

**WASHINGTON-SARATOGA-WARREN-HAMILTON-ESSEX
BOARD OF COOPERATIVE EDUCATIONAL SERVICES**

ADMINISTRATIVE REGULATION

FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993 (FMLA) requires public agencies to provide up to twelve (12) weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are "eligible" if they have been employed by the District for at least twelve (12) months and for at least 1,250 hours of service during the previous twelve-month period. Full-time teachers are deemed to meet the 1,250 hour test. However, a break in employment for military service (i.e., call to active duty) should not interrupt the twelve (12) month/1,250 hours of employment requirement and should be counted toward fulfilling this prerequisite. The law covers both full-time and part-time employees.

The BOCES will compute the twelve-month period according to the following time frame: a "rolling" twelve-month period will be used that is measured backward from the date an employee uses any FMLA leave.

Reasons for Taking Leave

A District must grant unpaid leave to an eligible employee for one (1) or more of the following reasons:

- 1) For the care of the employee's child (birth, or placement for adoption or foster care);
- 2) For the care of the employee's spouse, son or daughter, or parent/guardian, who has a "serious health condition"; or,
- 3) For a "serious health condition" that makes the employee unable to perform their job. A "serious health condition" is defined as an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider that renders the employee incapacitated for more than three (3) consecutive calendar days and where the employee is required to see the health care provider at least twice with the first visit commencing within seven (7) days of the incapacitating event and the second visit commencing within thirty (30) days of the incapacitating event. A "serious health condition" is also defined as any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence.

Military Family Leave Entitlements

Military Caregiver Leave

An eligible employee who is the spouse, son, daughter, parent, or next of kin (defined as the nearest blood relative of that individual) of a covered service member who is recovering from a serious illness or injury sustained in the line of duty while on active duty is entitled to up to 26 weeks of leave in a single 12-month period to care for the service member. This military caregiver leave is available during a single 12-month period during which an eligible employee is entitled to a combined total of 26 weeks of all types of FMLA leave. Military Caregiver Leave may be combined with other forms of FMLA-related leave providing a combined total of twenty-six (26) weeks of possible leave for any single twelve (12) month period; however, the other form of FMLA leave when combined can not exceed twelve (12) of the twenty-six (26) weeks of combined leave.

Military Caregiver Leave has a set "clock" for calculating the twelve (12) month period for when FMLA leave begins and tolling starts at the first day of leave taken

The term "covered service member" means a member of the Armed Forces, including a member of the National Guard or Reserves.

"Qualifying Exigency" Leave/Call to Active Duty

An eligible employee is entitled to FMLA leave because of "a qualifying exigency" arising out of circumstances where the spouse, son, daughter, or parent of the employee is serving in either the National Guard or the Reserves and is on active duty called for by the President of the United States or Congress, or has been notified of an impending call to active duty status, in support of a contingency operation.

A "qualifying exigency" related to families of National Guard and Reserve personnel on (or called to) active duty to take FMLA protected leave to manage their affairs is defined as any one of the following reasons:

- a) Short-notice deployment;
- b) Military events and related activities;
- c) Childcare and school activities;
- d) Financial and legal arrangements;
- e) Counseling;
- f) Rest and recuperation;
- g) Post-deployment activities; and
- h) Any additional activities where the employer and employee agree to the leave.

In any case in which the necessity for leave due to any qualifying exigency is foreseeable, whether because the spouse, or a son, daughter, or parent of the employee is on active duty, or because of notification of an impending call or order to active duty in support of a contingency operation, the employee shall provide such notice to the employer as is reasonable and practicable. This military-related leave is for up to twelve weeks during a single 12-month period.

Substitution of Paid Leave

At the employee's or District's option, certain kinds of paid leave may be substituted for unpaid leave.

Advance Notice and Medical Certification

The employee may be required to provide advance leave notice and medical certification.

- 1) The employee ordinarily must provide thirty (30) days advance notice when the leave is "foreseeable."
- 2) A District may require medical certification to support a request for leave because of a "serious health condition".
- 3) A District may reinstate the medical certification process with the first absence in a new 12-month leave year.
- 4) A District may also require medical certification if the employee is unable to return from leave because of a "serious health condition".
- 5) A District may also require medical certification for an employee returning to work often called the "fitness for duty" certification

Medical Treatment for a Serious Health Condition

The first visit to a health care provider for an employee claiming a "serious health condition" under FMLA must occur within seven (7) days of the aforementioned incapacity with the second required visit occurring within thirty (30) of the incapacitating event.

If the employee claiming FMLA under the "serious health condition" rationale is sustaining continuous treatment, their first visit to a health care provider must take place within seven (7) days of the claimed incapacitating event.

"Chronic serious health conditions" require "periodic visits"; the employee must see a health care provider a minimum of two (2) times per year. The definition of a "chronic" serious health condition includes:

- 1) Periodic visits [i.e., a minimum of two (2) visits per year] to a health care provider for treatment of the "chronic" serious health condition; and
- 2) The "chronic" serious health condition continues over an extended period of time (including reoccurring episodes of a single underlying condition); and
- 3) The "chronic" serious health condition may be categorized as causing episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

Intermittent or Reduced Leave

- 1) An employee may take intermittent leave or may work a reduced leave schedule to reduce the usual number of hours per day or work week.
- 2) Intermittent or reduced leave schedules are subject to District approval unless medically necessary.

