

**FAMILY AND MEDICAL LEAVE ACT - GENERAL FREQUENTLY ASKED QUESTIONS (FAQs)**

<b>DHR-Q #: To be assigned.</b>	<b>Authority: Family and Medical Leave Act of 1993, as amended Feb. 25, 2015; M.R. 5.3, 5.7</b>
<b>Effective Date: November 20, 2019</b>	<b>Supersedes: State of Delaware FMLA (HRM/OMB website, revised Sept. 29, 2014)</b>

The content in these Frequently Asked Questions (FAQs) applies to State of Delaware (State) Executive Branch cabinet agency employees. Other employers of State personnel may choose to adopt the [Family and Medical Leave Act \(FMLA\) Policy](#) as well as the provisions in this FAQs. Non-cabinet agency personnel should contact their supervisor to determine whether their employer has adopted these provisions. Employees should direct questions or concerns to their supervisor or Human Resources representative.

**ELIGIBILITY FOR FMLA LEAVE**

- 1. I have 12 months of service with the State of Delaware (State); but they are not consecutive, and they were worked in different agencies. Do I still qualify for Family and Medical Leave Act (FMLA) leave?**

You may. All time worked at State agencies, school districts, and courts counts. In order to be eligible to take leave under FMLA, an employee must (1) work 1,250 hours during the 12 months prior to the start of leave, and (2) have worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. The regulations clarify, however, that employment prior to a continuous break in service of seven years or more need not be counted unless the break in service is (1) due to an employee’s fulfillment of military obligations, or (2) governed by a collective bargaining agreement or other written agreement.

- 2. If I miss work due to National Guard or Reserves duty, will this affect my eligibility for FMLA?**

No. The regulations make clear the protections for our men and women serving in the military by stating that a break in service due to an employee’s fulfillment of military obligations must be taken into consideration when determining whether an employee has been employed for 12 months or has the required 1,250 hours of service. Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), hours that an employee would have worked but for his or her military service are credited toward the employee’s required 1,250 hours worked for FMLA eligibility. Similarly, the time in military service also must be counted in determining whether the employee has been employed at least 12 months by the employer.

**Example:**

Dean worked for his employer for six months in 2008, then was called to active duty status with the Reserves and deployed to Iraq. In 2009, Dean returned to his employer, requesting to be reinstated under the USERRA. Both the hours and the months that Dean would have worked but for his military status must be counted in determining his FMLA eligibility.

**3. Must the employee be in a permanent position with the State to take FMLA leave?**

No. All State employees who meet the eligibility requirements of having worked for the State for an aggregate of 12 months and worked the prerequisite 1,250 hours over the previous 12 months are eligible to take FMLA leave for any qualifying reason regardless of employment status.

**4. Is FMLA leave paid?**

No. The FMLA only requires unpaid leave. However, the law permits the employer to require the employee to use accrued paid leave. The State requires employees to use sick and annual leave concurrent with FMLA leave except for one workweek of annual leave and one workweek of sick leave, which they may elect to retain for use upon return to work. Usage of accrued sick leave shall only be in accordance with M.R. 5.3. An employee's ability to elect to use accrued paid leave during a period of FMLA leave is determined by the terms and conditions of the applicable paid leave policy.

**QUALIFYING REASONS FOR FMLA LEAVE****5. Can I use FMLA leave during pregnancy or after the birth of a child?**

Yes. An employee's ability to use FMLA leave during pregnancy has not changed. Under the regulations, a mother can use 12 weeks of FMLA leave for the birth of a child, for prenatal care and incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or childbirth). In accordance with Delaware Code, the State provides up to 12 calendar weeks of paid Parental Leave to eligible employees upon the birth of a child of the employee, or upon the adoption by the employee of a child six (6) years of age or younger. Parental Leave runs concurrently with FMLA and Short-Term Disability (STD), as applicable.

**6. Can I use FMLA for leave due to my chronic serious health condition?**

Under the regulations, employees can use FMLA leave for any period of incapacity or treatment due to a chronic serious health condition. The regulations define a chronic serious health condition as one that (1) requires "periodic visits" for treatment by a healthcare provider or nurse under the supervision of the healthcare provider, (2) continues over an extended period, and (3) may cause episodic rather than continuing periods of incapacity. The regulations clarify this definition by defining "periodic visits" as at least twice a year.

