

# STATE OF COLORADO

## FREQUENTLY ASKED QUESTIONS

about

## FAMILY/MEDICAL LEAVE FOR STATE EMPLOYEES

Revised July 2008

The following provides *general* information about family/medical leave (FML) in the state personnel system. The facts of a specific situation could change this information so employees and managers are encouraged to seek clarification or additional information from their department or higher education institution's (department) FMLA Coordinator. In addition, departments have differing practices so it is important for employees and managers to know their employing departments' processes.

### **What is family/medical leave?**

It is **unpaid**, job-protected leave provided by a federal law, the Family and Medical Leave Act of 1993. The state is automatically covered and considered to be a single employer. Included in the job-protection provisions is the right to return to the same or virtually identical position, with all of its terms and conditions, and the right to continued insurance benefits during the leave (as long as the employee continues to pay the employee's share of the premium).

### **How much leave time is available?**

Eligible employees with qualifying events may take up to 520 hours per fiscal year. Part-time employees are entitled to a pro-rated amount, e.g., a half time employee may receive up to 260 hours.

Federal law recently expanded the reasons for FMLA to include military caregiver leave for a single period of up to 1040 hours in one 12 month period.

### **If the manager agrees, can the employee take a longer leave, even if accrued leave is exhausted?**

The employee can take additional leave if approved by the manager. Because FML would not apply beyond the 13 weeks, some of the rights and benefits change. For example, the employee would need to pay both shares (employee and employer) of the premium in order to maintain health insurance coverage or, if coverage lapses, wait until the next open enrollment period to resume coverage. The employee would have rights to a position in the same class as opposed to the same or identical position.

### **When is an employee eligible for FML?**

A permanent employee with one year of state service (on the state payroll) is eligible for FML. Because the state is a single employer under the law, total state service is counted regardless of the specific department. The time need not be consecutive or continuous, but is simply the total service (employer-employee relationship), regardless of status and paid or unpaid leave. Temporary employees will only be eligible if they have the one year of state service and have worked at least 1250 hours in the 12 months prior to the start of the leave. Employees in the reserves or National Guard are entitled to count active military duty absences as time worked to establish eligibility (just as other employees on the payroll even if on unpaid leave).

### **What conditions are covered?**

Family/medical leave (up to 520 hours) is granted for the addition of a child through birth, adoption, or foster care. It is also granted for the serious health condition of the employee or an immediate family member. A definition of a serious health condition is contained in Chapter 1 of the Rules. FML may also be granted for active duty family leave. Eligible employees may take leave when a parent, child or spouse is called to active duty for a contingency operation. Chapter 5 contains the definition of contingency operation.

FMLA military caregiver leave is also granted (one-time period of up to 1040 hours) for to employees when a parent, child or spouse who is seriously injured or ill while on active duty in support of a contingency operation.

The department's FMLA Coordinator can also provide further information.

### **Who is an immediate family member?**

The law defines an immediate family member as a spouse, child, or parent. A parent does not include in-laws. A spouse includes common law marriages but not domestic partners. A child is a son or daughter under the age 18. A child 18 or over may be covered if disabled under the Americans with Disabilities Act.

Under the military leave (active duty and military caregiver), child is defined as one who is qualified for military service.

Note: The definition of family member under FML is different from that used for sick leave.

### **Is the father of a newborn eligible for FML? If so, can the amount of FML be limited?**

The law is gender neutral. A parent who is eligible for FML is entitled to take the full amount of leave as long as it is concluded within one year of the birth of the baby.

The amount of leave cannot be limited for the father of a newborn. If the employee is eligible, he is entitled to the full amount of time. Again, it must be concluded within one year of the birth.

Note: the amount of sick leave granted for male or female is dependent upon on the specified recovery period for the mother.

**If FML is used for an immediate family member who dies during the leave, can the employee continue to use FML until it is exhausted?**

FML ceases when the family member dies. Family/medical leave is provided for the care of the living. While FML ceases, other leave applies, such as bereavement leave.

**When should an employee let the manager know that leave is needed?**

Using regular leave procedures, an employee should request leave at least 30 days in advance when foreseeable. If the need for leave is unforeseeable, the employee should let the manager know of the need as soon as possible.

**How soon should a manager put an employee on FML?**

As soon as an eligible employee requests leave for a qualified reason, the manager should designate the leave as FML or not FML. The employer has two business days from the date the reason for the leave is known or should have been known to designate whether leave is covered by FML. Wait for leave to be requested for a qualifying condition before designating the leave. If leave is never used for the condition, no FML is involved.