Job and Benefits Protection

- 1) Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
The District may deny restoration to certain highly compensated employees, but only if necessary to avoid substantial and grievous economic injury to the District's operation.
- 2) The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.
- 3) The use of unpaid FMLA leave cannot affect the exempt status of bona fide executive, administrative and professional employees under the Fair Labor Standards Act.

Medical Insurance Coverage

- 1) For the duration of FMLA leave, the District must maintain the employee's medical insurance coverage under any "group health plan," under the conditions coverage would have been provided if the employee had continued working.
- 2) In some cases, the District may recover premiums paid for maintaining an employee's health coverage if the employee fails to return to work from FMLA leave.

Unlawful Acts by Employers

FMLA makes it unlawful and subject to penalty for any employer to:

- 1) Fail to comply with notice provisions to employees under FMLA;
- 2) Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- 3) Discharge or discriminate against any person for opposing any practice made unlawful by FMLA; and,
- 4) Discharge or discriminate against any person because of involvement in any proceeding under or related to FMLA.

Miscellaneous Provisions

The District shall post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA; and a notice of an employee's FMLA rights and responsibilities shall be either placed in the District's employee handbook or furnished to each new employee upon hire. The District has five (5) days to supply such notice from the date of hire. A willful violation of this requirement may subject the District to a fine of up to one hundred ten dollars (\$110) for each separate offense.

FMLA Leave for Spouses Employed at the Same Employer

Unless a "serious health condition" is the reason for why spouses employed by the same employer are taking FMLA-related leave, spouses are limited to a combined total of twelve (12) weeks of FMLA leave during any twelve (12) month period. If a "serious health condition" is the reason why FMLA leave is being taken, whether it be for either spouse, parent, or child, etc., each spouse is entitled twelve (12) weeks of FMLA-related leave during any twelve (12) month period.

Spouses who are entitled to FMLA leave for the reason of being a military caregiver to an injured service member may be limited to a combined total of twenty-six (26) weeks of leave during a single twelve (12) month period.

Special Provisions for School District Employees

An "instructional employee" is an employee whose principal function is to teach and instruct students in a class, a small group, or an individual setting (e.g., teachers, coaches, driving instructors, special education assistants, etc.). Teaching assistants and aides who do not have instruction as the principal function of their job are not considered an "instructional employee."

Intermittent Leave Taken By Instructional Employees

FMLA leave that is taken at the end of the school year and resumes at the beginning of the next school year is not regarded as intermittent leave but rather continuous leave. The period in the interim (i.e., summer vacation) is not counted against an employee and the employee must continue to receive any benefits that are customarily given over the summer break.

Intermittent leave may be taken but must meet certain criteria. If the instructional employee requesting intermittent leave will be on that leave for more than twenty percent (20%) of the number of working days during the period for which the leave would extend, the following criteria may be required by the employer:

- 1) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or
- 2) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

Appropriate notice for foreseeable FMLA leave still applies and all employees must be returned to an equivalent position within the School District. Additional certifications, requirements and/or training may not be required of the employee as a contingent of their return to work.

Leave Taken by Instructional Employees Near the End of the Instructional Year

There are also special requirements for instructional employees taking leave and the leaves relation to the end of the term. If the instructional employee is taking leave more than five (5) weeks prior to the end of the term, the District may require that the employee take the leave until the end of the term if the leave lasts more than three (3) weeks and the employee was scheduled to return prior to three (3) weeks before the end of the term.

If the instructional employee is taking leave less than five (5) weeks prior to the end of the term for any FMLA-related reasons except qualifying exigency, the District may require that the employee remain out for the rest of the term if the leave lasts more than two (2) weeks and the employee would return to work during that two (2) week period at the end of the instructional term.

If the instructional employee begins taking leave during the three (3) weeks prior to the end of the term for any reason except qualifying exigency, the District may require that the employee continue leave until the end of the term if the leave is scheduled to last more than five (5) working days.

Any additional time that is required by the District due to the timing of the end of the school year will not be charged against the employee as FMLA leave because it was the employer who requested that the leave extend until the end of the term.

FMLA Does Not

- 1) Affect any federal or state law prohibiting discrimination;
- 2) Supersede any state or local law which provides greater family or medical leave rights;
- 3) Diminish an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan, nor may the rights provided under FMLA be diminished by such agreement or plan; nor,
- 4) Discourage employers from adopting policies more generous than required by FMLA.

Enforcement

- 1) The Secretary of Labor is authorized to investigate and attempt to resolve complaints of violations, and may bring an action against an employer in any federal or state court of law.
- 2) FMLA's enforcement procedures parallel those of the federal Fair Labor Standards Act. The FMLA will be enforced by the Department's Wage and Hour Division.
- 3) An eligible employee may bring a civil action against an employer for violations.
- 4) Employers who act in good faith and have reasonable grounds to believe their actions did not violate FMLA may have any damages reduced to actual damages at the discretion of a judge.

For more information, please contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, Employment Standards Administration.