

SAMPLE FMLA POLICY¹

_____ (“Employer”) is committed to providing employees with leaves of absence in compliance with the Family and Medical Leave Act of 1993 (“FMLA”). This policy is intended to be construed in compliance with the FMLA but is not intended to provide greater rights than the FMLA provides.

Types of Leave

Family or Medical Leave

Eligible employees may take up to twelve (12) weeks of unpaid, job-protected leave for the following reasons:

- For incapacity due to pregnancy, prenatal medical care, childbirth, and to care for the newborn child. Both mothers and fathers may take FMLA leave for the birth of a child and to care for a healthy newborn child (*i.e.*, bonding) during the 12-month period beginning on the date of birth.
- For placement with the employee of a son or daughter for adoption or foster care, and to care for the newly-placed child. Leave for placement includes, but is not limited to, leave prior to the placement that is required for attendance at counseling sessions, court appearances, consultations with attorneys and doctors, travel to another country to complete an adoption, *etc.* Both mothers and fathers may take FMLA leave for placement of a child and to care for a healthy newly-placed child (*i.e.*, bonding) during the 12-month period beginning on the date of placement
- To care for the employee’s spouse, parent, son or daughter who has a serious health condition.
- Because the employee’s own serious health condition makes the employee unable to perform one or more of the essential functions of his or her job.

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either:

- An overnight stay in a hospital, hospice, or residential medical care facility; or
- Continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee’s job or prevents the qualified family member from participating in school or other daily activities. Subject to certain conditions, the continuing treatment requirement may be met by:

¹ This sample policy does not constitute legal advice. Differences in factual context can result in significant differences in legal obligations. This sample policy does not address special rules for school and/or airline flight crew employees. Further, there are several options available to employers, only some of which are addressed in footnotes in this sample policy. Please contact Greg Kult or your preferred Wooden & McLaughlin, LLP contact ((317) 639-6151; www.woodmclaw.com)) with questions.

- a period of incapacity of more than three (3) consecutive full calendar days and any subsequent treatment or period of incapacity relating to the same condition that also involves (i) treatment (an in person visit with a health care provider) at least two (2) times, the first of which occurs within seven (7) days of the first day of incapacity and the second within thirty (30) days of the first day of incapacity, or (ii) treatment (an in person visit with a health care provider) one time within seven (7) days of the first day of incapacity resulting in a regimen of continuing treatment under the supervision of the health care provider; or
- any period of incapacity due to pregnancy or due to a chronic condition (even if no treatment is received during the absence and even if the absence does not last at least three (3) consecutive full calendar days).

Other conditions may meet the definition of continuing treatment.

Military Family Leave

Eligible employees with a spouse, son, daughter, or parent who is a military member on covered active duty or call to covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces (including the National Guard or Reserves) may use their 12-week leave entitlement to address certain qualifying exigencies. Covered active duty or call to covered active duty involves deployment to a foreign country.

Qualifying exigencies may include addressing any issue that arises as a result of notice being given to the military member seven (7) or fewer calendar days prior to the date of deployment (leave for this purpose is limited to seven (7) calendar days); attending certain military events; attending certain family support and similar programs sponsored by the military; arranging for alternative childcare for the military member's child; arranging to transfer/enroll a military member's child into a new school or daycare; attending certain meetings with school or daycare staff; addressing certain financial and legal arrangements; attending certain counseling sessions; spending time with the military member who is on leave during deployment (up to 15 calendar days of leave may be used for this purpose); attending post-deployment reintegration briefings or other military programs that occur within 90 days of the conclusion of the active duty status; addressing issues that arise from the death of the military member while on covered active duty status; and arranging or providing care for the parent of a military member when the military member is on active duty. Other situations may qualify as exigencies.