**7. Are there any changes to the definition of a serious health condition under the regulations?**

A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider. The "continuing treatment" test for a serious health condition under the regulations may be met through (1) a period of incapacity of more than three consecutive, full calendar days plus treatment by a healthcare provider twice, or once with a continuing regimen of treatment; (2) any period of incapacity related to pregnancy or for prenatal care; (3) any period of incapacity or treatment for a

chronic serious health condition; (4) a period of incapacity for permanent or long-term conditions for which treatment may not be effective; or (5) any period of incapacity to receive multiple treatments (including recovery from those treatments) for restorative surgery, or for a condition which would likely result in an incapacity of more than three consecutive, full calendar days absent medical treatment. The regulations specify that if an employee asserts a serious health condition under the requirement of a "period of incapacity of more than three consecutive, full calendar days and any subsequent treatment or period of incapacity relating to the same condition," the employee's first treatment visit (or only visit, if coupled with a regimen of continuing treatment) must take place within seven days of the first day of incapacity. Additionally, if an employee asserts that the condition involves "treatment two or more times," the two visits to a healthcare provider must occur within 30 days of the first day of incapacity. Finally, the regulations define "periodic visits" for treatment of a chronic serious health condition as at least twice a year.

## **EMPLOYER NOTICE REQUIREMENTS**

### **8. What are an employer's posting and general notice requirements?**

Employers must post a general notice explaining the FMLA's provisions and providing information regarding procedures for filing a claim under the Act in a conspicuous place where it can be seen by employees and applicants. The State has the general notice posted electronically for all employees on the Department of Human Resources Personnel Management website and specifically available to applicants on the DEL website. The posted notice includes information regarding the definition of a serious health condition, the new military family leave entitlements, and employer and employee responsibilities. Employers must also include the information in this general notice in any employee handbook or other written policies or manuals describing employee benefits and leave provisions. Additionally, the State provides a description of FMLA on the Human Resource Management website and provides the General Notice to all new employees at orientation. Please contact your agency Human Resources staff for the posting location at your site.

### **9. How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?**

Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

### **10. Does an employer have to provide employees with information regarding their specific rights and responsibilities under the FMLA?**

At the same time an employer provides an employee notice of the employee's eligibility to take FMLA leave, the employer must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, the employer must inform the employee whether the employee will be required to provide certification of the FMLA-qualifying reason for leave and the employee's right to substitute paid leave (including any conditions related to such substitution, and the employee's entitlement to unpaid FMLA leave if those conditions are not met). If the information included in the Notice of Eligibility & Rights and Responsibilities changes, the employer must inform the employee of such changes within five business days of receipt of the

employee's first notice of the need for FMLA leave subsequent to any change. Employers are expected to responsively answer questions from employees concerning their rights and responsibilities.

**11. What are the State's requirements for leave usage while on FMLA leave?**

The State requires employees to use sick and annual leave while on FMLA. Employees can retain one workweek of sick and one workweek of annual leave for use after they return from FMLA. (M.R. 5.7)

**12. Does the State require the concurrent use of any other leave or benefit with FMLA?**

Yes. State employees eligible for any paid medical leave including Paid Parental Leave (PPL) or Short-Term Disability (STD) must use FMLA leave concurrently.

**13. Can an employee use accrued leave rather than FMLA?**

No, the employer is required to designate FMLA-qualifying events. In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying. (Ref. in US Code Title 29 C.F.R. Part 825--825.208)

**14. May I choose to use my sick and/or vacation leave first and save my FMLA leave for after I exhaust my paid leave?**

No. The State requires concurrent use of your paid leave time with your FMLA leave.

**15. What happens to my healthcare benefits?**

While on FMLA leave, you are responsible for your share of the premium and the State will continue to pay the State share of the premium. Please check with your agency Human Resources staff for specifics on your share.

**16. What happens to my health benefits while I am out on FMLA leave?**

Employees may continue to receive all their State benefits while on FMLA leave. For their group health benefits, the State share of medical benefits will continue as long as the employee pays the employee share of the cost of elected coverage. If you are in a "no pay" status, payments should be made payable to the State of Delaware and forwarded to the employee's agency Human Resources Office for processing.

Dental insurance may be continued provided the total employee cost is paid each month by the first of the month. If you are in a "no pay" status, payments should be made payable to the State of Delaware and forwarded to the employee's agency Human Resources Office for processing.

Group Universal Life Insurance through Minnesota Life may be continued. Minnesota Life will direct bill employees automatically after three full months of premiums are not paid by payroll deductions. Payment must be made directly to Minnesota Life once direct billing has begun.

