

**COMPARISON OF THE WEST VIRGINIA PARENTAL LEAVE ACT
AND THE FEDERAL FAMILY AND MEDICAL LEAVE ACT**

This chart compares and contrasts, in a general way, the provisions of the West Virginia Parental Leave Act and the federal Family and Medical Leave Act and is intended to assist State employees and employees of political subdivisions of the State in making informed decisions regarding such leave. It is **not** a “stand alone” document and is intended to supplement federal and State laws and the Division of Personnel Interpretive Bulletin. It is important to note that an employer must comply with any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA; *conversely*, the rights established by the FMLA may not be diminished by any employment benefit program or plan. **If an employee is eligible for leave under both laws, the employee is entitled to the greater benefit or more generous rights provided under the different parts of each law.** The employee is to determine which benefit is more generous given his or her individual situation. Due to the complexity of these laws and their differing eligibility requirements, as well as their differing leave provisions, it is necessary that each request for family or medical leave be individually evaluated, and guidance provided on a case-by-case basis. For additional information, please contact the Employee Relations Section of the West Virginia Division of Personnel at 304-558-3950, extension 57209.

PROVISION	WEST VIRGINIA PARENTAL LEAVE ACT (PLA)	FEDERAL FAMILY AND MEDICAL LEAVE ACT (FMLA)
EMPLOYER COVERAGE	Any department, division, board, bureau, agency, commission or other unit of state government and any county board of education.	The State or a political subdivision of the State (example: a state is a single employer; a county is a single employer; a city or town is a single employer). All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year.
EMPLOYEE ELIGIBILITY	Any individual hired for permanent employment, who has worked for at least 12 consecutive weeks performing paid services within West Virginia for any department, division, board, bureau, agency, commission, or other unit of state government, or any county board of education in the state. [<i>Excludes:</i> (1) elected public officials and members of their immediate personal staffs; (2) 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; (3) employees of County health departments; (4) a person in a vocational rehabilitation facility certified under federal law who has been designated an evaluatee, trainee or work activity client.]	<ul style="list-style-type: none"> • Has been employed by the employer for at least 12 months (<i>need not be consecutive months</i>) - AND • Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the beginning of the leave (<i>include only those hours actually worked, i.e., paid leave and unpaid leave, including FMLA leave, are not counted</i>) - AND • Works at a location where at least 50 employees are employed by the employer (e.g., the State or political subdivision) within 75 miles.
LEAVE ENTITLEMENT (See Exhaustion of Paid Leave)	<p>12 weeks of unpaid leave during any 12-month period. The 12-month period is calculated on a rolling 12-month period, measured backward from the date of leave use and the total amount of leave may not exceed the equivalent number of work hours the employee is normally scheduled to work in a 12-week period (e.g., a full-time employee is eligible for 480 hours and a 50% part-time employee is eligible for 240 hours).</p> <p>As with FMLA, the workweek is the basis for an employee's leave entitlement and is not phrased in terms of a particular number of days or hours of leave, but rather as 12 workweeks of leave based on their normal work schedule. Family leave may be taken intermittently when medically necessary.</p>	<ul style="list-style-type: none"> • 12 weeks of unpaid leave; employee chosen paid leave; or employer designated paid leave during any 12-month period. 1. The 12-month period shall be calculated on a rolling 12-month period, measured backward from the date of leave use. (Exception: the 12-month period for FMLA military caregiver leave requires the leave period to be based upon the first day the employee uses leave, measured forward.) • 26 weeks of unpaid leave; employee chosen paid leave; or employer designated paid leave to care for a covered service member in a single 12-month period. <p>The workweek is the basis for an employee's leave entitlement and is not phrased in terms of a particular number of days or hours of leave, but rather as 12 workweeks of leave. Thus if there is a holiday in a week when an employee is on leave for the full week, the employee is still charged with a week of leave. Similarly, if an employee normally works a 50-hour workweek, the employee's statutory entitlement is not capped at 480 hours. Thus, the focus is always on the workweek, and the employee's "normal" workweek (hours/days per week) prior to the start of FMLA leave is the controlling factor.</p>