Eligible employees who are the spouse, child, parent or next of kin of a covered service-member may take up to twenty-six (26) weeks of unpaid, job-protected leave to care for a covered service-member with a serious injury or illness. This leave is applied on a per-covered service-member, per injury basis as explained in the FMLA regulations. A covered service-member is:

- a current member of the Armed Forces (including a member of the National Guard or Reserves) who has an injury or illness for which the service-member is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list that: (i) was incurred in the line of duty on active duty in the Armed Forces (or that existed before the beginning of the service-member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and (ii) may render the service-member medically unfit to perform his or her military duties; or

- a veteran who was discharged or released under conditions other than dishonorable from the Armed Forces (including the National Guard or Reserves) at any time during the five (5)-year period immediately preceding the first date the eligible employee takes FMLA leave to care for the veteran and who has an injury or illness for which the service-member is undergoing medical treatment, recuperation, or therapy that: (i) was incurred by the service-member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the service-member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces); (ii) manifested itself before or after the service-member became a veteran; and (iii) meets the other requirements set forth in applicable FMLA regulations.

Eligibility

To be eligible for FMLA leave, you must meet all of the following requirements:

- You must have been employed by Employer for at least twelve (12) months as of the date the leave is to start. These 12 months need not be consecutive, however, employment periods prior to a break in service of seven (7) years or more will not be counted unless the break in service is due to fulfillment of your Uniformed Services Employment and Re-Employment Rights Act (“USERRA”) service obligations or there is a written agreement concerning our intention to rehire you after the break in service. If applicable, the period of absence from work with Employer due to your USERRA service will be counted in determining whether you have been employed at least 12 months for purposes of this policy.
- You must have actually worked at least 1,250 hours during the 12-month period immediately preceding the commencement of the requested leave. If applicable, an employee returning from fulfilling his or her USERRA service obligation shall be credited with the hours of service that would have been performed but for the USERRA service for purposes of determining whether this 1250 hour threshold has been met.
- You must be employed at a worksite where at least 50 employees are employed by Employer within 75 miles of that worksite.

If you request leave, we will inform you whether you are eligible under FMLA. If you are, the notice will specify any additional information required as well as your rights and responsibilities. If you are not eligible, then we will provide a reason for the ineligibility.

Amount of Leave

The period in which the 12 weeks of leave entitlement occurs is based on a rolling 12-month period measured backward from the date you use any FMLA leave.² In contrast, the period in which the 26 weeks of leave entitlement occurs begins on the first day the eligible employee takes FMLA leave to care for a covered service-member and ends 12 months after that date (Note: An eligible employee is limited to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during this 12 month period).

² Covered employers have several options for establishing the FMLA leave year as applied to the 12 week leave entitlement. The rolling period is one option.

Spouses employed by Employer who both are eligible for FMLA leave are limited to:³

- a combined total of twelve (12) weeks of leave during the applicable rolling 12-month period if the leave is taken for birth or placement of a child, for bonding with a healthy child after birth or placement, or to care for the employee's parent with a serious health condition; and
- a combined total of twenty-six (26) weeks of leave during a single 12-month period if the leave is taken to care for a covered service-member with a serious injury or illness, and also for birth or placement of a child, for bonding with a healthy child after birth or placement, or to care for the employee's parent with a serious health condition.

Continuous and Intermittent FMLA Leave

If you take FMLA leave after the birth, adoption or foster-placement of a child to care for a healthy child following birth or placement, your leave must be continuous.⁴ Eligibility for such leave expires at the end of the 12-month period beginning on the date of birth or placement.

FMLA leave for your own serious health condition, the serious health condition of a covered family member, or to provide care for a covered service-member with a serious injury or illness may be taken intermittently or on a reduced schedule where demonstrated to be medically necessary. If intermittent or reduced schedule FMLA leave is approved for planned medical treatment:

- We may temporarily transfer you to another position with equivalent pay and benefits that better accommodates your intermittent or reduced schedule leave; and
- You must make a reasonable effort to schedule your treatment in a manner that does not unduly disrupt Employer's operations.

FMLA leave due to a qualifying exigency also may be taken intermittently or on a reduced schedule basis.