Statewide Supplemental Benefit plans may also be continued. Employees should contact the vendor of the plan in which they are enrolled to arrange for payments while they are not receiving a payroll check. Contacts are listed on the [Statewide Benefits website](#).

If employees elect to discontinue coverage by not paying their cost, insurances/benefits will be canceled until employees return to work. Coverage may be resumed upon returning from FMLA leave.

**17. How soon after an employee provides notice of the need for leave must an employer notify an employee that the leave will be designated and counted as FMLA leave?**

Under the regulations, an employer must notify an employee whether leave will be designated as FMLA leave within (5) five business days of learning that the leave is being taken for an FMLA qualifying reason, absent extenuating circumstances. The designation notice states that paid leave will be substituted for unpaid FMLA leave and whether the agency will require the employee to provide a fitness-for-duty certification to return to work (unless the agency has a written document that clearly defines when such certification will be required in specific circumstances, in which case the agency may provide oral notice of this requirement). Additionally, if the amount of leave needed is known, an employer must inform an employee of the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (e.g., where the leave will be unscheduled), an employer must provide this information upon request by the employee, but no more often than every 30 days and only if leave was taken during that period.

**18. If an employer fails to tell an employee that leave has been designated as FMLA leave, can the employer count the leave against the employee's FMLA leave entitlement?**

The regulations revise the designation provisions to comply with the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). *Ragsdale* ruled that a "categorical" penalty for failure to appropriately designate FMLA leave was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement to demonstrate individual harm. Under the regulations, retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave (and notify the employee of the designation). The employer may be liable, however, if the employee can show that he or she has suffered harm or injury as a result of the failure to timely designate the leave as FMLA. Additionally, an employee and employer may agree to retroactively designate an absence as FMLA-protected.

**Example:**

Henry plans to take 12 weeks of FMLA leave beginning in August for the birth of his second child. Earlier in the leave year, however, Henry took two weeks of annual leave to care for his mother

following her hospitalization for a serious health condition. Henry's employer failed to notify him at the time of his mother's hospitalization that the time he spent caring for his mother would be counted as FMLA leave. If Henry can establish that he would have made other arrangements for the care of his mother if he had known that the time would be counted against his FMLA entitlement, the two weeks his employer failed to appropriately designate may not count against his FMLA entitlement.

## **EMPLOYEE NOTICE REQUIREMENTS**

### **19. How much notice must an employee give before taking FMLA leave?**

When the need for leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give at least 30 days of notice. If 30 days of notice is not possible, an employee is required to provide notice "as soon as practicable." Employees must also provide notice as soon as practicable for foreseeable leave due to a qualifying exigency, regardless of how far in advance such leave is foreseeable. The regulations clarify that it should be practicable for an employee to provide notice of the need for leave that is foreseeable either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must account for the individual facts and circumstances. When the need for leave is unforeseeable, employees are required to provide notice as soon as practicable under the facts and circumstances of that case, which the regulations clarify will generally be within the time prescribed by the employer's usual and customary notice requirements applicable to the leave.

#### **Example:**

When Mandy goes to her Monday physical therapy appointment for her serious health condition, she finds out that the appointment she had previously scheduled for Thursday has been changed to Friday. Upon her return to work after the Monday appointment, Mandy informs her employer that she will no longer need leave on Thursday for physical therapy but will need leave on Friday instead. Mandy has provided notice of her need for foreseeable leave as soon as practicable.

### **20. What information must an employee give when providing notice of the need for FMLA leave?**

When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA. The employee must, however, provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave. The regulations provide additional guidance for employees regarding what is "sufficient information." Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a healthcare provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty and that the requested leave is for a qualifying exigency; if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence if known. Additionally, the regulations require an employee seeking leave due to an FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave either to reference specifically the qualifying reason for leave or the need for FMLA leave. In all cases, an employer

should inquire further if it is necessary to have more information about whether FMLA leave is being sought by an employee.

**21. Is an employee required to follow an employer's normal call-in procedures when taking FMLA leave?**

Yes. Under the regulations, an employee must comply with an employer's call-in procedures unless unusual circumstances prevent the employee from doing so (in which case the employee must provide notice as soon as s/he can practicably do so). The regulations make clear that, if the employee fails to provide timely notice, s/he may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer's rules provide.

