While the 12 months of employment need not be consecutive, employment prior to a break in service of seven years or more need not be counted unless the break is occasioned by the employee’s fulfillment of his or her military obligation.
- (2) The employee must have worked at least 1,250 hours during the preceding 12 months. Overtime hours worked are included when calculating the 1,250-hour requirement. Paid or unpaid absences from work are not included when calculating the 1,250 hours worked.
- (3) JHRD shall determine whether the employee has worked the required number of hours by calculating from the date the absence is scheduled to begin. For example, if the employee requests a FMLA absence before becoming eligible but will have worked the required number of hours by the time the absence is scheduled to begin, the employee shall be deemed to have satisfied the required number of hours. JHRD, when responding to FMLA requests, must check the employee’s personnel and leave records to determine whether these requirements have been met. FMLA absence may not be denied on these grounds unless the records clearly indicate the employee has not worked a total of at least 12 months and at least 1,250 hours during the preceding 12 months. If there is no documentation to support these conclusions, the employee is entitled to the FMLA absence.

(h) Intermittent Leave and Reduced Schedules

- (1) Employees needing intermittent leave or a reduced schedule under the FMLA must attempt to schedule their leave so as not to disrupt the Judiciary’s operations. In addition, while the employee is on an intermittent or reduced schedule, the administrative head may transfer the employee to an alternative position that better accommodates the leave or reduced schedule, and which has equivalent pay and benefits.
- (2) FMLA absences to care for an eligible family member with a serious health condition or because of the employee’s own serious health condition may be taken intermittently or on a reduced work schedule only when medically necessary as determined by a health care provider.

- (3) The provisions of the FMLA permit employees to take time off intermittently, or on a reduced schedule after the birth of the employee's child, or for adoption or foster care placement of a child, only if the employee and employer agree to such an arrangement. The Judiciary agrees to approve such requests, provided: (1) the employee submits at the time of the birth, adoption, or placement, a complete plan for the time off requested; and, (2) the employee's administrative head approves a schedule of the requested intermittent leave.

(i) No Loss of Accrued Benefits During a FMLA Absence

- (1) Employees absent on FMLA do not lose "employment benefits" accrued prior to their FMLA absence. The term "employment benefits" is broadly defined to include retirement, health, disability, and life insurance, regardless of whether such benefits are provided by practice or written policy of the employer. Furthermore, commendations, bonuses, and awards for perfect attendance may not be jeopardized by a FMLA absence. During an unpaid FMLA absence, the employee must continue to receive group health coverage on the same terms and conditions as an employee not on a FMLA absence. If the leave is unpaid, the employee will be billed for his or her portion of the premium. The health care coverage may cease if the premium payment is not paid in a timely manner.
- (2) When an employee is using paid leave concurrently with a FMLA absence, the employee is entitled to the accrual of any seniority or employment benefits an employee who remained continuously at work would have received, *e.g.* earning of annual and sick leave, payment for a holiday when it occurs, earning of seniority credit, etc.
- (3) An employee is not entitled to the accrual of any seniority or leave benefits while in unpaid status.
- (4) An employee on paid or unpaid leave during a FMLA absence is not entitled to any greater rights than an employee who remained continuously at work.

(j) Job Restoration Upon Return from FMLA Absence

- (1) An employee who is on a FMLA absence and is now able to return to work, must be restored to the same or an equivalent job held at the time the absence began. An "equivalent" position is one with equivalent benefits, pay, and other terms and conditions of employment. An equivalent position must ordinarily be on the same shift or equivalent work schedule as the position held by the employee prior to the FMLA absence, and it must be in a geographically proximate work site.
- (2) An administrative head who eliminates the job of an employee who takes a FMLA absence must show that the elimination was due to business necessity.
- (3) When a FMLA absence of more than three days occurs due to the employee's own serious health condition, the employee is required, prior to returning to work, to provide medical certification from a health care provider indicating the employee is now able to resume work. Any requirement for a fitness for work certification must be job-related, consistent with business necessity, and may be

required only with regards to the medical condition that caused the need for the FMLA absence. The Judiciary may not require second or third fitness for duty certifications.

