

## **Family and Medical Leave**

*Application: All positions covered under the Virginia Personnel Act to include full-time and part-time classified, restricted employees, and eligible wage employees.*

### **Background**

The Family and Medical Leave Act (FMLA) is a federally mandated program that was signed into law on February 5, 1993 and amended by the National Defense Authorization Act on January 28, 2008. Enforcement actions under FMLA can be brought by either the United States Department of Labor or individual employees.

### **Policy**

It is the policy of the Commonwealth to fully comply with the FMLA and provide eligible employees with up to 12 weeks of unpaid family and medical leave per leave year because of their own serious health condition or the serious health condition of an eligible family member, or up to 26 weeks of unpaid leave to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the servicemember.

### **Purpose**

The purpose of this policy is to provide guidance regarding the interaction of the FMLA and the Commonwealth's other Human Resource policies.

More detailed information regarding the FMLA can be found at the DOL [FMLA](#) website.

### **Authority**

The Director of the Department of Human Resource Management (DHRM) is responsible for the official interpretation of this policy pursuant to the authority provided § 2.2-1201 of the Code of Virginia. DHRM reserves the right to revise or eliminate this policy as necessary.

The Virginia Personnel Act, Code of Virginia § 2.2-2900 *et. seq.* Specifies that agency heads shall be the appointing authorities of their respective agencies and shall establish methods of personnel administration within their agencies.

Policy – 4.20 FMLA  
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Agencies may supplement this policy to accommodate specific business needs.  
Supplemental policies must be consistent with the provisions of DHRM policy and must be communicated to all agency employees.

### **Related Policies**

Policy 1.30 – Layoff  
Policy 1.57 – Severance Benefits  
Policy 1.61 – Telework  
Policy 2.10 – Hiring  
Policy 2.20 – Types of Employment  
Policy 4.10 – Annual Leave  
Policy 4.30 – Leave Policies – General Provisions  
Policy 4.35 – Leave Sharing  
Policy 4.37 – Leave to Donate Bone Marrow and Organs  
Policy 4.52 – Public Health Emergency Leave  
Policy 4.55 – Sick Leave  
Policy 4.57 – Virginia Sickness and Disability Program  
Policy 4.60 – Workers’ Compensation  
Policy 6.10 – Personnel Records Management

### **Eligibility**

All full-time and part-time classified, restricted and wage employees who have been employed by the Commonwealth for a total of at least 12 months in the past seven years and have worked for at least 1,250 hours in the previous 12-month period are eligible. Eligibility determinations are made as of the date that the family and medical leave is to begin.

Note: Employees who are not eligible for family and medical leave at the beginning of a period of approved leave may become eligible during this period and begin family and medical leave once he/she meets the eligibility requirements.

### **Leave Amount**

If eligible, an employee is entitled to receive up to 12 weeks of unpaid family and medical leave per leave year on either a continuous, intermittent, or reduced leave schedule basis for any one or more of the following reasons:

- The prenatal care for or the birth of a child, and to care for the newborn child.
- Placement of a child with the employee for adoption or foster care.
- To care for the spouse, son, daughter or parent with a serious health condition.
- Because of a serious health condition which renders the employee unable to perform the functions of his/her position.
- Because of any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on active duty, or has been notified of an impending call or order to active duty in support of a contingency operation.

Eligible part-time employees may take up to 12 weeks of unpaid family and medical leave per leave year for the reasons listed above. Hours taken will be counted on a prorated basis corresponding to the percentage of hours they normally are scheduled to work during a calendar year.

Example: A part-time employee works 25 hours per week year-round. During any 12-week period, she works a total of 300 hours. Therefore, if intermittent leave is taken, she may take up to 300 hours of family and medical leave in a calendar year.

Eligible wage employees may take up to 12 weeks of unpaid family and medical leave per leave year for the reasons listed above. Actual hours taken will be counted on a prorated basis corresponding to the percentage of hours they normally are scheduled to work during the 365-day period prior to the date family and medical leave is scheduled to begin.

