

**Comment [KAS1]:** No substantive policy changes. Minor terminology update in policy and throughout footnotes to match new regulatory language. Various citations and web links are cleaned up.

## General Personnel

### Family and Medical Leave <sup>1</sup>

#### Leave Description

An eligible employee may use unpaid family and medical leave (FMLA leave), guaranteed by the federal Family and Medical Leave Act. The U.S. Department of Labor's rules (federal rules) implementing FMLA, as they may be amended from time to time, control FMLA leave.

An eligible employee may take FMLA leave for up to a combined total of 12 weeks each 12-month period, beginning September 1 and ending August 31 of the next year. <sup>2</sup>

During a single 12-month period, an eligible employee's FMLA leave entitlement may be extended to a total of 26 weeks of unpaid leave to care for a covered servicemember (defined in the federal rules) with a serious injury or illness. The "single 12-month period" is measured forward from the date the employee's first FMLA leave to care for the covered servicemember begins. <sup>3</sup>

While FMLA leave is normally unpaid, the District will substitute an employee's accrued compensatory time-off and/or paid leave for unpaid FMLA leave.<sup>4</sup> All policies and rules regarding the use of paid leave apply when paid leave is substituted for unpaid FMLA leave. Any substitution of paid leave for unpaid FMLA leave will count against the employee's FMLA leave entitlement. Use of FMLA leave shall not preclude the use of other applicable unpaid leave that will extend the

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<sup>1</sup> State or federal law controls this policy's content. This policy contains an item on which collective bargaining may be required. Any policy that impacts upon wages, hours, and terms and conditions of employment, is subject to collective bargaining upon request by the employee representative, even if the policy involves an inherent managerial right. This policy implements the very complex Family and Medical Leave Act, 29 U.S.C. §2612, (FMLA) and a school board is urged to have its attorney review it before adoption.

All public (and private) school employers are covered by the FMLA without regard to their number of employees (29 C.F.R. §§825.104 & 825.600). To be eligible for FMLA leave, however, an educational employee must be employed at a worksite where at least 50 employees are employed within 75 miles (29 C.F.R. §825.600).

The U.S. Department of Labor, Wage & Hour Division, has a very helpful website containing forms, compliance guidance, posters, etc. ([www.dol.gov/whd/fmla](http://www.dol.gov/whd/fmla)). It also contains a link to the complete FMLA rules, 29 C.F.R. Part 825.

<sup>2</sup> 29 C.F.R. §825.200 lists and explains the four methods boards may choose among for determining a 12-month period in which the 12-week entitlement occurs. While using a school year may be the easiest method to administer, **another method may be more suitable for the district**. Before changing to a different method of calculating the 12-month period, an employer must first give all employees at least 60-days' notice of the intended change; the transition must take place in such a way that the employees retain the full benefit of their leave entitlement under whichever method affords the greatest benefit to the employee. If the district fails to select an option, the one that provides the most beneficial outcome for employees will be used.

<sup>3</sup> 29 C.F.R. §825. Section 585 of the National Defense Authorization Act for FY 2008, Pub. L. 110-181, added two types of family military leave – qualifying exigency leave and ~~military caregiver leave~~ servicemember family leave. The latter leave extends the possible FMLA leave to 26 weeks in a *single 12-month period*. For more information, see f/n 6.

<sup>4</sup> This paragraph presents only one of many possible alternatives. The FMLA permits an employee to choose to substitute paid leave for FMLA leave, and an employer to require an employee to substitute paid leave for FMLA leave (29 C.F.R. §825.207). Substitution of paid leave for FMLA purposes means that the unpaid FMLA leave and the paid leave run concurrently. The sample policy, in the interests of clarity and limiting absences, requires this substitution. Likewise, an employer may require an employee to substitute accrued comp time against the employee's FMLA leave entitlement (29 C.F.R. §825.207(f)). Sample policy 5:310, *Compensatory Time-Off*, addresses the acquisition and use of comp time. The FMLA rules also describe the interaction between FMLA leave and leave taken pursuant to a disability plan and workers' compensation leave (29 C.F.R. §825.207(d) & (e)).

If employees have not previously been required to substitute accrued paid leave, this requirement's implementation may give rise to a duty to bargain because it affects the mandatory bargaining subject of employee paid leave.

employee's leave beyond 12 weeks, provided that the use of FMLA leave shall not serve to extend such other unpaid leave. Any full workweek period during which the employee would not have been required to work, including summer break, winter break and spring break, is not counted against the employee's FMLA leave entitlement. <sup>5</sup>

FMLA leave is available in one or more of the following instances: <sup>6</sup>

1. The birth and first-year care of a son or daughter.
2. The adoption or foster placement of a son or daughter, including absences from work that are necessary for the adoption or foster care to proceed and expiring at the end of the 12-month period beginning on the placement date.
3. The serious health condition of an employee's spouse, child, or parent.
4. The employee's own serious health condition that makes the employee unable to perform the functions of his or her job.
5. The existence of a qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a military member on covered active duty or has been notified of an impending call or order to active duty, as provided by federal rules.
6. To care for the employee's spouse, child, parent, or next of kin who is a covered servicemember with a serious injury or illness, as provided by federal rules.

