

PARENTAL LEAVE/FAMILY AND MEDICAL LEAVE

PURPOSE

In 1989, the Legislature found that there is a growing crisis in this country and State affecting the stability of our families and that the family unit is being torn apart due to the need for families to have 2 income producing parents. In order to address this situation and to provide for the love, nurturing and education of our children, the Legislature enacted "The Parental Leave Act," codified as West Virginia Code § 21-5D-1 et seq. to provide employees with unpaid time away from work (after exhausting annual and personal leave) without risk of employment loss.

Later, in 1993, Congress enacted the Family and Medical Leave Act (FMLA), which similarly provides for family and medical leave to be taken by eligible employees for qualifying events. The FMLA is administered and enforced by the U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division and the Federal Register and the Code of Federal Regulations remain the official sources for regulatory information concerning this law. Please reference the U.S. Department of Labor's website for additional information (www.dol.gov/dol/esa/fmla.htm)

In addition to the West Virginia Parental Leave Act and FMLA, the Administrative Rule of the Division of Personnel also provides for leave, both paid and unpaid, if an employee meets eligibility requirements and requests the leave for a qualifying event. Due to the complexity of these laws and rule and their differing eligibility requirements as well as their differing entitlement provisions, it is necessary that each request for family or medical leave be individually evaluated, and guidance provided on a case by case basis.

If an employee is eligible for leave under both the federal and State law, and/or the Administrative Rule, the employee is entitled to the greatest benefit or most generous rights provided under the different parts of each law or the Administrative Rule. (U.S. Department of Labor - FMLA Employee/Employer Advisor - www.dol.gov/dol/esa/fmla.htm) The determination of the most generous benefit will be at the employee's discretion. Please contact the WV Division of Personnel, Employee Relations Section at 558-3950, ext. 511, for more specific information.

The purpose of this interpretive bulletin is to provide general information on the State Parental Leave Act and the federal Family and Medical Leave Act, delineate the major differences between the 2 statutes, and to provide direction as to the proper administration of the 2 laws. This bulletin is an interpretation and does not provide any employee with absolute rights. Rather, its purpose is to provide employees and employers with possible applications of these Acts to individual situations.

DEFINITIONS II.

- A. Definitions for the West Virginia Parental Leave Act
 - 1. Dependent means any person who is living with or dependent upon the income of any employee whether related by blood or not.
 - 2. Employee means any individual, hired for permanent employment, who has worked for at least 12 consecutive weeks performing services for remuneration within this State for any depart-

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ment, division, board, bureau, agency, commission or other unit of State government, or any county board of education in the State. Employee does not include:

- a. Individuals employed by persons who are not employers as defined by this law;
- b. Elected public officials or the members of their immediate personal staffs;
- c. Principal administrative officers of any department, division, board, bureau, agency, commission, or other unit of State government, or any county board of education in the State; or,
- d. A person in a vocational rehabilitation facility certified under federal law who has been designated an evaluee, trainee, or work activity client.
- 3. Employer includes any department, division, board, bureau, agency, commission, or other unit of State government and any county board of education in the State.
- 4. Employment benefits means all benefits, other than salary or wages, provided or made available to employees by an employer, and includes group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a policy or practice of an employer or by an employee benefit plan as defined in the federal Employee Retirement Income Security Act of 1974.
- 5. The term health care or health care services means clinically-related preventive, diagnostic, treatment or rehabilitative services whether provided in the home, office, hospital, clinic, or any other suitable place, provided or prescribed by any health care provider or providers. Such services include, among others, drugs and medical supplies, appliances, laboratory, preventive, diagnostic, therapeutic and rehabilitative services, hospital care, nursing home and convalescent care, medical physicians, osteopathic physicians, chiropractic physicians, and such other surgical, dental, nursing, pharmaceutical, and podiatric services and supplies as may be prescribed by such health care providers.
- 6. Health care provider means a person, partnership, corporation, facility or institution licensed, certified or authorized by law to provide professional health care services in this State to an individual during this individual's medical care, treatment or confinement.
- 7. Parent means a biological, foster, or adoptive parent; a stepparent; or a legal guardian.
- 8. Serious health condition means a physical or mental illness, injury or impairment which involves:
 - a. Inpatient care in a hospital, hospice, or residential health care facility; or
 - b. Continuing treatment, health care, or continuing supervision by a health care provider.
- 9. Son or daughter means an individual who is a biological, adopted, or foster child; a stepchild or a legal ward, and is under 18 years of age or 18 years of age or older and incapable of self-care because of mental or physical disability.

