

## FAMILY AND MEDICAL LEAVE ACT LAW

### Definitions

Definitions under FMLA are contained in 29 C.F.R. 825.102. Included below are key definitions for quick reference.

- *Covered Active Duty*: The term means, in the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and, in the case of a member of the reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.
- *Covered service member* means a member of the Armed Forces (including a member of the 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 a member of the 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.
- *Equivalent position* is defined in 29 C.F.R 825.15.
- *FMLA* refers to the Family and Medical Leave Act of 1993, implemented by 29 C.F.R. 825.
- *Health care providers* are defined in 29 C.F.R 825.125.
- *In loco parentis* applies to employees with either day-to-day care or financial support of a child when the employee intends to assume the responsibilities of a parent with regard to a child.
- *Intermittent leave* means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.
- *Next of kin of a covered service member* means the nearest blood relative other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either

consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered service member's only next of kin.

- *Outpatient status*, when used with respect to a covered service member, means the status of a member of the Armed Forces assigned to a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (29 U.S.C. 2611).
- *Parent* means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents "in law."
- *Qualifying exigency* is defined in accordance with 29 C.F.R. 825.126.
- *Reduced leave schedule* is a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday.
- *Same health benefits* mean, for example, that if family member coverage is provided to an employee, family member coverage must be maintained during a FMLA leave. Also, if an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan or benefits to the same extent as if the employee were not on leave.
- *Serious health condition* means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of § 825.113 are met.
- *Serious injury or illness* means in the case of a member of the Armed Forces (including a member of the National Guard or Reserves), an injury or illness that was incurred by the member in 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 line of duty on active duty in the Armed Forces) and that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating; and, in the case of a veteran who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during a period described in paragraph (15)(B), means a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in 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 line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.

- *Son or daughter* means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either 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.
- *Spouse* 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:

1. Was entered into in a state that recognizes such marriages; or
  2. 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.  
(29 C.F.R. 825.102)
- *Teachers* (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily non-instructional employees.
  - *Veteran*: the term has the meaning given the term in section 101 of title 38, United States Code.

### Leave Description

The use of unpaid family and medical leave is subject to the following:

1. The District will pay family leave or sick leave only under circumstances permitted by the applicable leave plan (29 C.F.R. 825.207).
2. To be eligible for family and medical leave, an employee must (29 C.F.R. 825.110 and 825.111):
  - a. Have been employed by the District for at least 12 months (the 12 months need not be consecutive—see 29 CFR 825.110 for explanation).
  - b. Have been employed for at least 1,250 hours of service during the 12-month period immediately before the beginning of the leave.
3. Family and medical leave is available in one or more of the following instances (29 C.F.R. 825.112; 29 U.S.C. 2611):
  - a. The birth and first-year care of a son or daughter.
  - b. The adoption or foster placement of a child.
  - c. The serious health condition of an employee's spouse, parent, or child.

- d. The employee's own serious health condition that makes the employee unable to perform his/her essential job functions.
  - e. Because of any qualifying exigency, arising out of the fact that a spouse, son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.
  - f. To care for a covered service member if the eligible employee is the spouse, son, daughter, parent, or next of kin of the covered service member.
4. FMLA may generally be used for up to a combined total of 12 weeks during any 12-month period (29 C.F.R. 825.200). Eligible employee caring for a covered service member in accordance with "3f" above are entitled to a total of 26 workweeks of leave during a single twelve-month period (29 C.F.R. 825.127).
  5. School board policy will govern family and medical leaves, but FMLA, and its implementing regulations, will be the final authority (29 C.F.R. 825.700).

### Response to Leave Requests

The Superintendent or designee shall issue the following notices to employees upon receiving a leave request:

1. **Eligibility notice:** When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. 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. The eligibility notice must state whether the employee is eligible for FMLA leave. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employer, the number of hours of service worked for the employer during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. Notification of eligibility may be oral or in writing.
2. **Rights and responsibilities notice:** Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice shall be provided to the employee each time the eligibility notice is provided. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:
  - a. That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying.
  - b. Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or a call to covered active duty status, and the consequences of failing to do so;

- c. The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave
  - d. Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);
  - e. The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);
  - f. The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave
  - g. The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.
3. **Designation notice:** The employer is responsible in all circumstances for designating leave as FMLA-qualifying and for giving notice of the designation to the employee. 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 five business days absent extenuating circumstances.
- a. If the employer determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination.
  - b. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.
  - c. If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time.
  - d. If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position.