(k) Notice Requirements

- (1)** The FMLA requires the employee to provide at least a 30-day notice when an absence is foreseeable. As a general rule, 30-day notice is expected in cases involving the birth, foster care, or adoption of a child or planned medical treatment for an employee or an employee's family member's serious health condition, or the planned medical treatment for a serious injury or illness of a covered servicemember. In those cases when a 30-day notice is not practical, or the need for leave is not foreseeable, an employee must provide notice as soon as practicable under the facts and circumstances of the particular case.
- (2)** If the foreseeable leave is due to a qualifying military exigency, an employee is required to give notice as soon as practicable.
- (3)** Absent unusual circumstances, employees must follow the usual and customary call-in procedure for reporting an absence, including any requirement to contact a specific individual.
- (4)** If an employee fails to give a 30-day notice when the need for a FMLA absence is foreseeable, fails to give notice as soon as practicable, or fails to follow the usual and customary call-in procedures, the JHRD may deny designating the absence as FMLA or delay designating the absence as FMLA until a reasonable time has passed after the notice. If an employee is unable to give advanced notice because the need was not foreseeable, but gives notice after returning to work, the time off may be treated as a FMLA absence.
- (5)** In situations where the employee cannot reasonably be expected to request the leave personally, a family member (ex. spouse, parent, child of majority age), or legal designee of the employee, should make the request.
- (6)** This policy shall constitute notice of the FMLA's notice requirements.

(l) Documentation Requirements for Adoption and Foster Care

If an employee requests a FMLA absence because of the placement of a child for adoption or foster care with the employee, then the employee must provide documentation of the placement of the child with the employee.

(m) Documentation Requirements for Serious Health Condition – Medical Certification Required

- (1)** The employee must provide JHRD with medical certification of a serious health condition.

- (2) An employee requesting a FMLA absence for the illness of a family member or the employee's own serious illness shall be provided a "Certification of health care provider for employee's serious health condition" or "Certification of health care provider for family member's serious health condition" as soon as a request for a FMLA absence is submitted, or within two business days, if possible. An employee may provide a medical certification from any health care provider as defined in this policy. Information on the provider's letterhead is acceptable in lieu of the certification forms.
- (3) The employee must provide the medical certification within 15 calendar days after the request unless it is not practicable. The certification shall include:
 - (A) Medical facts supporting certification;
 - (B) Date of commencement and duration of absence;
 - (C) Additional treatments required or needed for intermittent time off; and,
 - (D) Ability of employee to perform essential functions of job.
- (4) If the employee does not provide the required medical certification, then, at the JHRD's discretion, the FMLA absence may be approved or denied based upon existing documentation and information.

(n) Recertification of Serious Health Condition

- (1) The employee must furnish recertification for absences due to a serious health condition once every 30 calendar days unless the minimum duration of the period of incapacity specified on the most recent medical certification is more than 30 days. For example, if the most recent certification states the period of incapacity is six to eight weeks, then the employee would furnish recertification at six weeks duration.
- (2) An employee may not be required to provide recertification more than once every 30 calendar days while on a FMLA absence, except in the following cases:
 - (A) The employee requests an extension of leave;
 - (B) Circumstances described by the previous certification have significantly changed, e.g., the frequency or duration of the illness, the nature of the illness or complications; or,
 - (C) The employer receives information, or there is a pattern of absences, that casts doubt upon the validity of the certification.
- (3) For medical conditions that are chronic but not necessarily life-long conditions (such as, but not limited to, high blood pressure, migraines, diabetes, sciatica, etc.) then it will be sufficient to recertify on a yearly basis.
- (4) For a medical condition that is considered by the medical community to be a life-long condition (such as, but not limited to, Parkinson's Disease, Lou Gehrig's Disease, Multiple Sclerosis, etc.), the FMLA designation may be considered permanent and recertification may be deemed unnecessary.

