



**THE FAMILY AND MEDICAL LEAVE ACT (FLMA) POLICY AND PROCEDURE - Statewide**

**DHR-STW-Policy #: DHR-STW-403.1**

**Authority: The Family and Medical Leave Act of 1993, as amended Feb. 25, 2015; M.R. 5.7**

**Effective Date: November 20, 2019**

**Revision Date: May 29, 2024**

**Supersedes: State of Delaware FMLA (HRM/OMB website, revised Sept. 29, 2014)**

**Signature:** 

**Application: Executive Branch Agencies**

## **1. Policy Purpose Statement**

The Family and Medical Leave Act (FMLA) provides a means of balancing the demands of the workplace with the needs of families and promotes the stability, integrity, and economic security of employees' families in a manner that accommodates the legitimate interests of the State of Delaware (State). The State will provide FMLA leave to its eligible employees. This policy provides employees with a description of their FMLA rights.

This policy also provides for up to 26 workweeks of "Military Caregiver Leave," leave for employees during a single 12-month period to care for a covered military family member and covered veteran. In the event of any conflict between this policy and applicable laws, employees will be afforded their rights required by applicable laws.

## **2. Scope**

This policy applies to eligible Executive Branch agency employees upon meeting criteria outlined in this document.

## **3. Definitions and Acronyms**

- **Continuing Treatment:** Two (2) or more visits to a health care provider for the same medical condition. The two (2) visits must occur within 30 days of the beginning of the period of incapacity, and the first visit must take place within seven (7) days of the first day of incapacity. Continuing treatment may also mean one (1) treatment resulting in a regimen of continuing treatment under the supervision of a health care provider, or continuing supervision but not necessarily being actively treated for a severe long-term or chronic condition. Continuing supervision for a severe long-term or chronic condition requires at least two (2) visits to a health care provider per year.
- **Covered Military Member:** An employee's spouse, son, daughter, or parent who is a member of the Armed Forces (including the National Guard or Reserves) is on covered active duty or has been notified of an impending call or order to covered active duty. For members of the 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 Reserve components of the Armed Forces (members of the U.S. National Guard or Reserves), covered active duty is duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation.

- **Covered Service Member:** A current member of the Armed Forces, including a member of the U.S. 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; or a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness, and who was discharged within the previous five (5) years before the employee takes Military Caregiver Leave to care for the veteran.
- **Eligible Employee:** An employee must meet the following two (2) conditions to qualify:
  - a) An employee who has worked for the State for 12 months or 52 weeks. The 12 months or 52 weeks need not have been consecutive. Separate periods of employment will be counted, provided that the break in service does not exceed seven (7) years.<sup>1</sup> An employee will be considered to have been employed for an entire week even if the employee was on the payroll for only part of a week or if the employee is on leave during the week.
  - b) The employee must have worked at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave. All state employment, for example, Merit, school district, and higher education should be counted. The 1,250 hours do not include time spent on paid or unpaid leave. Consequently, these hours of leave should not be counted in determining the 1,250-hour eligibility test for an employee under FMLA.
- **Exigency Leave:** Leave for an eligible employee with a covered military family member who is on active duty or called to active duty for the following "qualifying exigencies": (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, (8) parental care, and (9) additional activities, where the State and employee agree to the leave.
- **Family and Medical Leave Act (FMLA):** A federal law that entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage, if applicable, under the same terms and conditions as if the employee had not taken leave.
- **FMLA year:** 12-month period measured forward from the first date an employee takes FMLA leave. The next 12-month period would begin the first time FMLA leave is taken after completion of the prior 12-month period; For example, Lucia's FMLA leave begins on November 6, 2012, so the 12-month FMLA period is November 6, 2012 through November 5, 2013.
- **Intermittent Leave:** Leave under FMLA due to a qualifying single illness or injury that is not taken in a continuous period of time. Leave could be taken in separate blocks of time or on a reduced leave schedule, reducing the employee's usual weekly or daily work schedule.
- **Military Caregiver Leave:** Leave for the eligible employee to care for a covered service member with a serious illness or injury if the employee is the service member's parent, spouse, son, daughter, or next of kin.
- **Serious Health Condition:** An illness, injury, impairment, or physical or mental condition where at least one (1) of the following shall be satisfied: inpatient hospital care; absence from work or school for more than three (3) consecutive calendar days that involves continuing

<sup>1</sup> Separate periods of employment will be counted if the break in service exceeds seven (7) years due to National Guard or Reserve military service obligations or when there is a written agreement, including a collective bargaining agreement, stating the State's intention to rehire the employee after the service break.

treatment by a health care provider; continuing treatment for a chronic serious health condition; continuing treatment for a serious health condition that, if not treated, would result in incapacity for more than three (3) consecutive calendar days; and any period of incapacity due to prenatal care. The three (3)-day requirement does not apply to pregnancy, chronic serious health conditions, or for multiple treatments.