Note: The employee must be given at least 15 calendar days to provide supporting documentation for the requested leave.

**How can a manager make a designation within two business days when the employee has 15 days to deliver a medical certificate with the information?**

In some cases, it will be clear before the certificate is delivered so the manager should go ahead with the designation. In other cases where it is less clear, the manager should use a conditional designation until the certificate is delivered. A conditional designation can be withdrawn later, in writing, if the condition turns out to be unqualified for family/medical leave.

**When does family/medical leave begin for a pregnant employee?**

Family/medical leave should be designated and begin when the employee begins leave for pregnancy-related reasons, e.g., pre-natal visits to a health care provider, severe morning sickness, complications of a difficult pregnancy, child birth.

**Can an employee choose not to be placed on family/medical leave? What if the manager agrees?**

No, family/medical leave is not based on the employee's desires nor does the employee need to specifically apply for or mention FML. If an eligible employee has a qualifying condition, the employer must designate the leave as FML. The employer bears the sole responsibility for

designating whether each leave request is qualified based on the reason for the leave provided by the employee. Family/medical leave rights cannot be waived and employees cannot interfere with an employer's obligation to designate the qualifying condition.

### **Is family/medical leave in addition to any sick and annual leave?**

Family/medical leave (an unpaid type of leave) and the employee's accrued paid leave run concurrently. Paid leave is to be exhausted before an employee is placed on unpaid leave, subject to rules on the types of leave. Under FML, the state applies this principle by requiring the substitution of accrued paid leave for unpaid leave. The result is that sick leave (subject to regular sick leave provisions) and annual leave (unless receiving STD benefits) must be used before placing the employee on unpaid leave during FML. This requirement applies to all employees regardless of the amount of accrued sick or annual leave the employee may have. Accrued paid leave must be used before placing the employee on unpaid leave.

### **What if the supervisor agrees to allow the employee to go on unpaid FML before sick or annual is exhausted so the employee can save some paid leave for later?**

This arrangement is not allowed, as explained above. The use of paid leave is required and applies uniformly to all employees.

### **How does family/medical leave work with Workers' Compensation?**

The leave should be designated (as qualified or not), but the time may or may not count as FML depending on whether any accrued leave is available. The state uses a "make whole" policy, which requires the use of accrued leave to make up the difference between gross base pay and Workers' Compensation payments. As long as the employee is being made whole, the leave cannot count against the FML time. If the employee is not being made whole (no accrued paid leave), the absence does count against the FML time.

### **Does a holiday during FML extend the leave time?**

A holiday also runs concurrently with FML and does not extend the amount of leave. The only exception is when a department closes business operations for one week or more. In such a case, there is no expectation or opportunity for work and that time would not count against the FML entitlement.

### **Is the same true for Short-Term Disability (STD) leave? If STD and FML run together, does the employee have to use accrued annual leave to make up the 40% of salary not covered by STD payments?**

FML runs concurrently with all leave, including STD leave. The leaves are different from STD salary replacement benefit payments. Regular STD leave provisions apply, which require the use of paid leave (sick and/or annual) during the 30-day benefit waiting period or the exhaustion of sick leave beyond the 30-day period before salary replacement benefit payments will be made. The

provisions do not include the use of annual leave while receiving STD salary replacement benefit payments. In fact, to do so reduces the STD salary replacement benefits.

The following example illustrates how different types of leave are used concurrently with FML. Assume the employee is covered by both STD and FML and has requested 12 weeks of leave. The employee has three weeks of sick and two weeks of annual leave.

| Family/Medical Leave for 12 weeks                   |                       |  |
|---|-----------------------|--|
| 3 weeks sick leave<br>30 day waiting period for STD | 1 wk.<br>annual leave | 8 weeks STD leave with salary replacement benefits<br>60% salary |

**Can an employee use compensatory time for a family/medical leave condition?**

The employee can choose to use accrued compensatory (comp) time and managers have the authority to require its use. Comp time is not leave but a form of hours worked. For this reason, it is not counted against FML time. For example, if the employee needs six weeks of FML leave and has one week of comp time, the employee may elect to use the comp time and five weeks of FML to cover the six weeks. If comp time is not used before FML, managers are reminded to keep overtime payment requirements for the comp time in mind.

**Can the manager place any restrictions on how the employee uses his or her time while on FML?**

If a department has an established policy on outside employment while on leave, it should be uniformly applied and include those on family/medical leave. Otherwise, no restrictions can be imposed as long as the reason for leave remains valid and all requirements have been fulfilled.

