



*Division of
Personnel*

**Reference Guide to Federal
Family and Medical Leave &
West Virginia Parental Leave**

Employee Relations Section
Revised: August 2011

DISCLAIMER

This booklet is intended to be used as a reference and procedural guide to employee conduct. The general information it contains should not be construed to supersede any law, rule, or policy. In the case of any inconsistencies, the statutory and regulatory provisions shall prevail. This booklet is written with the understanding that the West Virginia Division of Personnel is not engaged in rendering legal services. If legal advice or assistance is required, the services of an attorney should be sought. Supervisors should also refer to policies, rules and regulations as well as consult with the human resources office within his or her respective agency. For technical assistance concerning specific situations, employees and employers may contact the Division of Personnel's Employee Relations Section at (304) 558-3950, extension 57209.

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I. PURPOSE

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The purpose of this guide is to provide general information on the Parental Leave Act and the Family and Medical Leave Act, delineate the major differences between the two statutes, and to provide direction as to the proper administration of the two laws. This guide 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. The prescribed forms for requesting leave under both Acts can be found in this guide.

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,” (PLA) codified as W. VA. 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 federal 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 (DOL). Please reference the DOL’s website for additional information: www.dol.gov/whd/fmla/finalrule.htm.

In 2010, the Division of Personnel promulgated the *Family and Medical Leave Act / Parental Leave Act* policy (DOP-P23) to achieve consistency among agencies regarding administration of leave. The policy established standards for the calculation method to be used and for the substitution of paid leave for qualifying absences.

In addition to the West Virginia Parental Leave Act (PLA) and FMLA, the *Administrative Rule* of the West Virginia Division of Personnel, W. VA. CODE R. §143-1-1 *et seq.*, 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 FMLA and PLA, 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*. The determination of the most generous benefit will be at the employee’s discretion. However, if the paid and/or unpaid leave qualifies under both the federal and State law, and/or the *Administrative Rule*, the leave entitlement under each will exhaust concurrently. Please contact the Division of Personnel, Employee Relations Section at (304) 558-3950, extension 57209, for more specific information.

II. DEFINITIONS

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A. Definitions for the West Virginia Parental Leave Act (PLA):

1. **Dependent:** Any person who is living with or dependent upon the income of any employee whether related by blood or not.
2. **Employee:** Any individual, hired for permanent employment, who has worked for at least 12 consecutive weeks performing services for remuneration within this State for any department, 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 evaluatee, trainee, or work activity client.
 - e. Individuals employed by County Health Departments.
3. **Employer:** 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:** 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. **Health Care or Health Care Services:** 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:** 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:** A biological, foster, or adoptive parent; a stepparent; or a legal guardian.

8. Serious Health Condition: 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: 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.
10. Spouse: Any person legally married to an employee covered under this article.

B. Definitions for Family and Medical Leave Act (FMLA):

1. Covered Military Member: Employee's spouse, son, daughter, or parent on active duty or called to active duty status.
2. 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.
3. In loco parentis: Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.
4. Next of Kin of a Covered Service Member: Blood relatives granted legal custody, brothers, sisters, grandparents, aunts, uncles, and first cousins (not fiancées). Service member may make a written designation of a specific blood relative as next of kin.
5. Parent: Biological, adoptive step or foster father or mother or one who stood "in loco parentis" but not parent "in law."
6. Son or Daughter (for non-military related leave): Biological, adopted, foster or step child, a legal ward or a child of a person standing "in loco parentis." Must be under age 18 or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time FMLA leave commences.
7. 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.
8. Spouse: As recognized by State law.

III. INTERPRETIVE MATERIAL

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A. WEST VIRGINIA PARENTAL LEAVE ACT (PLA)

(The full text of the West Virginia Parental Leave Act may be found at: www.legis.state.wv.us/WVCODE/Code.cfm?chap=21&art=5D#05D)

1. The Parental Leave Act provides that an employee shall be entitled to up to a total of 12 weeks of unpaid family leave following the exhaustion of all his or her annual leave during any 12-month period if they have been employed for at least 12 consecutive weeks (see [definition](#) of employee).
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 unduly disrupt 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 or she is required to provide to the employer certification of the family member's health condition by the health care provider using form [DOP-L3](#). Form [DOP-L6](#) may be used if additional information is needed.
 - (2) If 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 a rolling 12-month period measured backward from the date of leave use and such 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). 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.