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<p>Leave Entitlement <i>(continued)</i></p>		<p>Spouses employed by the same employer may be limited to a combined total of 12 workweeks of family leave for the following reasons:</p> <ol style="list-style-type: none"> 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. <p>In addition, spouses employed by the same employer may be limited to a combined total of 26 workweeks of military caregiver leave.</p>
<p>QUALIFYING EVENTS</p>	<ul style="list-style-type: none"> • Birth of employee’s child • Placement of child with employee for adoption • To care for employee’s child, spouse, parent, or dependent who has a serious health condition (<i>“dependent” is defined as any person living with or dependent on the income of the employee, whether related by blood or not</i>) 	<ul style="list-style-type: none"> • Birth and care of employee’s newborn child (<i>entitlement expires at the end of the 12-month period beginning on the date of the birth</i>). • Placement of a child with employee for adoption or foster care and to care for the newly placed child (<i>entitlement expires at the end of the 12-month period beginning on the date of the placement</i>). • Care for an immediate family member (spouse, child, or parent) with a serious health condition. • Employee is unable to work because of his or her own serious health condition. • For qualifying exigencies arising out of the fact that the employees’ spouse, son, daughter, or parent is on active duty during the deployment to a foreign country or call to active duty status as a member of the National Guard, Reserves or Armed Forces. • Care for covered service member who suffered a serious injury/illness in the line of duty while on active duty for which he or she is undergoing medical treatment, recuperation, or therapy.
<p>INDIVIDUALS FOR WHOM LEAVE MAY BE TAKEN</p>	<ul style="list-style-type: none"> • Son or Daughter - a biological, adopted or foster child; a stepchild; or, a legal ward who is: (1) under age 18; or, (2) age 18 or older and incapable of self-care because of mental or physical disability • Spouse - any person legally married to an employee covered by the PLA • Parent - a biological, foster or adoptive parent, a stepparent or a legal guardian • Dependent - any person who is living with or dependent on the income of any employee, whether related by blood or not • Employee - <i>No such provision in PLA, but may qualify for Medical Leave of Absence Without Pay under W. VA. CODE R. §143-1-14.8(c)</i> 	<ul style="list-style-type: none"> • Son or Daughter - a biological, adopted or foster child; a stepchild; a legal ward; or, a child of a person standing <i>in loco parentis</i> who is: (1) under age 18; or, (2) age 18 or older and incapable of self-care because of mental or physical disability. • Son or Daughter (for military related leave): Biological, adopted, foster or step child, a legal ward or a child of a person standing “in loco parentis.” May be of any age. • Spouse - a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides. • Parent - a biological parent or an individual who stands or stood <i>in loco parentis</i> to an employee when the employee was a son or daughter.

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<p>Individuals for Whom Leave May Be Taken <i>(continued)</i></p>		<ul style="list-style-type: none"> • Dependent - <i>No such provision in FMLA.</i> • Employee - individual who meets eligibility criteria. • Covered Service Member – (a) Current member of Armed Forces, including member of 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 incurred in the line of duty on active duty, or, (b) a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness as designated by the Secretary of Labor 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 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.
<p>EXHAUSTION OF PAID LEAVE</p>	<p>The employee <i>is required</i> to exhaust all annual and family sick leave <i>prior to</i> taking unpaid leave.</p>	<p>Appropriate, available paid sick and annual leave shall be utilized to cover leave taken for FMLA qualifying events. Paid sick leave may only be used for the employee’s own serious health condition; the 40 hours of paid family sick leave may be used for a family member. The paid leave shall run concurrently with the employee’s entitlement to unpaid FMLA leave starting on the date the agency provides the required notice. FMLA leave must be categorized as Medical Leave of Absence Without Pay or Personal Leave of Absence Without Pay.</p>
<p>INTERMITTENT LEAVE</p>	<p>Leave may be taken on a part-time basis and on a part-time leave schedule provided such leave does not exceed 12 consecutive months <i>and</i> does not unduly disrupt the employer’s operations.</p>	<ul style="list-style-type: none"> • Intermittent/reduced schedule leave may be taken when medically necessary for planned and/or unanticipated medical treatment or for recovery from treatment of or recovery from a serious health condition of the employee’s seriously ill child, spouse or parent, or because of the employee’s own serious health condition. It may also be taken to provide care or psychological comfort to an employee’s child, spouse, or parent with a serious health condition. Intermittent leave must be scheduled so as not to unduly disrupt the employer’s operations, <i>subject to the approval of the employee’s health care provider.</i> • Intermittent leave may be taken for qualifying exigency military FMLA leave purposes. • Intermittent/reduced schedule leave may be taken after the birth or placement of a child for adoption or foster care <i>only with the employer’s approval; however,</i> such approval is not necessary for intermittent leave during which the mother has a serious health condition in connection with the birth or if the newborn child has a serious health condition.
<p>SERIOUS HEALTH CONDITION</p>	<p>A physical or mental illness, injury, or impairment that involves:</p> <ul style="list-style-type: none"> • inpatient care in a hospital, hospice or residential health care facility • continuing treatment, health care or continuing supervision by a health care provider 	<p>An illness, injury, impairment, or physical or mental condition that involves:</p> <ul style="list-style-type: none"> 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;

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<p>Serious Health Condition <i>(continued)</i></p>		<p>b. a period of incapacity requiring absence of more than 3 consecutive full calendar days from work, school, or other regular daily activities, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:</p> <ul style="list-style-type: none"> (1) treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist; or, (2) treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider. <p>In order to qualify for leave under this provision, the employee or family member must visit a health care provider within 7 days of the first day of incapacity and visit(s) must be in-person.</p> <p>c. any period of incapacity due to pregnancy, or for prenatal care;</p> <p>d. any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.). The employee must visit a health care provider at least 2 times per year to qualify under this provision;</p> <p>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.); and/or,</p> <p>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.).</p>
<p>CERTIFICATION</p>	<p>The certification is sufficient if it contains the following:</p> <ul style="list-style-type: none"> • a statement that the child, spouse, parent, or dependent has a serious health condition • the date the serious health condition commenced and its probable duration • the medical facts regarding the serious health condition 	<p>Reference W. VA. CODE R. §143-1-14(g) and applicable DOP certifications forms.</p> <p>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, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or decertification) after the employer has given the employee an opportunity to cure any deficiencies. To make such contact, the employer must use a health care provider, human resources professional, leave administrator, or management official. Under no circumstances, however, should the employee’s direct supervisor contact the employee’s health care provider. Information beyond what is required on the certification form may not be solicited.</p> <p>Qualifying Exigency Military FMLA Leave Certification - Employers can request certification by having the employee provide a copy of the service member’s active-duty orders or using the prescribed DOP form. Employers may also verify with a third party that an employee met with the third party during qualifying exigency military FMLA leave. If the employee submits a complete certification supporting a request for leave, the employer may not request additional information as re-certification is not permitted.</p>