**What if the employee does not want to put the reason for the leave on the leave request form?**

First, the employee is obligated under the federal law’s requirements to state the reason for the leave so the employer can determine the type of leave to authorize and meet its legal obligation to designate the leave. The employee could verbally state the reason to whoever makes the designation and that person could simply note on the form that the leave is qualified and designated.

Second, all medical or health information requires strict confidentiality on the part of those handling such documents. It must be maintained in separate locked files with limited access. An employee should refer to the department’s human resources office for specifics on its medical confidentiality policy. Any violations of medical confidentiality should be promptly reported to either the appointing authority or the department’s human resources office.

Third, it is understandable that some conditions are very sensitive and the employee is uncomfortable sharing the information with a manager. Each department is to have a “back up” process with someone outside the work unit designated as the contact to who the employee can report the reasons for a leave request. Generally, it is the department’s FMLA Coordinator who is trained to handle highly sensitive situations.

Finally, the employee ultimately controls whether he or she will comply with the requirement to state the reason for the leave or to provide required documents. However, the employee should consider the decision to refuse and be prepared to accept the consequences.

### **What if the employee refuses to deliver the requested medical certificate?**

Again, it is ultimately in the employee's control whether to deliver the requested medical certificate. If the certificate is not delivered in a timely manner, FML can be denied and the employee will not have any of the protections and benefits of the leave. If the absence is longer than three consecutive regularly scheduled workdays and a certificate is not provided, the use of sick leave **must** be denied in accordance with Colorado statute. The employee also may be subject to other employment actions.

### **Does the employee need doctor's documentation to take all of the FML? Can the employee be required to provide medical records?**

In the case of a serious health condition, the employer can require a medical certificate form completed by a health care provider. Note that such a certificate is required for an absence of more than three consecutive regularly scheduled workdays if sick leave is to be granted. The employee does not need to provide medical records. The medical certificate form is designed to provide the information needed by the employer. In the case of care or bonding with a new child, a medical certificate is not required but proof of familial relationship may be.

An employee who is using FML for a serious health condition is provided with the amount of FML the health care provider indicates is necessary in the medical certificate, up to 520 hours per fiscal year (pro-rated for part time).

In the case of active duty family leave, military orders fulfill the certification requirements. For military caregiver leave, a medical certificate issued by the Department of Defense is acceptable.

### **What if the employee's doctor refuses to complete the medical certificate or charges a fee?**

The employee bears the sole responsibility, including any cost, for obtaining the requested medical certificate. This may include deciding whether to pay a fee or choose a different health care provider to complete the form. As an initial step, the employee may want to speak with the health care provider or the office staff of the health care provider who process paperwork to explain the importance of the certificate. However, the bottom line is that the employee is responsible for furnishing the requested medical certificate or the employer can deny FML.

### **If the employee gives permission, can the health care provider call the manager instead of completing the form?**

No. The employer is not allowed to have contact with the health care provider. However, if the department employs a health care provider and the employee grants permission, the provider can

clarify content or authenticity of the medical certification form. The only exception is if Workers' Compensation is involved. A manager or any other person acting on behalf of the employer needs to explain to the calling health care provider that the law does not allow the contact and offer the medical certificate form.

The form is also important for compliance with record keeping requirements placed on the employer by federal law.

### **What if the manager suspects FML is being taking advantage of?**

There are several options available when the validity of the leave is questionable. If it is at the time of the initial leave request, the manager can make a conditional designation pending receipt of the medical certificate. This allows for timely designation while waiting for the information and it can be withdrawn, in writing, if the certificate does not support FML.

If the original medical certificate is involved, the manager can request a 2<sup>nd</sup> opinion. The employer chooses the health care provider and pays for the examination. If the 2<sup>nd</sup> opinion conflicts with the original certificate, a 3<sup>rd</sup> opinion can be obtained. In such a case, the department pays for the opinion but the employee and manager choose a mutually acceptable health care provider.

If circumstances change during the course of the leave and the manager has reason to doubt the continuing need for FML, additional medical certifications are allowed. The employer is allowed to obtain re-certification every 30 days or the duration of the leave stated in the medical certificate, whichever is longer. In addition, the employer is allowed to request new certification in a new fiscal year. Chronic conditions are not given lifetime designations. FMLA is only triggered when there is a need to use leave.