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.
6. The position held by the employee immediately before the leave is commenced shall be held for a period not to exceed the twelve-week period of the parental leave and the employee shall be returned to that position. The employer may employ a temporary employee according to the provisions of the Division of Personnel's *Administrative Rule* for the period of the employee's family leave.
See www.state.wv.us/admin/personnel/rules/rule710/143CSR7-2010.pdf.
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. As such, employees will not accrue service tenure for leave accrual, annual increment, reduction-in-force, etc.
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 West Virginia Division of Labor that explains employees' rights under this law. The poster may be found at: www.wvlabor.org/forms/wageforms/PARENT.pdf.

B. FEDERAL FAMILY AND MEDICAL LEAVE ACT (FMLA)

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(The full text of the regulations may be found at: www.dol.gov/whd/fmla/finalrule.htm)

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 including any "qualifying exigency" arising out of the active duty or call to active duty status of a spouse, son, daughter or parent. Further, the FMLA allows employees to take up to 26 weeks of unpaid leave in each 12-month period to care for family members who suffered a serious injury or illness while on active military duty.
2. Employer Coverage - FMLA applies to all public agencies, including the State of West Virginia and its political subdivisions. The State of West Virginia or a political subdivision of the State of West Virginia 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, including time worked as a temporary employee, (the 12 months need not be consecutive). Employment prior to a break in service of 7 years or more need not be counted toward the 12 months in most cases (fulfillment of National Guard or Reserve military service obligation must be counted);
 - 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, provided an employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours of service that would have been performed but for the period of military service); 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 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. Up to a total of 12 workweeks:
 - (1) for the birth and care of the newborn child of the employee (entitlement expires at the end of the 12-month period beginning on the date of the birth);
 - (2) for placement with the employee of a son or daughter for adoption or foster care (entitlement expires at the end of the 12-month period beginning on the date of the placement);
 - (3) to care for an immediate family member (spouse, child, or parent) with a serious health condition;
 - (4) to take medical leave when the employee is unable to work because of his or her own serious health condition; or,
 - (5) 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.
 - b. Up to a total of 26 workweeks of military caregiver FMLA leave for an eligible employee (spouse, parent, child, or next of kin of the covered service member) to care for a covered service member who suffered a serious injury or illness in the line of duty while on active military duty for which he or she is undergoing medical treatment, recuperation, or therapy. Any eligible employee who is a spouse, son, daughter, parent or next of kin may

take leave to care for a covered service member unless such service member makes a single designation of next of kin. More information regarding military family leave entitlements may be found on the DOL website at: www.dol.gov/whd/regs/compliance/whdfs28a.pdf.

The following shall apply to military caregiver leave:

- (1) The leave is based on a separate FMLA year beginning with the first date of caregiver leave and ending 12 months later irrespective of the employer's chosen method of calculation for other FMLA leave and can be taken intermittently or in a single block;
- (2) If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of his or her 26 workweeks of leave entitlement cannot be carried over from year to year and is therefore forfeited;
- (3) The entitlement is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered service members or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period.
- (4) When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period.
- (5) The leave must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the single 12-month period, the employer must designate such leave as leave to care for a covered servicemember in the first instance.
- (6) An eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a single 12-month period, provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason during this period. For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave, but could not take 16 weeks of leave to care for a newborn child and 10 weeks of military caregiver leave.