If spouses are employed by the District, they may together take only 12-weeks for FMLA leaves when the reason for the leave is 1 or 2, above, or to care for a parent with a serious health condition, or a combined total of 26 weeks for item 6 above. <sup>7</sup>

An employee may be permitted to work on an intermittent or reduced-leave schedule in accordance with federal rules. <sup>8</sup>

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<sup>5</sup> 29 C.F.R. §825.200(h). If a holiday occurs within the week taken as FMLA leave, the week is still counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement.

<sup>6</sup> 29 C.F.R. §§825.112 & 825.200. See §§825.120 & 825.121 for birth or placement for adoption or foster care. [Spouse includes an individual in a same-sex or common law marriage that either: \(1\) was entered into in a state that recognizes such marriages; or \(2\) if entered into outside of any state, is valid in the place where entered into and could have been entered into in at least one state \(29 C.F.R. §§825.102 and 825.122\(b\)\). See also Obergefell v. Hodges, 135 S.Ct. 2584 \(2015\).](#)

Leave for a qualifying exigency (reason number 5) is governed by 29 C.F.R. §§825.122 (definition) & 825.126.

Leave to care for a covered servicemember (reason number 6) is governed by 29 C.F.R. §§825.122 (definition) & 825.127. An eligible employee may take 26 weeks of leave in different "single 12-month periods" to care for multiple servicemembers or to care for the same servicemember with a subsequent serious injury or illness (29 C.F.R. §825.127).

Attorneys disagree whether the Illinois Family Military Leave Act, 820 ILCS 151/, applies to schools because its definition of *employer* does not specify school districts. A covered employer must allow a spouse, parent, child, or grandparent of a person called to military service to take an unpaid leave of 15 or 30 days, depending on the number of individuals employed by the employer ([Id. at 151/10\(a\)-\(b\)](#)). The length of leave provided to an employee under State law because his or her spouse or child is called to military service is reduced by the number of days of leave provided under 29 U.S.C. §2612(a)(1)(E) because of any qualifying exigency arising out of the fact that the employee's spouse or child is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces (820 ILCS 151/10(b)).

<sup>7</sup> 29 C.F.R. §§825.120(a)(3) ([birth](#)) & 825.121(a)(3) ([adoption and foster care](#)).

<sup>8</sup> 29 C.F.R. §§825.121(b), 825.202 - 825.205 & 825.601.

### Eligibility <sup>9</sup>

To be eligible for FMLA leave, an employee must be employed at a worksite where at least 50 employees are employed within 75 miles. In addition, one of the following provisions must describe the employee:

1. The employee has been employed by the District for at least 12 months and has been employed for at least 1,250 hours of service during the 12-month period immediately before the beginning of the leave. The 12 months an employee must have been employed by the District need not be consecutive. However, the District will not consider any period of previous employment that occurred more than ~~7~~<sup>seven</sup> years before the date of the most recent hiring, except when the service break is due to [fulfillment of a covered service obligation under the employee's Uniformed Services Employment and Reemployment Rights Act \(USERRA\), 38 U.S.C. 4301, et seq., National Guard or Reserve military service](#) or when a written agreement exists concerning the District's intention to rehire the employee.
2. The employee is a full-time classroom teacher.

### Requesting Leave <sup>10</sup>

If the need for the FMLA leave is foreseeable, an employee must provide the Superintendent or designee with at least 30 days' advance notice before the leave is to begin. If 30 days' advance notice is not practicable, the notice must be given as soon as practicable. The employee shall make a reasonable effort to schedule a planned medical treatment so as not to disrupt the District's operations, subject to the approval of the health care provider administering the treatment. The employee shall provide at least verbal notice sufficient to make the Superintendent or designee aware that he or she needs FMLA leave, and the anticipated timing and duration of the leave. Failure to give the required notice for a foreseeable leave may result in a delay in granting the requested leave until at least 30 days after the date the employee provides notice.