### **Can the manager refuse to grant FML?**

If the employee is eligible, the event qualifies, the requirements have been met for requesting the leave and providing documents, and the FML has not been exhausted for the year, the requested leave cannot be denied.

### **The employee wants to use FML intermittently. Can the manager deny such a request?**

It depends on the reason for the requested leave. If the request is based on a serious health condition and the medical certificate indicates that intermittent leave is medically necessary, the request must be granted. However, the employee is expected to work with the manager on a mutually acceptable schedule before the leave is taken so that there is minimal disruption to the workplace.

If the intermittent leave is not medically necessary (e.g., the employee is requesting the leave to bond with a new child), the manager has discretion whether to grant the request for intermittent use. While the full amount of leave must be granted in such a case, the manager can require that it be used in one block.

### **Can a manager terminate an employee on FML?**

Typically, the answer is no but there are a few exceptions. If employment would not have otherwise continued, the employee can be terminated. Some examples are a temporary appointment that was scheduled to end, a planned layoff involving the employee's position as one of those identified for abolishment, disciplinary action in progress due to poor performance, or inability to return after FML and accrued paid leave is exhausted. In the last example, the manager should check with the department ADA Coordinator before making a final decision to administratively discharge an employee for exhaustion of paid leave.

### **A factor on the employee's performance plan is attendance or use of leave. How is FML factored into the evaluation?**

The taking of family/medical leave cannot be used in any employment action, including counting it against the employee in a performance evaluation. It is as if the leave were never taken when considering an attendance factor.

### **Can a manager require an employee to return before FML is exhausted, e.g., modified duty during Workers' Compensation, emergencies, subpoena due to official state duties?**

An employee cannot be required to return as long as all the requirements of FML are met. In the case of Workers' Compensation, the employee must choose whether to accept an offer of modified duty or continue on FML. The employee should be aware that refusal of modified duty affects Workers' Compensation benefits. In the case of emergencies or other situations such as a subpoena, the employer may request but the employee can refuse the request. If a subpoena involves official state duties, the department should contact legal counsel.

### **At the end of FML that is not related to Workers' Compensation, if the employee can only return to modified duty, is the manager obligated to restore the employee?**

The employee has a right to the job as it existed at the time the leave began. If the employee cannot perform all of the essential functions, including work hours, the protections of FML no longer apply. This includes the right to be restored to the same or identical position. However, managers are urged to contact the department FMLA and ADA Coordinators before deciding not to restore an employee.

### **Does the manager have to allow the employee to return if a fitness-to-return certificate has not been provided?**

As long as the employee was properly notified of requirement for a fitness-to-return certificate, the manager is not obligated to return the employee until such certification is provided. However, if the employee is allowed to return to work while waiting for the requested certificate, restoration cannot be denied or delayed. Remember that the employee must have at least 15 calendar days from the request for a fitness-to-return certificate so planning is important in order to coordinate the delivery of the certificate and the return to work.



## **Where do employees and managers get the paperwork for FML?**

Depending on the department's specific procedures, all of the forms are generally available from the manager. Forms are also available from the department's human resources office and are also on the web at [www.colorado.gov/dpa/dhr](http://www.colorado.gov/dpa/dhr).

## **What forms are required from the employee?**

The employee needs to complete the *State of Colorado Leave/Absence Request* form (or equivalent form, including electronic leave systems) to request any type of leave, including FML. When requested, the employee may also be required to deliver a completed medical certificate and/or fitness-to-return certificate. Again, the forms are available from the manager, department human resources office, or the web.

The employee may also be asked to submit proof of familial relationship, e.g., affidavit of common law marriage, adoption papers, birth certificate, etc.

## **What forms are required from the manager?**

The manager needs to complete the bottom portion of the *State of Colorado Leave/Absence Request* form, which includes determining the type of leave to authorize, whether medical and fitness-to-return certificates are required, and designation of the specific leave request. If the leave is designated as FML, the employer's individual notice form must be completed.

In general, the manager is responsible for designating each leave request in a timely manner once the reason for the leave is known or should have been known, requesting certifications, notifying the employee of the designation, providing the forms or informing the employee where to get access.

Every attempt is made to keep this information updated. For additional information, refer to the *State Personnel Board Rules and Director's Administrative Procedures* or contact your department human resources office. Assistance is also available from the Statewide FMLA Coordinator in the Department of Personnel and Administration. Subsequent revisions to rule or law could cause conflicts in this information. In such a situation, the laws and rules are the official source upon which to base a ruling or interpretation. This document is a guide, not a contract or legal advice.