Please note the following important information concerning entitlement:

- a. Under FMLA, the twelve-month period may be based on a calendar year, any fixed 12-month "leave year", a 12-month period going forward from the date the leave begins, or a rolling 12-month period measured backward from the date of leave use. The Division of Personnel *Family and Medical Leave Act / Parental Leave Act* policy (DOP-P23) requires that agencies use the rolling 12-month period measured backward calculation method. **Exception:** the 12-month period for FMLA military caregiver leave must be based upon the first day the employee uses leave, measured forward..
- b. 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 an employee normally works a 50-hour workweek, the employee's statutory entitlement is not capped at 480 hours. Conversely, if an employee normally works a 30-hour workweek, the employee is not entitled to 480 hours of leave. 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;
- c. Employees on FMLA leave for an entire week on a week during which a holiday is observed are charged with a week of leave. If the leave is being taken in increments of less than a full week the holiday does not count as FMLA leave unless the employee was otherwise scheduled and expected to work;
- d. Missed overtime must be counted toward FMLA if the employee would otherwise be required to report for duty but for the taking of FMLA leave. If the serious health condition limits the employee to working 40 hours per week and the employee would otherwise be scheduled for hours in excess of 40, the employee would be charged FMLA leave for the hours scheduled in excess of 40;
- e. 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 and the employer may require sufficient documentation to support the request for leave;
- f. Expectant mothers may take FMLA leave before birth for prenatal care if she is unable to work;
- g. Husbands may take FMLA leave to care for an expectant spouse if she is unable to work. Only a spouse may take FMLA leave to care for a pregnant woman before birth. This includes providing comfort to the expectant woman; see [Section 8\(f\)](#) below.
- h. Spouses employed by the same employer may be limited to a combined total of 12 workweeks of family leave for the following reasons:
 - (1) birth and care of a child;
 - (2) for the placement of a child for adoption or for foster care, and to care for the newly-placed child; and,
 - (3) to care for an employee's parent who has a serious health condition.

In addition, spouses employed by the same employer may be limited to a combined total of 26 workweeks of military caregiver leave.

- I. The qualifying exigency military FMLA leave of the employee (a spouse, son, daughter or parent of the military member) must be related to certain qualifying circumstances related to the military service. The FMLA defines a qualifying situation as one involving:
 - (1) short-notice deployment, meaning a call or order that is given no more than seven calendar days before deployment (employee can take up to 7 days beginning on the date of notification);
 - (2) military events and related activities, such as official military-sponsored ceremonies and family support and assistance programs related to the family member's call to duty;
 - (3) arrangement of alternative childcare or to provide urgent (not recurring and routine) childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement;
 - (4) school or daycare related activities necessitated by the active duty or call to active duty status of a covered military member;
 - (5) financial and legal arrangements relating to the family member's active duty;
 - (6) counseling for the employee or his or her minor child that isn't already covered by the FMLA;
 - (7) spending time with the covered service member on rest and recuperation breaks during deployment, for up to 5 days per break;
 - (8) post-deployment activities such as arrival ceremonies and reintegration briefings or to address issues from the service member's death while on active duty; or,
 - (9) other purposes arising out of the call to duty, as agreed on by the employee and employer.
- j. The definition of "immediate family member" under FMLA is more restrictive than the definition found in subsection 3.43 of the Division of Personnel's *Administrative Rule* www.state.wv.us/admin/personnel/rules/rule710/143CSR7-2010.pdf. Employers may request reasonable documentation of family relationship;
- k. Since subdivision 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 and the leave entitlement under each will exhaust concurrently;

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, some of which require the employer's approval:
 - 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, including bonding, but 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 and,
 - d. for qualifying exigency military FMLA leave purposes.

Use of intermittent leave is subject to the employer's approval if FMLA leave is for the birth and care of a healthy child, or the placement for adoption or foster care of a healthy child.

If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered service member, including during a period of recovery, or if the employer agrees to permit intermittent leave or a reduced work schedule for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. The alternative position must have equivalent pay and benefits and when the employee no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced.

6. Substitution of Paid Leave - The Division of Personnel *Family and Medical Leave Act / Parental Leave Act policy* (DOP-P23) requires that appropriate, available paid sick and annual leave be utilized to cover leave taken for FMLA-qualifying events. Accrued compensatory time should also be used to cover the absence. 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. The substitution of accrued sick leave for FMLA leave is limited by the provisions in the *Administrative Rule* (www.state.wv.us/admin/personnel/rules/rule710/143CSR7-2010.pdf). 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. Annual leave shall be used for:
 - a. non-medical qualifying exigency military FMLA leave purposes;
 - b. the employee's own serious health condition prior to or after exhaustion of paid sick leave; or,
 - c. to care for an eligible family member prior to or after exhaustion of the 40 hours of family sick leave.