Pay and Benefits

Generally, FMLA leave is unpaid. The salary of an exempt employee may be reduced for any hours taken as intermittent or reduced schedule FMLA leave. Although FMLA leave generally is unpaid, you must use accrued PTO from the commencement of your FMLA leave.⁵ Use of PTO does not extend your FMLA leave. You simply substitute paid leave for otherwise unpaid leave. Notwithstanding anything in this policy to the contrary, if you are on FMLA leave and are receiving some type of income replacement benefit during that leave (for example, worker's compensation or a disability benefit), you may, but do not have to, use accrued PTO to supplement the income replacement benefit.

³ Covered employers do not have to limit the amount of leave available to spouses.

⁴ Employers may allow intermittent or reduced schedule leave in this context.

⁵ The regulations provide some options for use of PTO.

During your FMLA leave, your group health insurance coverage will be maintained on the same terms as if you had continued to work. Your share, if any, for such insurance will be collected through a payroll deduction or other written payment arrangement. If your premium payment is more than thirty (30) days late, your health insurance will be subject to lapse. You will receive written notice that your payment has not been received at least fifteen (15) days before coverage ceases, advising that coverage will be dropped on a specified date unless payment is received by that date. If our group health plan allows, your coverage may be dropped retroactively to the date the unpaid premium payment was due.

If you fail to return to work after using up all of your FMLA leave, your group health benefits will cease, unless you continue them at your expense pursuant to COBRA.

Life insurance, disability insurance and other non-health benefits will be maintained during your FMLA leave only if you timely and properly pay the applicable premium.

If we pay any portion of your share of premiums for any benefits during FMLA leave, you must reimburse us, regardless of whether you return to work. To the extent permitted by law, if you fail to return to work at the conclusion of your FMLA leave, we may recover our share of health insurance premiums that we paid during any unpaid FMLA leave. For purposes of the FMLA, with limited exception, you will not be considered to have returned to work until you have returned to work for at least thirty (30) calendar days.

Reinstatement

As a general rule, at the conclusion of your FMLA leave, you will return either to the same position that you held at the beginning of your FMLA leave, or to an equivalent position with equivalent pay, benefits and other conditions of employment. In most cases, you will return to the same shift or to the same or equivalent work schedule. Please understand, however, that you have no right to return to the exact position held before your FMLA leave began.

Use of FMLA leave will not result in the loss of any employment benefit that accrued prior to the start of your leave. Moreover, upon timely return to work from FMLA leave, benefits that lapsed during the leave will be reinstated without any qualifying period, medical examination, pre-existing condition waiting period, *etc.*

It is your responsibility to timely respond to any inquiry concerning your intention to return to work and to advise us as soon as you know that you will not be returning to work.

Examples of situations where your right to reinstatement may be limited follow:

- You have no greater right to reinstatement or to other benefits or terms of employment than if you had been continuously employed.
- If you are a salaried “key employee” (top paid 10% of all employees within 75 miles of your worksite), it is possible that you will not be reinstated at the end of an FMLA leave if reinstatement would result in substantial and grievous economic injury to our operations. You will be advised if you are a “key employee” and whether reinstatement might not be available to you.
- If you fail to provide a required fitness-for-duty certificate.

- If you are unable to perform the essential functions of the job, with or without reasonable accommodation.
- If you fraudulently obtain FMLA leave.
- If you engage in outside or supplemental employment while on FMLA leave.

Notice of Need for Leave

With respect to leave due to a qualifying exigency, you must provide notice as soon as practicable, regardless of how far in advance such leave is foreseeable. With respect to FMLA leave for other reasons, you must provide at least thirty (30) days' advance notice of foreseeable leave. If 30 days' notice is not possible, you must provide notice as soon as practicable (usually the same day you learn of the need for leave or by the next business day). Depending on the circumstances, your failure to provide sufficient notice of leave may result in the delay or denial of your leave. You must follow our usual and customary notice and procedural requirements for requesting leave (for example, completing specific forms, reporting to specific individual, reporting absence in a timely manner, *etc.*). **You must promptly advise your supervisor or manager and the Director of Human Resources in writing (e-mail is acceptable) as soon as you know that you may need a leave of absence for any reason, or, if later, within the time periods set forth in this paragraph, so that a determination of your eligibility, rights and obligations may be made. You must provide the reasons for the requested leave, the anticipated start of the leave, the anticipated duration of the leave, and the information set forth in the following paragraph to enable us to determine whether the reason may be FMLA-qualifying. Failure to follow these requirements may result in the delay or denial of leave.**⁶