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10. Spouse means any person legally married to an employee covered under this article.

III. INTERPRETIVE MATERIAL

A. WEST VIRGINIA PARENTAL LEAVE ACT

- 1. The Parental Leave Act provides that an employee shall be entitled to up to a total of 12 weeks (480 hours) of unpaid family leave (following the exhaustion of all his or her annual and personal leave) during any 12-month period.
- 2. An employee may take family leave on a part-time basis and on a part-time leave schedule, but the period during which the number of workweeks of leave may be taken may not exceed 12 consecutive months, and such leave shall be scheduled so as not to disrupt unduly the operations of the employer.
- 3. Leave may be taken for the following reasons:
 - a. The birth of a son or daughter of the employee. If a leave because of birth is foreseeable, the employee must provide the employer with 2 weeks written notice of the expected birth.
 - b. Placement of a son or daughter with the employee for adoption. If a leave because of adoption is foreseeable, the employee must provide the employer with 2 weeks written notice of the adoption.
 - c. To care for the employee's son, daughter, spouse, parent, or dependent who has a serious health condition.
 - (1) If an employee requests family leave to care for a family member with a serious health condition, he/she is required to provide to the employer certification of the family member's health condition by the health care provider on form DOP L-4 and L-5.
 - (2) If a leave under this section is foreseeable because of planned medical treatment or supervision, the employee:
 - (a) Shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider of the family member or dependent; and
 - (b) Shall provide the employer with 2 weeks written notice of the treatment or supervision.
- 4. The 12-month period is measured forward from the date the leave begins and may not exceed 480 hours in a 12-month period. Family leave may be taken intermittently when medically necessary.
- 5. The employer may provide employees with rights to family leave which are more generous to the employee than the rights provided under this law.

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- 6. The employer may employ a temporary employee or temporary employees, according to the provisions of the Division of Personnel's *Administrative Rule* for the period of the employee's family leave.
- 7. No employer may, because an employee received family leave or medical leave, reduce or deny any employment benefit or seniority which accrued to the employee before his or her leave commenced.
- 8. Nothing in this law entitles any returning employee to the accrual of any seniority or employment benefits during any period of family leave.
- 9. The employer shall continue group health insurance coverage for an employee on family leave provided the employee shall pay the employer the premium costs of such group health insurance coverage.
- 10. No person may interfere with, restrain, or deny the exercise of any right provided by this law.
- 11. Employers must post a notice approved by the WV Department of Labor that explains employees' rights under this law.

B. FEDERAL FAMILY AND MEDICAL LEAVE ACT

- 1. The FMLA entitles eligible employees to take up to 12 weeks of unpaid, job protected leave in a 12-month period, for specified family and medical reasons.
 - a. Although the law provides for unpaid leave, an employee may choose to substitute accrued, paid leave for all or any portion of the otherwise unpaid leave. If the employee does not choose to substitute paid leave, an employer may require the employee to do so.
 - b. Employees may take leave on an intermittent basis or may work a reduced schedule under certain circumstances.
 - c. The employer is required to maintain group health insurance coverage, including family coverage, for an employee on FMLA on the same terms as if the employee continued to work.
- 2. Employer Coverage FMLA applies to all public agencies, including the State of WV and its political subdivisions. The State of WV or a political subdivision of the State of WV constitutes a single public agency, and therefore, a single employer for purposes of determining employee eligibility.
- 3. Employee Eligibility To be eligible for FMLA benefits, an employee must:
 - a. work for a covered employer (all public agencies are covered by the FMLA);
 - b. have worked for the employer for a total of 12 months (the 12 months need not be consecutive);