- **Serious Injury or Illness:** (1) in the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered service member in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the service member medically unfit to perform the duties of the member's office, grade, rank or rating; and (2) in the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service 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: (i) 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 service member unable to perform the duties of the service member's office, grade, rank or rating; or (ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs 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 Military Caregiver Leave; or (iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or (iv) 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.
- **Workweeks:** The term "workweek" is the employee's usual or regular schedule (hours/days per week) prior to the start of FMLA leave.

The following definitions shall apply to determine the family members that are eligible under FMLA:

**a. Family Member's Serious Health Condition:**

- 1) **Spouse:** A husband or wife. 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 (1) state, including same-sex marriage.
- 2) **Parent:** A biological parent, adoptive, step or foster father or mother, or an individual who stands or stood "in loco parentis," meaning, "in place of a parent," to the employee when the employee was a child. This does not extend to a parent "in-law."
- 3) **Son or Daughter:** A biological, adoptive, step or foster child, a legal ward, or a child of a person standing "in loco parentis" under age 18, or age 18 or older and incapable of self-

care because of a mental or physical disability at the time that FMLA leave is to commence<sup>2</sup>.

**b. Military Caregiver Leave for Family Member's Serious Illness or Injury:**

- 1) **Spouse:** A husband or wife. 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 (1) state, including same-sex marriage.
- 2) **Parent:** A biological parent, adoptive, step or foster father or mother, or an individual who stands or stood "in loco parentis," meaning, "in place of a parent," to the employee when the employee was a child. This does not extend to a parent "in-law."
- 3) **Son or Daughter:** A son or daughter on active duty or called to active-duty status as an employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood "in loco parentis," who is on active duty or called to active-duty status, and who is of any age.
- 4) **Next of Kin:** A service member's nearest blood relative, other than the service member's spouse, parent, son, or daughter, in an FMLA specified order of priority. (See [FMLA FAQs – Military](#)).

**c. Exigency Leave Family Members:**

- 1) **Spouse:** A husband or wife. 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 (1) state, including same-sex marriage.
- 2) **Parent:** A biological parent, adoptive, step or foster father or mother, or an individual who stands or stood "in loco parentis," meaning, "in place of a parent," to the employee when the employee was a child. This does not extend to a parent "in-law."
- 3) **Son or Daughter:** A son or daughter on active duty or called to active-duty status as an employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood "in loco parentis," who is on active duty or called to active-duty status, and who is of any age.

**4. Policy**

**a. This policy provides an eligible employee:**

- 1) Up to 12 workweeks of unpaid FMLA leave for serious health conditions of their own or family members defined in this policy. The FMLA year begins on the first day of approved FMLA and extends for the next 12 calendar months;
- 2) Up to 12 workweeks of unpaid qualifying Exigency Leave for families of active-duty Regular Armed Forces, National Guard, and Reserve members to manage their affairs.

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<sup>2</sup> Per U.S. Department of Labor, in order for a parent to take FMLA leave for a child who is 18 years of age or older, the son or daughter must: (1) have a disability, as defined by the Americans with Disabilities Act, at the time the leave is to commence; (2) be incapable of self-care because of the disability; (3) have a serious health condition; and (4) need care because of the serious health condition.