- e. The designation notice must be in writing.
- f. The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period.

### **FMLA Leave for Spouses**

A husband and wife who are both eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken (29 C.F.R. 825.120):

1. For birth of the employee's son or daughter or to care for the child after birth;
2. For placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement; or
3. To care for the employee's parent with a serious health condition.

A husband and wife who are both eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 workweeks during any single 12-month period if the leave is taken:

1. To care for a covered service member; or
2. As a combination of leave to care for a covered service member and leave for the birth, foster placement, or adoption of a child; or to care for the child after birth, adoption, or foster placement; or to care for a parent with a serious health condition. However, if the leave taken by the husband and wife includes leave for the birth, foster placement, or adoption of a child; or to care for the child after birth, adoption, or foster placement; or to care for a parent with a serious health condition, the leave for that reason shall be limited to 12 workweeks per year.

### **Medical Certification**

Except in the case of leave for care of covered service member, the Superintendent or designee may challenge the adequacy of a medical certification and require the employee to obtain a second opinion from a second health care provider, paid for by the District. If a second medical opinion conflicts with the first, the Superintendent may require a third opinion, paid for by the District. The third health care provider must be designated or approved jointly by the District and the employee. The third opinion is final and binding.

### **Intermittent or Reduced-Leave Requests**

1. If the leave is taken to care for a sick family member, to care for a covered service member, or for the employee's own serious health condition, leave may be taken

- intermittently or on a reduced schedule when medically necessary. Leave due to a qualifying exigency may be taken intermittently or on a reduced schedule basis.
2. Non-instructional employees, may be required to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of intermittent or reduced-schedule leave. The alternative position must be equivalent in pay and benefits; benefits will not be eliminated even when they are not available to part-time employees.
  3. If an instructional employee requests intermittent leave or leave on a reduced-leave schedule to care for a family member, to care for a covered service member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the Superintendent may require the instructional employee to choose either to:
    - a. Take leave for a period(s) of a particular duration, not greater than the duration of the planned treatment. OR
    - b. Transfer temporarily to an available alternative position for which the employee is qualified, which has the equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position. (29 C.F.R. 825.601)

### **Health Insurance Premiums**

Any share of health plan premiums which had been paid by the employee before taking the leave, must continue to be paid by the employee during the FMLA leave (29 C.F.R. 825.210). Districts must provide advance written notice of the terms and conditions under which premium payments must be made.

A district's obligation to maintain health insurance coverage ceases if an employee's premium payment is more than 30 days late (29 C.F.R. 825.212). In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date.

All other obligations under the FMLA continue. If coverage lapses because an employee has not made required premium payments, the employer must still restore the employee to coverage and benefits when the employee returns from leave. Districts may recover: (1) the employee's share of any premium payments paid by the employer after the employee misses a payment, and (2) its share of premiums during an unpaid FMLA leave if the employee fails to return to work after the employee leave entitlement is exhausted or expires, with a few exceptions (29 C.F.R. 825.213). The district's attorney must be consulted for the appropriate premium recovery method.

### **Return to Duty**

An instructional staff member may be required to wait to return to work until the next term if:

**EXHIBIT**

Descriptor Code: DDAA-E1

1. The employee's leave begins more than five weeks before the end of a term, the leave will last at least three weeks, and the employee would return during the three-week period before the end of the term.
2. The employee's leave, for a purpose other than the employee's own serious health condition or qualifying exigency, begins during the five-week period before the end of a term; the leave will last more than two weeks; and the employee would return during the two-week period before the end of the term.
3. The employee's leave, for a purpose other than the employee's own serious health condition or qualifying exigency, begins during the three-week period before the end of a term and the leave will last more than five working days.

**End of McClusky School District #19 Exhibit DDAA-E1 .....[04/20]**