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- c. have worked at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave (this excludes time spent on paid annual and sick leave, paid holidays, any unpaid leaves of absence, and any unauthorized leave or suspensions); and,
- d. work at a location where at least 50 employees are employed by the employer (e.g. the State or political subdivision) within 75 miles.
- 4. Leave Entitlement The employer must grant an eligible employee up to a total of 12 workweeks of either unpaid leave; employee chosen accrued, paid leave; or employer designated accrued, paid leave during any 12-month period for one or more of the following reasons:
 - a. for the birth and care of the newborn child of the employee;
 - b. for placement with the employee of a son or daughter for adoption or foster care;
 - c. to care for an immediate family member (spouse, child, or parent) with a serious health condition; or,
 - d. to take medical leave when the employee is unable to work because of his/her own serious health condition.
 - e. Please note the following important information concerning entitlement:
 - (1) The 12-month period commences on the date the employee's leave begins;
 - (2) An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement;
 - (3) The definition of immediate family member is more restrictive than that found in Section 3.44 of the *Administrative Rule*;
 - (4) Since Section 14.8(c) of the *Administrative Rule* provides a more generous unpaid medical leave benefit of up to a maximum of 6 months, the State benefit fulfills the entitlement provisions of the FMLA for an employee's own serious health condition;
 - (5) Spouses employed by the same employer may be limited to a combined total of 12 workweeks of family leave for the following reasons:
 - (a) birth and care of a child;
 - (b) for the placement of a child for adoption or for foster care, and to care for the newly-placed child; and,
 - (c) to care for an employee's parent who has a serious health condition.

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- 5. Intermittent/Reduced Schedule Leave The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances:
 - a. when medically necessary to care for a seriously-ill family member or because of the employee's serious health condition;
 - b. to care for a newborn or newly-placed adopted or foster care child only with the employer's approval;
 - c. for foreseeable medical treatment but must be scheduled so as not to unduly disrupt the employer's operations, subject to the approval of the employee's health care provider.
- 6. Substitution of Paid Leave Employees may choose to use, or employers may require the employee to use accrued paid sick and annual leave to cover some or all of the leave taken for FMLA qualifying events. The use of accrued, paid leave will run concurrently with the employee's entitlement to unpaid leave under FMLA. The substitution of accrued sick leave for FMLA leave is limited by the provisions in the *Administrative Rule*.
- 7. Serious Health Condition An illness, injury, impairment, or physical or mental condition that involves:
 - a. any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility;
 - b. a period of incapacity requiring absence of more than 3 calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider;
 - c. any period of incapacity due to pregnancy, or for prenatal care;
 - d. any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.);
 - e. a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.);
 - f. any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than 3 consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).
- 8. Medical Certification -The need for leave for a serious health condition of the employee or the employee's immediate family member must be supported by a certification issued by a health care provider (DOP L-4 and L-5). The employee must be permitted at least 15 calendar days to obtain the medical certification.
 - a. If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider; however, a health care provider representing the employer may contact the employee's

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health care provider, with the employee's permission for purposes of clarification and authenticity of the medical certification.

- b. An employer who has reason to doubt the validity of a medical certification, may, at its own expense, require the employee to obtain a second medical certification from a health care provider. The employer may choose the health care provider for the second opinion, except that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider.
- 9. Health Care Provider Health care providers who are recognized by the Public Employees Insurance Agency's group health plan's benefits manager may provide certification of a serious health condition.
 - a. The providers must be authorized to practice, and be performing within the scope of their practice, under State law.
 - b. Generally included are: doctors of medicine or osteopathy; podiatrists, dentists, clinical psychologists, optometrists, and chiropractors; nurse practitioners, nurse-midwives, and clinical social workers; and Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.
- 10. Maintenance of Health Benefits The employer is required to maintain group health insurance coverage, including family coverage, for an employee on FMLA leave on the same terms as if the employee continued to work.
 - a. Where appropriate, arrangements will need to be made for employees taking unpaid FMLA leave to pay their proportionate share of health insurance premiums. Such payments may be made under any arrangement voluntarily agreed to by the employer and employee.
 - b. The employer's obligation to maintain health benefits under FMLA stops if and when an employee informs the employer of an intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is exhausted.
 - (1) The employer's obligation also stops if the employee's premium payment is more than 30 days late and the employer has given the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received.
 - (2) In some circumstances, the employer may recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave.
- 11. Other Benefits Certain types of earned benefits, such as tenure, paid leave, and annual increment pay do not accrue during periods of unpaid FMLA leave, unless such earned benefits are specifically provided by State law or *Administrative Rule*. For other elected benefits, such as optional life insurance coverage for which the employee typically pays through payroll deduction, the employer and the employee may make arrangements to continue benefits during periods of unpaid FMLA leave.