Note: Spouses employed by the same agency are limited in the amount of family and medical leave they may take for the birth and care of a newborn child, or the placement of a child for adoption or foster care to a combined total of 12 weeks. Leave for birth and care, or placement for adoption or foster care, must conclude within 12 months of the birth or placement.

### **Paid Leave**

Employees have the option of using paid leave, as appropriate under each particular leave policy, for absences covered under family and medical leave. An agency may designate such leave as family and medical leave, if it meets the conditions set forth in this policy. Note: Other leave policies have not changed as a result of this policy.

If an employee’s accrued leave balances are used for family and medical leave, then agencies are required to provide only the number of unpaid workdays which, when combined with the number of days of other leave taken, equal a total of 60 workdays or 480 work hours.

Example: An employee uses 3 days of sick leave and 18 days of annual leave to care for a parent who has a serious health condition. His/her agency must allow him/her to take an additional 39 days of unpaid leave if he/she requests such.

### **Intermittent Leave or Reduced Leave Schedule**

When medically necessary because of an eligible employee's own serious health condition or the serious health condition of a child, spouse or parent, an employee may take family or medical leave on an intermittent leave basis or work a reduced schedule, not to exceed 480 hours for full-time employees.

Employees who take intermittent leave or work a reduced schedule may either use their available paid leave balances as permitted by each specific leave policy or take unpaid family and medical leave.

Employees do not accrue annual and sick leave for pay periods when they are on leave without pay status during family and medical leave.

*If approval is granted by agency management in advance, an employee may take leave intermittently or on a reduced schedule to care for a newborn child, or a child that has been placed with the employee for adoption or foster care.*

When the conditions noted above are applicable, the agency may temporarily transfer the employee to another position that better accommodates the intermittent leave or reduced schedule as long as the new position carries equivalent pay and benefits.

### **Employee Responsibility**

An employee should submit a written request for family and medical leave at least 30 calendar days prior to the anticipated leave begin date or as soon as practicable in unforeseen circumstances. If an employee is not able to provide notice because of an illness or injury, notice may be given by a family member or a spokesperson as soon as practicable.

Note: An employee must comply with agency leave request procedures, absent unusual circumstances. Failure to do so may be grounds for delaying or denying an employee's request of FMLA qualifying leave.

### **Certification of Need for Leave**

The agency may require that a request for family and medical leave be supported by a Health Care Professional's (HCP) certification of the medical condition of the person affected.

When leave is for the employee’s own serious health condition, the health care provider should complete the "[Certification of Health Care Provider for Employee’s Serious Health Condition](#)” form (U.S. Department of Labor Form WH-380-E) to satisfy the certification requirement.

Note: VSDP claim approval documentation shall be accepted for FMLA purposes.

When leave is for a family member’s serious health condition, the health care provider should complete the "[Certification of Health Care Provider for Family Member’s Serious Health Condition](#)" form (U.S. Department of Labor Form WH-380-F). Medical certification is required except in the case of birth, adoption, or foster placement. Other confirmation may be required in the case of adoption or foster placement.

Medical certification shall be obtained by the employee and returned to his/her agency within 15 calendar days of the request or upon return to work from an absence that may qualify as FMLA leave (absent extenuating circumstances). If an employee fails to provide certification, recertification, or clarification in a timely manner then the agency may deny FMLA leave until the required certification is provided.

**Leave Because of a Qualifying Exigency**

An employee may take family and medical leave for qualifying exigencies while his or her spouse, son, daughter, or parent who is a member of a regular component of the Armed Forces, or a member of the National Guard or Reserves is on active duty or called to active duty status in support of a contingency operation. .

The employee should submit a complete and sufficient "[Certification of Qualifying Exigency for Military Family Leave](#)" (U.S. Department of Labor Form WH-384) form and submit it to his or her Human Resource department or supervisor.

The first time an employee requests leave because of a qualifying exigency, he or she must provide a copy of the covered military member’s active duty orders or other documentation issued by the military. This documentation must include the dates of the covered military member’s active duty service. This information need only be provided once. A copy of new active duty orders or other documentation issued by the military shall be provided if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty status of the same or a different covered military member.