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 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:
 - (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.

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.

- 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.). The employee must visit a health care provider at least 2 times per year to qualify under this provision;
- 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,
- 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 using form [DOP-L3](#), [DOP-L5](#) or [DOP-L6](#), as appropriate. 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, 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, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may 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.

- 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.
- c. 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 form [DOP-L8](#). 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.
- d. 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. Otherwise, form [DOP-L7](#) is to be used to secure certification. Employers may seek authentication and clarification of the certification, but may not seek second or third opinions or re-certification.
- e. Re-certification - Employers may request recertification 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 six 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 six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six 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.). Further, employers can provide the health care provider with a record of absences and ask if the need for leave is consistent with the serious health condition. Requiring re-certification for qualifying exigency military FMLA or military caregiver leave is not permitted.
- f. The medical certification provision that an employee is "needed to care for" a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

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 accredited by the Mother Church.
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) 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.
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.
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. Employers may obtain fitness-for-duty certifications for employees returning from leave. Employees on intermittent leave may be asked for fitness-for-duty certifications when there are reasonable safety concerns, defined as a reasonable belief of a significant risk of harm to the employee or others, considering the nature and severity of the potential harm and likelihood of occurrence. These certifications can't be required more often than once every 30 days and employers cannot obtain second or third opinions on fitness for duty. Employers may, however, require an employee to take a medical exam at the employer's expense after the employee has returned from FMLA leave. The Division of Personnel's Functional Capacity Assessment form may be used for fitness-for-duty certification. The form may be downloaded on the Division of Personnel web site at: www.state.wv.us/admin/personnel/emprel/toolbox/RTWGuide.pdf.
 - c. If the employee is unable to perform an essential function of his or 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). It is strongly recommended that you contact Employee Relations in such circumstances.
 - d. "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 DOL'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 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);
 - c. notice in compliance with the employer's call-in procedure when reporting an absence under intermittent FMLA leave, unless there are unusual circumstances; and,
 - d. 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).

Refusal to comply with procedure or to provide necessary documentation may result in the absence being charged as unauthorized leave and disciplinary action being taken.

14. Employer Notices - Employers must post and keep posted on its premises, in conspicuous places where employees are employed, a notice approved by the Secretary of the DOL explaining rights and responsibilities under FMLA.
 - a. An employer that willfully violates this posting requirement may be subject to a civil money penalty not to exceed \$110 for each separate offense. The poster approved by the DOL may be found www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf.
 - b. In addition to the posted notice, employers must provide the same notice in employee handbooks or distribute a copy of the FMLA policy upon hire.
 - c. When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, employers must provide written eligibility notice to the employee within 5 business days. Notice should be accomplished using the prescribed Notice of Eligibility and Rights and Responsibilities form [DOP-L9](#) which includes all of the information required under FMLA. 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. Employers may want to notify an employee automatically in the following situations that time off may be protected under FMLA and/or PLA:
 - (1) The employee takes three consecutive days off from work and requires continuing or repeated medical care;
 - (2) The employee is off work for three days or more due to workers' compensation injury;
 - (3) The employee requires follow-up treatment for a previous illness or injury that was a serious health condition;
 - (4) The employee has occasional absences due to a chronic condition;
 - (5) The employee needs time off due to the illness of a family member; and/or,
 - (6) The employee is taking time off in relation to qualifying exigency or military caregiver leave.
 - d. 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 5 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. Notice should be

accomplished using the prescribed [DOP-L10](#) form which includes all of the information required under FMLA. This form should also be used for subsequent notification of changes (e.g., exhaustion of FMLA leave entitlement).