(o) Notice of Changed Circumstances

If the employee needs to extend the FMLA absence, or if the absence as originally requested is no longer necessary, an employee shall, if the changed circumstances are foreseeable, provide notice within two business days of when the employee became aware of the necessity for the change.

(p) Other Work Prohibited

An employee, while on a FMLA absence for his or her own serious health condition, may not engage in other employment. An employee, while on a FMLA absence for a family member's serious health condition, may not engage in other employment during the employee's normal Judiciary work hours.

(q) Employer's Obligations

- (1)** As soon as an administrative head (or anyone acting on his or her behalf) gains knowledge of a qualifying condition or that an employee's request for time off may qualify under the FMLA, the administrative head must notify the JHRD. (An employee's request for time off does not have to specifically refer to the FMLA.) The JHRD will give the employee written notice that shall include the following:
 - (A) Notice that time off that is related to the qualifying event shall be counted against the employee's annual FMLA entitlement;
 - (B) The requirements for medical certification to substantiate a serious health condition, and any consequences for failing to do so;
 - (C) The requirement that the employee must use paid leave if it is available;
 - (D) Any requirement for the employee to pay health insurance premiums and the consequences of failing to make payments;
 - (E) Any requirement that the employee present a fitness for duty certificate to be reinstated;
 - (F) Notice of the employee's right to receive the same or an equivalent job after returning from a FMLA absence; and,
 - (G) Notice of the employee's potential liability for health insurance premiums paid by the employer during the unpaid FMLA absence if the employee fails to return to work after the absence.
 - (H) If the employee is not eligible, the JHRD will provide to the employee written notice detailing the reason(s) for denial.
- (2)** The JHRD shall provide an employee who requests a FMLA absence with the following forms:
 - (A) Certification of health care provider for employee's serious health condition;
 - (B) Certification of health care provider for family member's serious health condition;
 - (C) Certification of Qualifying Exigency for Military Family Leave; or,
 - (D) Certification for Serious Injury or Illness of a Covered Service Member, for Military Family Leave.
- (3)** When properly completed, these forms provide the information required to determine whether the condition qualifies for FMLA. Failure by the employee to provide required certification within 15 calendar days of the employee's request for FMLA absence may result in the denial of leave until appropriate certification is provided.

- (4) The JHRD is responsible for evaluating available information to determine whether an employee's condition and/or absence is covered under the FMLA. The determination must be made within five business days of receiving the request if possible. It is important for administrative heads and/or supervisors to cooperate with and inform the JHRD as quickly as possible to ensure compliance with this time limit. The JHRD must act quickly to gather necessary information by:
- (A) Asking appropriate questions about the reasons for the employee's absence;
 - (B) Recognizing the absence, whether paid or unpaid, may be covered by FMLA and would, therefore, count toward the employee's 12-week entitlement;
 - (C) Informing the employee of the determination so the absence can be properly coded on the employee's time sheet;
 - (D) Informing the employee of his/her rights and obligations while the employee is on a FMLA absence; and,
 - (E) Preserving management's right to provide only as much time off as the law requires.

(r) Designation of a FMLA Absence

If the JHRD has sufficient knowledge to determine an absence is protected under the FMLA, then the JHRD is required to designate it as such, even absent documentation. The employee may not bar an employer from designating any qualifying absences as FMLA leave. The designation may be made retroactively (not to exceed 12 months) if necessary. Failure to designate an absence as FMLA can result in the leave not counting towards the employee's 12-week entitlement.

(s) Contacting Employee's Health Care Provider

The JHRD may contact the employee's or eligible family member's health care provider to authenticate and/or to clarify medical documentation related to the FMLA condition. An employee's supervisor(s) must not contact the provider.

(t) Exceptions: The Chief Judge of the Court of Appeals and the State Court Administrator may make exceptions to this policy.

(u) Interpretive Authority: The JHRD is responsible for the interpretation of this policy.

(v) Not a Contract: This policy does not constitute or create an express or implied contract. It is not intended to, and does not, create contractual obligations with respect to any matter it covers.