**Leave to Care for a Covered Servicemember**

An eligible employee is entitled to receive up to 26 weeks of unpaid leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if

the employee is the spouse, son, daughter, parent or next of kin of the servicemember. The single 12-month period commences the first day leave is taken to care for the covered servicemember and expires 12 months later.

Note: An eligible employee is entitled to a combined total of 26 weeks of unpaid leave during a single 12-month period for any FMLA-qualifying reason.

Example: An eligible employee may take 16 weeks of family and medical leave to care for a covered servicemember and 10 weeks of family and medical leave to care for a newborn child.

The employee should submit a complete and sufficient “[Certification for Serious Injury or Illness of Covered Servicemember](#)” form (U.S. Department of Labor Form WH-385) to his or her Human Resources department or supervisor.

### **Agency Actions**

Agencies must grant an eligible employee's request to take up to 12 weeks of family and medical leave, or 26 weeks of leave to care for a covered servicemember, during a leave year or 12-month period, as applicable, for the reasons stated above.

Upon receiving a request for family and medical leave the agency must notify the employee of their eligibility for FMLA within five business days. The agency may require certification for leave requested for an employee's serious health condition, for his or her family member's serious health condition, or for the serious injury or illness of a covered service member, before granting family and medical leave. The agency should provide the employee with a completed “[Notice of Eligibility and Rights & Responsibilities](#)” form (U.S. Department of Labor Form WH-381).

Agencies must make a determination on a family and medical leave request within five business days of receiving sufficient information to make a determination. Once a determination has been made, agencies should provide notification to their employees using the “[Designation Notice](#)” form (U.S. Department of Labor Form WH-382).

The agency may designate family and medical leave for an employee if notified that the employee has a serious health condition, rather than wait for the employee to request it.

### **Returning from Leave**

Upon returning from family and medical leave, an employee is entitled to be reinstated to their original position, or an "equivalent position." During periods of family and medical leave agencies can require their employees to report periodically on their status and intent

to return to work, and can require certification from health care providers that employees are able to return to work.

### **Status of Benefits during Periods of FML**

Agencies will continue to contribute to the health insurance premiums of salaried employees who are using paid leave, as appropriate under each particular leave policy, for absences covered the provisions of the FMLA. An employee who is on paid leave under FMLA will pay the same portion of their health insurance premiums as they would if they were not on leave.

Agencies will continue to contribute to the health insurance premiums of salaried employees who are on leave without pay under the provisions of FMLA. The employee's premium contributions will be handled as if they were on leave without pay for other reasons. Premiums are due to agencies by the first day of each month of coverage. If the employee fails to make premium payments, agencies will follow the same procedures to terminate coverage as they would if employees failed to pay premiums while on leave without pay for other reasons.

If an employee fails to return to work at the end of leave under FMLA, his/her agency may recover from them the Commonwealth's share of premiums paid during the period of leave without pay. However, there will be no recovery of premium if the employee fails to return to work as a result of the onset, recurrence, or continuation of serious health conditions that entitle them to leave to care for themselves or for a family member; or other circumstances beyond the employee's control.

Other employee benefits shall be treated as follows:

**Performance increases** - employee eligibility for performance increases will be determined in accordance with the Performance Planning and Evaluation policy or enabling legislation.

**Life insurance** - agencies will continue to pay life insurance premiums while employees are on family and medical leave.

**Leave accrual** - employees will not accrue annual or sick leave hours during any period of leave without pay, or after 90 calendar days on leave with pay.

**Retirement** - Retirement contributions (including the component to fund the retiree health credit) will be made for any pay period in which qualifying compensation has been received by the employee. Retirement contributions will not be made for any pay period in which no qualifying compensation has been received by the employee (i.e., the employee was on leave without pay for the entire pay period).

**Other** - Service credit toward sick leave payout - employee's periods of unpaid family and medical leave exceeding 14 consecutive calendar days are not credited as service time toward the required five years of continuous state service which employees must have in order to receive payment for sick leave balances when they separate from state

employment.

Next Annual Leave Anniversary Dates - when more than 14 consecutive calendar days of unpaid family and medical leave are taken, employees will be placed on inactive service status and their next annual leave anniversary dates will be advanced according to the length of time taken on unpaid family leave.