Failure to follow the notice requirements may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

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 West Virginia Parental Leave Act) or lawfully promulgated rule (i.e., the *Administrative Rule* of the Division of Personnel) which may provide greater family or medical leave protection.
- b. If an employee is eligible for leave under both FMLA and PLA, 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.
- d. Employers may deny a "perfect attendance" award to an employee who does not have perfect attendance because of FMLA leave but only if employees taking non-FMLA medical and/or sick leave are treated in the same manner. For example, if employees who are on medical leave of absence without pay as provided in the *Administrative Rule* are denied perfect attendance awards then employees who take unpaid FMLA leave may be denied such awards.
- e. An employee may voluntarily accept (not as a condition of employment) a light duty assignment while recovering from a serious health condition. An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.
- f. Employers are encouraged to develop policies prohibiting employees from working for secondary employers while on medical-related leave of absence with or without pay. Such restriction must apply to all types of medical-related leave as FMLA leave may not be treated differently in this regard.

IV. REFERENCES:

[\(Table of Contents\)](#)

- 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*, W. VA. CODE R. §143-1-14.8(b)
- E. West Virginia Division of Personnel Family and Medical Leave Act / Parental Leave Act policy (DOP-P23)

FORMS INDEX AND BRIEF EXPLANATION OF PURPOSE

[Checklist for Employers](#)

This checklist may be used when the employer becomes aware that an employee is taking or plans to take leave from work for reasons that may qualify under FMLA (click [to see reasons](#)) and/or PLA (click [to see reasons](#)).

[Checklist for Employees](#) [How to apply for benefits](#)

This checklist may be used by an employee when he or she plans to request leave from work for reasons that may qualify under FMLA (click [to see reasons](#)) and/or PLA (click [to see reasons](#)).

APPLICATION FOR LEAVE WITH PAY - Form [DOP-L1](#)

Use this form to apply for different types of leave with pay, such as annual, jury, sick, and family sick. It is *not* used for paid leave under FMLA. If the employee has already submitted a DOP-L1 and DOP-L3 certification form and there is sufficient information to determine FMLA eligibility further certification is not necessary to make a designation.

APPLICATION FOR LEAVE OF ABSENCE WITHOUT PAY - Form [DOP-L2](#)

Use this form to apply for personal, military or education leave without pay.

PHYSICIAN'S/PRACTITIONER'S STATEMENT - Form [DOP-L3](#)

Use this form when requesting sick leave for an absence of more than three (3) consecutive work days, a medical leave of absence without pay under the Division of Personnel's *Administrative Rule* (W. VA. CODE R. §143-1-1 *et seq.*), and/or leave with or without pay under FMLA and/or PLA. Certification forms DOP-L5 or DOP-L6, as applicable, may be required if additional information is needed. This form may also be used for a release to return to work and/or to comply with leave restriction requirements. If there is sufficient information on this form to determine FMLA/PLA eligibility, further certification should not be needed to make a designation.

APPLICATION FOR LEAVE OF ABSENCE FOR FEDERAL FAMILY and MEDICAL LEAVE ACT, STATE PARENTAL LEAVE ACT, and/or MEDICAL LEAVE OF ABSENCE WITHOUT PAY - Form [DOP-L4](#)

Use this form to apply for a medical leave of absence without pay, FMLA leave with or without pay, or PLA leave. A completed and current DOP-L3, DOP-L5, DOP-L6, DOP-L7, and/or DOP-L8 certification, as applicable, must be included with this application or be on file. Form DOP-L7 or DOP-L8, as applicable, is required when requesting military FMLA leave.

SUPPLEMENTAL CERTIFICATION OF HEALTH CARE PROVIDER FOR EMPLOYEE'S SERIOUS HEALTH CONDITION - Form [DOP-L5](#)

This form should only be used when form DOP-L3 provides insufficient information from the health care provider concerning an employee's request for FMLA leave and/or a medical leave of absence without pay for his or her own serious health condition. Form DOP-L6 should be used to obtain supplemental information, if necessary, concerning a request for leave for a family member's serious health condition. If an employee has already submitted a DOP-L3 certification form and there is sufficient information to determine FMLA eligibility, further certification should not be needed to make a designation.

SUPPLEMENTAL CERTIFICATION OF HEALTH CARE PROVIDER FOR FAMILY MEMBER'S SERIOUS HEALTH CONDITION - Form [DOP-L6](#)

This form should only be used when form DOP-L3 provides insufficient information from the health care provider concerning an employee's request for FMLA and/or PLA leave for a family member's serious health condition. If an employee has already submitted a DOP-L3 certification form and there is sufficient information to determine FMLA/PLA eligibility, further certification should not be needed to make a designation.