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Certification <i>(continued)</i>		<p>Military Caregiver Certification - Employer must accept “invitational travel orders” or “invitational travel authorizations” issued by the Department of Defense to family members as sufficient certification of the need for military caregiver leave, at least until the order or authorization’s expiration date. Employers may seek authentication and clarification of the certification, but may not seek second or third opinions or recertification.</p> <p>Recertification may be requested no more than once every 30 days for a chronic or permanent/long-term condition if no minimum period of incapacity is specified, or - if an extended period of incapacity was listed on the initial certification - until that period initially specified by the health care provider passes. In all cases, an employer may request a recertification of a medical condition every 6 months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of 6 months (e.g., for a lifetime condition), the employer would be permitted to request recertification every 6 months in connection with an absence. Unless: 1) the employee requests an extension of leave; 2) the circumstances described by the previous certification have changed significantly; or 3) the employer receives information that casts doubt on the continuing validity of the certification (i.e., leave abuse, suspected forgery, etc.). Requiring re-certification for qualifying exigency military FMLA or military caregiver leave is not permitted.</p>
ADDITIONAL MEDICAL OPINIONS	No guidance is provided within the Statute. FMLA requirements may be used for a guideline.	An employer 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 and must pay for the examination, except that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider and must pay for the examination. This third opinion shall be final and binding. The third health care provider must be approved jointly by the employer and the employee.
NOTICE BY EMPLOYEE	Two (2) weeks written notice if leave is foreseeable because of birth, adoption, planned medical treatment or supervision.	<ul style="list-style-type: none"> • 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); • notice “as soon as practicable” (usually the same day or the next business day unless there are unusual circumstances) when the need to take FMLA leave is not foreseeable (i.e., because of a lack of knowledge, change in circumstances, or medical emergency); • notice in compliance with the employer’s call-in procedure when reporting an absence under intermittent FMLA leave, unless there are unusual circumstances; and, • 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).

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NOTICE BY EMPLOYER	Employers are required to post in one or more conspicuous places where notices to employees are customarily posted, a notice in a form approved by the West Virginia Department of Labor explaining employees' rights under this law.	<ul style="list-style-type: none"> • General Notice accomplished through posting the information in “conspicuous places” on premises. • General Notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically. • Notice of Eligibility and Rights and Responsibilities 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. The notice must detail the specific expectations and obligations of the employee and explain consequences of failure to meet these obligations. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA qualifying reason in the applicable 12-month period. 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. • Designation Notice designating leave as FMLA-qualifying, 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. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the information provided by the employer to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee’s first notice of need for leave subsequent to any change, written notice of the change.
MAINTENANCE OF HEALTH BENEFITS	The employee is eligible to continue participation in the group health insurance plan provided the employee pays the employer 100% of the premium costs.	The employer is required to maintain the employee’s group health insurance benefits on the same terms as if the employee had continued to work. The employer’s obligation to maintain health benefits under FMLA stops if and when an employee informs the employer of 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. 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. As provided in the FMLA regulations, 29 CFR 825.213, the employer may recover premiums it paid to maintain health insurance coverage and other benefits for an employee who fails to return to work from FMLA leave.

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JOB RESTORATION	The employee <i>shall</i> be returned to the position held immediately prior to the leave.	<ul style="list-style-type: none"> • The employee is entitled to be returned to the same position held when the leave began, or to an equivalent position with equivalent benefits pay, and other terms and conditions. • If the employee is unable to perform an essential function of the position because of a physical or mental condition, the employee has no right to reinstatement; <i>however</i>, employer's obligations may be governed by ADA. • "Key" employee exception - Under specified and <i>limited</i> circumstances, an employer may refuse to restore a salaried employee among the highest paid 10% of employees within 75 miles of work site.
ENFORCEMENT	The West Virginia Department of Labor (<i>W. VA. CODE § 21-5D-1 et seq.</i>).	The US Department of Labor, Employment Standards Administration, Wage and Hour Division (<i>29 USC 2601 et seq.; 29 CFR 825</i>).
MORE INFORMATION	To view the Parental Leave Act, go to: www.legis.state.wv.us/WVCODE/Code.cfm?chap=21&art=5D#05D	To view the regulations and obtain other Department of Labor information, go to: www.dol.gov/whd/fmla/finalrule.htm