The eligible FMLA year for qualifying exigencies begins on the first day of approved FMLA for this purpose and extends for the next 12 calendar months;

- 3) Up to 26 workweeks of unpaid Military Caregiver Leave to care for a qualified military family member and qualified veteran (a parent, spouse, son, daughter, or next of kin who is a covered military service member or covered veteran). The FMLA year begins on the first day of approved FMLA and extends 12 calendar months.<sup>3</sup>
- b. Leave shall be granted to eligible employees for the following reasons:
- 1) To care for an employee's child after birth, or placement for adoption or foster care; to care for an employee's family member (spouse, son, daughter, or parent) who has a serious health condition; or for a serious health condition that renders an employee unable to perform his/her job.
  - 2) For a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or called to covered active-duty status.
  - 3) To care for a covered service member with a serious illness or injury if the employee is the service member's parent, spouse, son, daughter, or next of kin.
- c. When it is medically necessary, as certified by a health care provider, FMLA leave may be taken on an intermittent basis or on a reduced schedule when there is a medical need for such leave for an employee's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered service member with a serious injury or illness.
- 1) Employees must make a reasonable effort to schedule treatment to not unduly disrupt the employer's operations when intermittent leave is needed for planned medical treatment for the employee or their qualifying family member.
  - 2) Only the amount of leave taken may be counted against an employee's FMLA leave entitlement.
  - 3) Employees are entitled to use intermittent leave for qualifying exigencies.
  - 4) Employees are not entitled to intermittent leave for the birth and care of a newborn child or for the placement with the employee of a child for adoption or foster care unless the employer agrees.
- d. Employee FMLA leave entitlement for birth, adoption, or placement for foster care expires one (1) year following the date of birth, adoption, or placement.<sup>4</sup>
- e. State employees eligible for any paid medical leave including short-term disability (STD) must use FMLA concurrently.
- f. FMLA runs concurrently with the Parental Leave benefit, as applicable. The State provides up to 12 calendar weeks of Parental Leave to eligible employees upon the birth of a child of the employee, or upon the adoption by the employee of a child who is six (6) years of age or younger. An employee shall be eligible for Parental Leave even if the employee has exhausted his/her FMLA time consistent with the law covering FMLA. If an employee

<sup>3</sup> An eligible employee is limited to a combined total of 26 unpaid workweeks for any FMLA-qualifying revisions during the single 12-month period.

<sup>4</sup> Please see specific guidelines for foreign country adoption. ([29 Del.C. § 5116](#))

becomes eligible for FMLA while on Parental Leave, the employee must apply for and use FMLA. ([See Parental Leave Policy.](#))

- g. FMLA leave can be taken for more than one (1) qualifying reason in the same 12-month leave year. However, multiple qualifying conditions for leave do not increase the total FMLA leave entitlement available.
- h. The State requires eligible employees to use sick and/or annual leave while on FMLA and may escrow (save) one (1) workweek of annual leave and one (1) workweek of sick leave.
- i. Employees continue their State benefits while on approved FMLA leave. Health coverage continues if premium payments are made per the Group Insurance Plan's Eligibility and Enrollment Rules.
- j. The State shall restore most eligible employees to their same or an equivalent position at the conclusion of their FMLA leave, barring any unforeseen circumstances unrelated to the employee's taking of the leave (i.e., workforce reduction).
- k. It is unlawful for an employer to interfere with, restrain, or deny the exercise of any right provided for the use of FMLA. Additionally, the State cannot discharge or discriminate against employees for opposing any practice made unlawful by FMLA or for their involvement in any proceeding under or relating to FMLA.
- l. The State 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 of Delaware has the [FMLA General Employee Rights and Responsibilities Requirement Notice](#) posted electronically for all employees on the [Department of Human Resources Policies and Procedures website](#) and specifically available to applicants on the [Delaware Employment Link \(DEL\) website](#).

## **5. Procedures**

- a. Employees are required to provide advance leave notice and certification whenever practical. Advance notice of 30 days shall be given when leave is foreseeable.
- b. If an employee is absent or sick for more than three (3) consecutive days and will need more time off for a serious health condition of his/her own or an eligible family member,<sup>5</sup> the employee must notify his/her agency Human Resources (HR) for application of FMLA.
  - 1) Medical certification to support a request for FMLA leave is required, and the State may also require second and third opinions (at the State's expense) and an FMLA "fitness-for-duty" report to return to work.
  - 2) Certification for leave to bond with a newborn child or a child placed for adoption or foster care may not be requested under FMLA leave.
  - 3) Military Caregiver certification is required to support a request for leave to care for a covered family service member. The State may not request second opinions.

<sup>5</sup> Reference eligible family members in Section 3 - Definitions and Acronyms.