Family and medical leave without pay should be keyed in as a PSE003 transaction, with the FMLA Code changed to “Y” in the Personnel Management Information System (PMIS) when more than 14 consecutive calendar days for FMLA are taken.

### **FMLA Records Management**

Agencies must make, keep and preserve records pertaining to their obligations under FMLA. Records must be kept for at least three years and must include the information listed below:

- Basic payroll and identifying employee data, including: name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.
- Leave designated as FMLA leave, both paid and unpaid, and the dates employees took it. (If FMLA leave is taken in increments of less than a day, the hours must be noted.)
- Copies of employee’s notices of leave furnished to agency.
- Any documents (including written and electronic records) describing employee benefits or agency policies and practices regarding the taking of paid and unpaid leaves.
- Records of premium payments.
- Records of any dispute between the agency and an employee regarding designation of leave as FMLA leave, including any written statement from the agency or employee of the reasons for the designation and for the disagreement.

Records and documents relating to medical certifications, re-certifications or medical histories of employees or employee’s family members are to be maintained in separate files/records and treated as confidential medical records except:

- Supervisors and managers may be informed regarding necessary restrictions on work duties and necessary accommodations.
- First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment.
- Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.



## Glossary

**Adoption** - The act of legally and permanently assuming the responsibility of raising a child as one's own.

**Covered Servicemember** - A member of the Armed Forces (including a member of the 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; or a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness 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.

**Employment Benefits** - All benefits provided by the Commonwealth to salaried employees including group life insurance, health insurance, annual and sick leave, educational benefits, and retirement contributions.

**Equivalent Position** - one with the same pay, benefits and working conditions (shift and schedule) and the same or substantially similar duties, conditions, privileges, and status which require equivalent skill, effort, responsibility and authority.

**Health Care Provider** - Doctors of medicine or osteopathy that are authorized to practice medicine or surgery (as appropriate) by the state in which the doctors practice; any other person determined by the Secretary of the Department of Labor to be capable of providing health care services; and others capable of providing health care services to include only podiatrists, dentists, clinical psychologists, optometrists, chiropractors, physician assistants, nurse practitioners and nurse-midwives authorized to practice in the state and performing within the scope of their practice as defined under state law. This also includes Christian Scientist practitioners listed with the First Church of Christ, Scientist in Boston, although an employee or family member may be required to submit to a medical examination for a second or third opinion (not treatment) from a non-Christian Science practitioner.

**Intermittent Leave Schedule** - A leave schedule permitting the employee to take leave periodically for a few hours a day (less than eight hours), or for a few days, on an as-needed basis.

**Parent** - Biological parent or individual who stood in place of the parent of the employee and was charged with the duties and responsibilities of the parent.

**Qualifying Exigency** - A reason for taking FMLA leave, arising out of the fact that the employee's spouse, son, daughter or parent is on, or has been notified of an impending call or order to active duty in the Armed Forces. Qualifying exigencies fall into 8 categories: 1) short-notice deployment, 2) military events and activities, 3) childcare and school activities, 4) financial and legal arrangements, 5) counseling, 6) rest and recuperation, 7) post-deployment activities, and 8) additional activities which arise out of active duty, or call to active duty, provided that the employee and agency agree.

**Reduced Schedule** - A leave schedule permitting the employee to reduce his or her usual number of hours worked per workweek or per workday.

**Serious Health Condition** - An illness, injury, impairment or physical or mental condition that involves inpatient care or either:

1. A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:
  - Treatment two or more times within 30 days by or under the supervision of a health care provider the first of which must occur within seven days of the first day of incapacity; **or**
  - One treatment by a health care provider, within the first seven days of incapacity, with a continuing regimen of treatment; **or**
2. Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; **or**
3. Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visit to a health care provider at least twice a year, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; **or**
4. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; **or**
5. Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

**Son or daughter** - A biological, adopted or foster child, a stepchild, or legal ward, or a child of a person standing in place of the parent. The child must either be under age 18 or be age 18 or older and incapable of self-care because of a mental or a physical disability.

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**Spouse** - Husband or wife as recognized *in accordance with Executive Order #30, Marriage Equality in the Commonwealth of Virginia.*

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