**Example:**

Sam has a medical certification on file with his employer for his chronic serious health condition, migraine headaches. He is unable to report to work at the start of his shift due to a migraine and needs to take unforeseeable FMLA leave. He follows his employer's absence call-in procedure to provide timely notice to his employer about his need for FMLA leave. Sam has provided his employer with appropriate notice.

**CERTIFICATION OF NEED FOR FMLA LEAVE**

**22. Do I have to give my employer my medical records for leave due to a serious health condition?**

No. An employee is not required to give the employer his/her medical records. The employer, however, does have a statutory right to request that an employee provide medical certification containing sufficient medical facts to establish that a serious health condition exists. The State provides the medical certifications for Serious Health Condition for [employees](#) and for [family members](#).

**23. What if I do not want my employer to know about my medical condition?**

If an employer requests it, an employee is required to provide a complete and sufficient medical certification in order to take FMLA-protected leave due to a serious health condition.

**24. How soon after I request leave does my employer have to request a medical certification of a serious health condition?**

Under the regulations, an employer should request medical certification, in most cases, at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave begins. An employer may request certification later if it has reason to question the appropriateness or duration of the leave.

**25. What happens if my employer says my medical certification is incomplete?**

An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The regulations require that the employer

state in writing what additional information is necessary to make the certification complete and sufficient. The regulations also require that the employer allow the employee at least seven calendar days to cure the deficiency, unless seven days is not practicable under the circumstances despite the employee's diligent good faith efforts.

## **26. May my employer contact my health care provider about my serious health condition?**

Yes. The regulations clarify that contact between an employer and an employee's provider must comply with the Health Insurance Portability and Accountability Act (HIPAA healthcare) privacy regulations. Under the regulations, employers may contact an employee's healthcare provider for authentication or clarification of the medical certification by using a healthcare provider, a human resource professional, a leave administrator, or a management official. In order to address employee privacy concerns, the rule makes clear that in no case may the employee's direct supervisor contact the employee's healthcare provider. For an employee's HIPAA-covered healthcare provider to provide an employer with individually-identifiable health information, the employee will need to provide the healthcare provider with a written authorization allowing the healthcare provider to disclose such information to the employer. Employers may not ask the healthcare provider for additional information beyond that contained on the medical certification form.

## **27. Must I sign a medical release as part of a medical certification?**

No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the healthcare provider to provide a complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.

## **28. Can employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?**

Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for such conditions to submit a certification from the employee's own healthcare provider that the employee is able to resume work. Under the regulations, an employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the employer has appropriately notified the employee that this information will be required and has provided a list of essential functions. Additionally, an employer may require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his/her duties based on the condition for which leave was taken.

## **29. What happens if I do not submit a requested medical or fitness-for-duty certification?**

If an employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the employee never provides a medical certification, then the leave is not FMLA leave.

## **MISCELLANEOUS QUESTIONS**

### **30. Can my FMLA leave be counted against me for my bonus?**

Under the regulations, an employer may deny a bonus that is based upon achieving a goal, such as hours worked, products sold or perfect attendance, to an employee who takes FMLA leave (and thus does not achieve the goal) as long as it treats employees taking FMLA leave the same as employees taking non-FMLA leave. For example, if an employer does not deny a perfect attendance bonus to employees using vacation leave, the employer may not deny the bonus to an employee who used vacation leave for an FMLA-qualifying reason.

#### **Example:**

Sasha uses ten days of FMLA leave during the quarter for surgery. Sasha substitutes paid vacation leave for her entire FMLA absence. Under Sasha's employer's quarterly attendance bonus policy, employees who use vacation leave are not disqualified from the bonus but employees who take unpaid leave are disqualified. Sasha's employer must treat her the same way it would treat an employee using vacation leave for a non-FMLA reason and give Sasha the attendance bonus.

### **31. My medical condition limits me to a 40-hour workweek but my employer has assigned me to work eight hours of overtime in a week. Can I take FMLA leave for the overtime?**

Yes. Employees with proper medical certifications may use FMLA leave in lieu of working required overtime hours. The regulations clarify that the hours that an employee would have been required to work but for the taking of FMLA leave can be counted against the employee's FMLA entitlement. Employers must select employees for required overtime in a manner that does not discriminate against workers who need to use FMLA leave.

## **ADDITIONAL RESOURCES:**

- [Family and Medical Leave Act \(FMLA\) Policy](#)
- [FMLA General Employee Rights and Responsibilities Requirement](#)
- [FMLA Eligibility](#)