- 4) Exigency Leave certification is required to support a request for leave for one (1) of the eight (8) qualified reasons for exigency or for other related reasons not specified by mutual agreement of the employee and the State. The State may only request verification of military status once per active duty or call to active-duty event.
- c. Employees applying for STD benefits must also apply for FMLA leave.
- d. Absent extenuating circumstances, the State must notify an employee whether the employee is eligible to take FMLA leave (and, if not, at least one (1) reason why the employee is ineligible) within five (5) business days of the employee requesting leave or the employer learning that an employee's leave may be for an FMLA-qualifying reason.
- e. The State is required to send the employee a written Notice of Eligibility and Employee Rights and Responsibilities within five (5) business days of the State agency's learning that leave is being taken for an FMLA-qualifying reason, absent extenuating circumstances. The State should avoid any retroactive designation of FMLA leave. Medical certification is valid for the time specified by the health care provider.
- f. Employees are responsible for providing the qualifying reason. Failure of the employee to provide completed certifications within 15 calendar days of receipt of the medical certification paperwork may result in the delay or denial of FMLA. Employees are responsible for remaining in contact with the State and for notifying the State of any change in FMLA.
- g. If the medical certification is incomplete, the State will request in writing additional information necessary to make the certification complete and sufficient. The employee will have seven (7) calendar days to cure the deficiency (unless seven (7) days is not practicable under the circumstances despite the employee's diligent good faith efforts).
- h. The employees' supervisors and managers must be informed of the frequency and duration of the episodes of incapacity due to the serious health condition.
- i. Re-certification may be required no more than every 30 days and only when the employee is absent or has requested to be absent.
- 1) If the initial certification indicates that the minimum duration of the serious health condition will be more than 30 days, an employer must generally wait until the minimum duration expires before requesting recertification.
  - 2) In all cases, including cases where the condition is of an indefinite duration, the state may request recertification for absences every six (6) months.
  - 3) Recertification in less than 30 days may be requested if:
    - an extension of the leave is requested;
    - the circumstances in the last certification have changed significantly; or
    - information has been received casting doubt on the stated reason or continued validity.



- j. Employees on FMLA shall use available accrued sick and/or accrued annual leave except for one (1) workweek of annual leave and one (1) workweek of sick leave. Eligibility to use sick and annual leave is governed by the [State of Delaware Merit Rules](#) and the Disability Insurance Program Rules and Regulations.
- 1) Employees using annual or sick leave concurrently with FMLA leave must follow the same policy and procedural requirements that apply to other employees using such leave.
  - 2) Employees may be on a Workers' Compensation absence due to an on-the-job injury or illness, which also qualifies as a serious health condition under FMLA. The Workers' Compensation absence and FMLA leave do not run concurrently unless requested by the employee.
  - 3) If an employee does run FMLA concurrently with Workers' Compensation and the employee is offered a "light duty" assignment, he/she is permitted, but not required under FMLA, to accept the position. (However, the same is not true under Workers' Compensation when a refusal of light duty could result in the employee no longer qualifying for payments from the Workers' Compensation benefit plan.) The employee would continue to be entitled to FMLA until either the employee is able to return to the same job or until the 12-week FMLA leave entitlement is exhausted.
  - 4) Employees who exhaust their 26-week Military Caregiver Leave during the single 12-month period are not eligible for additional FMLA leave during that period for themselves or a family member.
  - 5) Employees may only use annual leave to cover periods of Exigency Leave, as the reasons for using such leave are non-medical and would not qualify for sick leave usage.
- k. An employee must comply with their agency's call-in procedures and procedures to designate the time off as FMLA. This is unless unusual circumstances prevent the employee from following the procedures and calling in (in which case the employee must provide notice as soon as s/he can practicably do so). If the employee fails to provide timely notice, he or she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer's rules provide.
- l. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, the agency may require that the FMLA 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. The agency must apply this policy or practice requiring all similarly situated employees who take leave for such conditions to submit a certification from the employee's own health care provider that the employee is able to resume work.
- m. Coverage under the State of Delaware Group Health Insurance Program and "State Share" eligibility continue for employees on approved FMLA leave as long as the payment for "Employee Share" of premiums is made per the Group Health Insurance Plan's Eligibility and Enrollment Rules. Employee share of premiums is deducted from employee pay. If an employee on any leave does not have sufficient salary from which payment of the employee share can be deducted, the employee must submit payment directly to his/her Human Resources Office by the first (1<sup>st</sup>) of each month for coverage to continue. The Human Resources Office will provide the employee with the schedule of payments at the beginning of the FMLA leave. The State's obligation to maintain health coverage for employees on



FMLA ceases if an employee's premium payment is more than 30 days late, at that time, the Agency must provide written notice to the employee that the payment has not been received and allow at least 15 days after the date of the letter to receive payment. If payment is not received, then the Benefit Representative or Human Resources Office will submit a retroactive cancellation to the first (1<sup>st</sup>) of the month of non-payment.