CERTIFICATION FOR A SERIOUS INJURY OR ILLNESS OF A COVERED SERVICE MEMBER (for FMLA Military Family Leave) -Form [DOP-L7](#)

Use this form to obtain medical certification about a covered service member when the employee has requested leave to care for the service member.

CERTIFICATION OF QUALIFYING EXIGENCY FOR MILITARY FAMILY LEAVE - Form [DOP-L8](#)

Use this form for certifying the need for military exigency leave under FMLA.

NOTICE OF ELIGIBILITY AND RIGHTS & RESPONSIBILITIES (for FMLA and/or PLA) - Form [DOP-L9](#)

Use this form to provide the required notice to an employee when they request FMLA leave or when the employer acquires knowledge that an employee's leave may be for a FMLA- and/or PLA-qualifying reason. The notice must be provided within 5 business days. See [Eligibility Notice](#) for more information.

DESIGNATION NOTICE for FMLA and/or PLA Form [DOP-L10](#)

When the employer has enough information to determine whether the leave is being taken for a FMLA- or PLA-qualifying reason (e.g., after receiving a certification), use this form to notify the employee whether the leave will be designated and will be counted as FMLA/PLA leave. This must be done within 5 business days absent extenuating circumstances. See [Notice of Designation](#) for more information.

EMPLOYER CHECKLIST
for Family and Medical Leave Act (FMLA) and/or Parental Leave Act (PLA)

Employee Name: _____ Date: _____

This checklist may be used when the employer becomes aware that an employee is taking or plans to take leave from work for reasons that may qualify under the federal Family and Medical Leave Act (FMLA) and/or State Parental Leave Act (PLA). *If you are not familiar with the requirements of FMLA or PLA, it is recommended you read the [interpretive information in this guide or contact Employee Relations at \(304\) 558-3950, extension 57209.](#)*

If the employee does not qualify for FMLA and/or PLA he or she may qualify for medical and/or personal leave of absence without pay as provided in the West Virginia Division of Personnel *Administrative Rule*, W. Va. CODE R. §143-1-1 *et seq.*, subsection 14.8. The Rule is found at: www.state.wv.us/admin/personnel/rules/rule710/143CSR7-2010.pdf.

- Ask the employee to complete the prescribed FMLA/PLA application for leave of absence form [DOP-L4](#). An employee's failure to submit a written request does not relieve the employer from responsibility to grant leave under federal law.
- Review the employee's eligibility for [FMLA](#) /[PLA](#) leave, including calculation of entitlement already exhausted.
- Once eligibility is determined, provide [written notice of eligibility](#) within five (5) business days using the prescribed FMLA/PLA Notice of Eligibility and Rights & Responsibilities form [DOP-L9](#).
- Ask the employee to complete the appropriate [certification](#) form for the requested leave and return it within fifteen (15) calendar days. If the employee submits a DOP-L3 certification form and there is sufficient information to determine FMLA/PLA eligibility, further certification should not be necessary. Do not ask for more information than the certification provides. See the [forms index](#) section for the appropriate form. If the leave is for the birth of a child or the placement for adoption or foster care request sufficient documentation to support the request for leave.
- If the leave will be [intermittent](#), work with employee to reach a mutually satisfactory schedule and/or to clarify the schedule of absences as much as possible and consider accommodating the employee by changing work assignments or schedule. Use of [intermittent leave is subject to the employer's approval](#) if FMLA leave is for the birth and care of a healthy child, or the placement for adoption or foster care of a healthy child.
- Review the certification form(s) when received and notify the employee by completing the prescribed FMLA/PLA [Designation](#) Notice form [DOP-L10](#) within five (5) business days that the time off will or will not be considered covered under FMLA/PLA. If this decision is tentative, indicate what additional information is needed.