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12. Job Restoration

- a. On return from FMLA leave, an employee must be restored to his or her original job, or to a job "equivalent" to the employee's former position in terms of pay, benefits, and other employment terms and conditions and must entail substantially equivalent skill, effort, responsibility and authority.
- b. If the employee is unable to perform an essential function of his/her position because of a physical or mental condition, the employee has no entitlement to restoration to another position; however, the employer's obligations may be governed by the Americans With Disabilities Act (ADA).
- c. "Key" Employee Exception Under specified and limited circumstances where restoration to employment will cause "substantial and grievous economic injury" to its operations, an employer may refuse to reinstate certain highly-paid, salaried, "key" employees.
 - (1) A "key" employee is a salaried, FMLA-eligible employee who is among the highest paid 10 percent of employees within 75 miles of the employee's worksite.
 - (2) The term "salaried" means "paid on a salary basis", as determined in the Department of Labor's regulations defining employees who may qualify as exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act.
- 13. Employee Notice Eligible employees seeking to use FMLA leave are required to provide:
 - a. 30-day advance notice of the need to take FMLA leave when the need is foreseeable (i.e. expected birth, placement for adoption or foster care, or planned medical treatment);
 - b. notice "as soon as practicable" (usually within one or 2 business days) when the need to take FMLA leave is not foreseeable (i.e., because of a lack of knowledge, change in circumstances, or medical emergency);
 - c. sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons, i.e., the reason for taking leave; if applicable, the family member for whom the leave is requested; the nature of the injury, impairment, or physical or mental condition that necessitates the leave; and the anticipated duration of the leave (the employee need not mention FMLA when requesting leave to meet this requirement, but is required to explain why the leave is needed).
- 14. Employer Notices Employers must post a notice approved by the Secretary of the U.S. Department of Labor explaining rights and responsibilities under FMLA.
 - a. An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense. The poster approved by the Department of Labor may be found at www.dol.gov/dol/esa/public/regs/compliance/posters/fmla.htm.
 - b. In addition to the posted notice, employers must provide written notice to the employee within 2 business days after receiving the employee's request, advising the employee of his/

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her rights, responsibilities and consequences for failing to meet responsibilities. A sample letter developed by the Department of Labor which fulfills this requirement can be found at www.dol.gov/dol/esa/public/regs/compliance/whd/fmla/wh381.pdf.

15. Other Provisions

- a. FMLA does not affect any other federal or State law which prohibits discrimination, nor supersede any State law (i.e., the WV Parental Leave Act) or lawfully promulgated rule (i.e. the Administrative Rule of the WV Division of Personnel) which may provide greater family or medical leave protection.
- b. If an employee is eligible for leave under both the federal and State law, and/or the *Administrative Rule*, the employee is entitled to the greatest benefit or most generous rights provided under the different parts of each law or the *Administrative Rule*.
- c. The determination of the most generous benefit will be at the employee's discretion.

IV. REFERENCES:

- A. West Virginia Parental Leave Act, W.Va. Code § 21-5D-1 et seq.
- B. Family and Medical Leave Act, 29 USC 2601 et seq.
- C. United States Department of Labor, Family and Medical Leave Act Regulations, 29 CFR 825
- D. West Virginia Division of Personnel, Administrative Rule, Section 14.8(b)
- V. **ISSUE DATE:** October 1, 1991.
- **VI. REVISION:** August 1, 2001 (includes renaming).
- VII. BULLETIN NUMBER: DOP-B1.

Approved and Issued by:

Nichelle D. Perkins, Director of Personnel

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