- n. Per FMLA regulations, employees who fail to return to work after their FMLA leave entitlement has been exhausted shall be responsible for repayment of the State Share under the group health plan, unless they fail to return to work due to their own or eligible family member's serious health condition, or for some other reason beyond their control.

## **6. Exclusions or Exceptions**

- Employees or family members who do not meet the eligibility criteria.

## **7. Dissemination and Training**

- State agencies will post the notice, [FMLA General Employee Rights and Responsibilities Requirement Notice](#) on its premises where notices to employees and applicants for employment are customarily posted.
- The agency HR office shall provide employees who are new to their respective agencies a review of the [FMLA General Employee Rights and Responsibilities Requirement Notice](#) on commencement of their employment. Employees must read and mark complete this Notice in the Delaware Learning Center, or if not applicable by other means within 14 days of its assignment and/or receipt.
- The agency HR office shall provide current employees a review of this policy and procedure within 30 days of its effective date and shall provide employees who are new to their respective agencies a review of this policy and procedure within 60 days of the employee's hire date.
- Employees must read and acknowledge receipt of this policy in the Delaware Learning Center (DLC), or if not applicable, by other means, within 30 days of its effective date or within 30 days of assignment in the DLC or upon receipt.
- Employees and supervisors shall attend required trainings as prescribed by DHR.

## **8. Data Reporting**

- The State is required to make, keep, and preserve records and documents relating to FMLA for no less than three (3) years.
- Medical Certifications and re-certifications of employees or their family members are confidential medical records. Such records are to be maintained in separate files from the employee's personnel file.

## 9. Associated Policy/Regulations/Information

- [ADA Policy & Reasonable Accommodation Procedure](#)
- [Disability Insurance Program Rules & Regulations](#)
- [Donated Leave Policy & Procedure](#)
- [FMLA General Employee Rights and Responsibilities Requirement](#)
- [GHIP Eligibility and Enrollment Rules](#)
- [Military Leave Policy & Procedure and associated documents](#)
- [Parental Leave Policy & Procedure and associated documents](#)
- [State of Delaware Merit Rules](#)

The U.S. Department of Labor is authorized to investigate and resolve complaints of FMLA violations, and an eligible employee may bring a civil action against the State for violations.

### References

U.S. Department of Labor, *Family and Medical Leave Act of 1993 Final Rules*, Federal Register, Vol. 80, No. 37, February 25, 2015

### Resources

U.S. Department of Labor

Wage and Hour Division

Website: <https://www.dol.gov/whd/fmla/>

Phone: 1-866-4-USWAGE

## 10. Appendices and Forms Associated with this Policy

### Forms

- [Certification of Health Care Provider for Employee's Serious Health Condition \(FMLA\)](#)
- [Certification of Qualifying Exigency for Military Family Leave \(FMLA\)](#)
- [Certification of Health Care Provider for Family Member's Serious Health Condition \(FMLA\)](#)
- [Certification of Serious Injury or Illness of Current Servicemember for Military Family Leave \(FMLA\)](#)
- [Certification of Serious Injury or Illness of a Veteran for Military Caregiver Leave \(FMLA\)](#)
- [Designation Notice \(FMLA\)](#)
- [Notice of Eligibility and Rights & Responsibilities \(FMLA\)](#)

### FAQs

- [Frequently Asked Questions \(FMLA – General\)](#)
- [Frequently Asked Questions \(FMLA – Military\)](#)

**11. Policy Owner**

- Division Name: Division of Talent Management
- Policy Owner: Employee Engagement Administrator
- Website: [DHR - Employee Engagement \(delaware.gov\)](https://delaware.gov/dhr-employee-engagement)

*This policy is not intended to create any individual right or cause of action not already existing and recognized under State or Federal law. If there is a conflict with, i.e., the law or regulation and this policy, the law and/or regulation govern.*