When reporting your need for leave, you must provide sufficient information for us to determine if the leave may qualify for FMLA protection. Depending on the situation, such information may include that a condition renders you unable to perform the functions of your job; that you are pregnant or have been hospitalized overnight; whether you or your family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in this policy or in the FMLA regulations; or, if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered service-member with a serious injury or illness. **You must inform us if the requested leave is for a reason for which FMLA leave was previously taken or certified. Simply calling in "sick" is not sufficient.**

We will inform you if leave will be designated as FMLA-protected and the amount of leave counted against your leave entitlement. If we determine that the leave is not FMLA-protected, we will notify you.

During any FMLA leave, you may be required to periodically report on your status and intent to return to work. If the amount of leave that you need changes, you must let us know within two (2) business days of the date you know of the change in circumstances.

⁶ Covered employers have some flexibility in their protocol for requesting leave.

Certifications

As a general rule, your request for FMLA leave for your own serious health condition; to care for a spouse, son, daughter, or parent with a serious health condition; to care for a covered service-member with a serious injury or illness; or because of a qualifying exigency must be supported by a certification. We will provide you with the required form, which must be completed and returned to the Director of Human Resources within fifteen (15) calendar days.

With respect to medical certifications for the serious health condition of the employee or covered family member, we may require a second opinion from a healthcare provider that we designate, at no cost to you. If there is a difference between the two opinions, we may require a third opinion from a mutually agreeable healthcare provider, at no cost to you, which will be final and binding.

From time to time, at your expense, recertification of a serious health condition may be required. Recertification generally will not be required more often than every thirty (30) days (or longer period if the minimum duration of your condition is certified to exceed 30 days) unless you request an extension of the FMLA leave, circumstances described in a previous certification have changed significantly, or there is a reason to doubt the validity of the prior certification.

A fitness-for-duty certification from a healthcare provider, at your expense, will be required before you may return to work following any FMLA leave due to your own serious health condition. This does not apply each time you return from intermittent leave; however, we may require a fitness for duty certification every 30 days (or longer period) in such situations if we have reasonable safety concerns regarding your ability to perform your duties.

You are responsible for providing a complete and sufficient certification. If you provide a certification that is not complete or sufficient, you will have seven (7) days to cure deficiencies that we bring to your attention. If you fail to meet timelines for providing a complete and sufficient certification, your request for leave may be delayed or denied.

FMLA and “Light Duty”

If you have a “serious health condition” and we make light duty available to you, you have the option of (i) remaining on FMLA leave until you exhaust such leave or (ii) accepting light duty work. If you turn down light duty work, you may not be eligible to receive worker’s compensation wage benefits. If you accept a light duty position, your right to be restored to your same or equivalent position expires at the end of the 12 month FMLA leave year.

Supplemental Employment

As with other leaves of absence from Employer, supplemental employment during FMLA leave is prohibited.

Enforcement

Employer will not interfere with, restrain, or deny the exercise of any right provided under the FMLA; or discharge or discriminate against any person for opposing any practice prohibited by the FMLA or for involvement in any proceeding under or relating to the FMLA.

No one who attempts to exercise their rights under the FMLA will be subjected to retaliation of any kind for doing so. If you believe anyone has violated this policy, you should immediately report your concerns to the **Director of Human Resources at _____** or to the **President at _____**. We will take immediate and appropriate corrective action (which may include unpaid suspension or termination) if we determine that a violation of this policy has occurred.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law which provides greater family or medical leave rights. The FMLA is enforced by the U.S. Department of Labor. Please see our FMLA Notice, posted with other notices to employees, for more information.