(Continued)

EMPLOYER CHECKLIST *(continued)*

Employee name: _____

- When a tentative decision becomes final, is reversed based on new evidence, or is updated due to changed circumstances, notify the employee by completing another [Designation Notice](#), form [DOP-L10](#).
- During the leave, monitor the FMLA/PLA hours used as well as payment of [health insurance premiums](#) (if any) and other optional insurance premiums.
- Ask for medical [recertification](#) as appropriate (typically not more often than every 30 days). This request need not be in writing, but should be documented.
- At least two weeks in advance of the end of the leave, ask the employee for a status report and whether they intend to return to work on schedule. Based upon the employee's response:
 - If the employee was absent due to an illness or injury, and the nature of the problem was such that it is questionable whether they are fully capable of performing their job functions, you may request a [fitness for duty certification](#) using the functional capacity form found at www.state.wv.us/admin/personnel/emprel/toolbox/RTWGuide.pdf. In other cases form [DOP-L3](#) may be used as release to return to work. No release is necessary if the employee was off due to the incapacity of a family member.
 - Resolve [reinstatement](#) issues.
 - When employee returns to work, re-enroll him or her in any insurance coverages that may have lapsed and any new coverages that became available during the absence.
 - If the employee clearly states that he or she does not intend to return to work, give termination/disability/COBRA information as appropriate and pursue [recovery of premiums](#) paid by the employer to maintain health insurance coverage and other benefits.

EMPLOYEE CHECKLIST **for Family and Medical Leave Act (FMLA) and/or Parental Leave Act (PLA)**

You may use this checklist when you plan to request leave from work for reasons which may qualify under the federal [Family and Medical Leave Act](#) (click [to see reasons](#)) and/or the [State Parental Leave Act](#) (click [to see reasons](#)). You may also want to review the Employer [checklist](#) and the [interpretive information](#) in this guide to better understand the approval and follow-up process. If you have questions, call Employee Relations at (304) 558-3950, extension 57209.

- Submit a written, signed, and dated application for leave of absence using form [DOP-L4](#). Provide at least 30 days [notice](#) or, if the need for leave was not foreseeable, as soon as possible. Make a reasonable effort to schedule any planned treatment and/or absence so as not to unnecessarily disrupt the employer's operations.
- Notify your supervisor and your agency leave/benefits coordinator and/or Human Resources office of your intention to take a leave of absence and provide a copy of your request form for approval.
- A determination will be made whether:
 - 1) your leave qualifies under FMLA/PLA;
 - 2) you have disability benefits for which you may file a claim; and/or,
 - 3) you need to file a Workers Compensation claim.
- Upon request from the leave/benefits coordinator or your supervisor, have your [health care provider](#) complete the appropriate certification form, which will vary depending on the reason you are taking leave (see the [forms index](#) section for an explanation of each certification form). If the leave is for the birth of a child or the placement for adoption or foster care your employer may request sufficient documentation to support the request for leave.
- If your leave will be intermittent (see [FMLA](#) and/or [PLA](#) for explanation), work with your supervisor to reach a mutually satisfactory schedule and/or to clarify the schedule of absences as much as possible, and to discuss accommodations such as changing work assignments or schedule. Use of [intermittent leave is subject to the employer's approval](#) if FMLA leave is for the birth and care of a healthy child, or the placement for adoption or foster care of a healthy child.
- Have your health care provider supply [medical updates](#) to your employer if required.
- If you are on unpaid leave for part or all of your absence, you will receive information and instructions for continuation of [medical insurance](#) and [other insurance coverage](#).
- If your leave is for birth or adoption under FMLA and you want to add the child to your insurance, obtain the necessary form(s) from your benefits coordinator.
- If you need an extension of your medical leave, submit a written request to your supervisor.
- Contact your supervisor in advance to confirm the date you will return to work.
- Prior to returning to work, have your health care provider complete a form [DOP-L3](#) if the reason for your leave was your own serious health condition. If there is a question whether you are fully capable of performing your job functions, you may, or your employer may, request a functional capacity evaluation using the form found at www.state.wv.us/admin/personnel/emprel/toolbox/RTWGguide.pdf. Your return to work may be delayed if you do not provide one of these items.
- Work with your supervisor and Human Resources to accommodate work restrictions if necessary.