### Certification <sup>11</sup>

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<sup>9</sup> 29 C.F.R. §§825.110, 825.111, & 825.600. **The default policy language exceeds federal law requirements because it provides immediate eligibility to full-time classroom teachers.** A board may substitute the following to deny eligibility to classroom teachers who have not worked 12 months for the district, but it should first analyze collective bargaining consequences and seek its board attorney's advice:

To be eligible for FMLA leave, both of the following provisions must describe the employee:

1. The employee is employed at a worksite where at least 50 employees are employed within 75 miles; and
2. The employee has been employed by the District for at least 12 months and has been employed for at least 1,250 hours of service during the 12-month period immediately before the beginning of the leave. The 12 months an employee must have been employed by the District need not be consecutive. However, the District will not consider any period of previous employment that occurred more than 7 years before the date of the most recent hiring, except when the service break is due to ~~National Guard or Reserve military service~~[fulfillment of a covered service obligation under the employee's Uniformed Services Employment and Reemployment Rights Act \(USERRA\), 38 U.S.C. 4301, et seq.,](#) or when a written agreement exists concerning the District's intention to rehire the employee.

[A service break due to fulfillment of covered service obligation is found in the \*Glossary of Terms Used in FMLA\* available at: \[webapps.dol.gov/elaws/whd/fmla/3.aspx?Glossary\\\_Word=ELIGIBLE\]\(http://webapps.dol.gov/elaws/whd/fmla/3.aspx?Glossary\_Word=ELIGIBLE\).](#)

An employee's eligibility requires analysis of the information available in each case using the guidance in §825.110. Any week during which an employee is maintained on the payroll, even if the employee does not work that week, is counted toward the 12-months' service requirement (*Id.* at 825.110(b)(3)).

<sup>10</sup> 29 C.F.R. §§825.302-825.304 require an employee to notify the employer of the need for leave and to generally schedule leave for planned medical treatments in a way that the absences do not unduly disrupt the employer's operations. The policy's notice provisions are the shortest time frame allowable (29 C.F.R. §825.302). The employee need not expressly request a leave under the FMLA. An employer may require that employees follow its usual and customary notice and procedural requirements for requesting leave.

Within 15 calendar days after the Superintendent or designee makes a request for certification for a FMLA leave, an employee must provide one of the following:

1. When the leave is to care for the employee's covered family member with a serious health condition, the employee must provide a complete and sufficient certificate signed by the family member's health care provider.
2. When the leave is due to the employee's own serious health condition, the employee must provide a complete and sufficient certificate signed by the employee's health care provider.
3. When the leave is to care for a covered servicemember with a serious illness or injury, the employee must provide a complete and sufficient certificate signed by an authorized health care provider for the covered servicemember.
4. When the leave is because of a qualified exigency, the employee must provide: (a) a copy of the covered military member's active duty orders or other documentation issued by the military indicating that the military member is on active duty or call to active duty status, and the dates of the covered military member's active duty service, and (b) a statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested.

The District may require an employee to obtain a second and third opinion at its expense when it has reason to doubt the validity of a medical certification.

The District may require recertification at reasonable intervals, but not more often than once every 30 days. Regardless of the length of time since the last request, the District may request recertification when the, (1) employee requests a leave extension, (2) circumstances described by the original certification change significantly, or (3) District receives information that casts doubt upon the continuing validity of the original certification. Recertification is at the employee's expense and must be provided to the District within 15 calendar days after the request. The District may request recertification every ~~six~~ months in connection with any absence by an employee needing an intermittent or reduced schedule leave for conditions with a duration in excess of ~~six~~ months.

Failure to furnish a complete and sufficient certification on forms provided by the District may result in a denial of the leave request.

#### Continuation of Health Benefits <sup>12</sup>

During FMLA leave, employees are entitled to continuation of health benefits that would have been provided if they were working. Any share of health plan premiums being paid by the employee before taking the leave, must continue to be paid by the employee during the FMLA leave. A District's obligation to maintain health insurance coverage ceases if an employee's premium payment is more than 30 days late and the District notifies the employee at least 15 days before coverage will cease.

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<sup>11</sup> Requests for medical certification, 2nd and 3rd opinions, and recertification are governed by 29 C.F.R. §§825.305-825.310. The appropriate certification forms are available at [www.dol.gov/WHD/fmla](http://www.dol.gov/WHD/fmla). Districts must inform the employee of the medical certification requirement and of the consequences for failing to provide it.

<sup>12</sup> Required by 29 C.F.R. §825.209. The same health benefits means, for example, that if family member coverage is provided to an employee, family member coverage must be maintained during FMLA leave. If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan or benefits to the same extent as if the employee were not on leave. *Health benefits* do not include individual policies paid exclusively by the employee. Districts must provide an advance written description of how premium payments must be made (29 C.F.R. §825.210). [See fn 1, above.](#) [Consult the board attorney about whether any existing collective bargaining agreements alter a district's obligation to continue health benefits even after exhaustion of FMLA.](#)

If coverage lapses because an employee has not made required premium payments, the employer must still restore the employee to coverage and benefits when the employee returns from leave (29 C.F.R. §825.212). 29 C.F.R. §825.213 governs how districts may recover premium payments if the employee fails to return to work after the leave entitlement is exhausted or expires. The board attorney must be consulted for the appropriate premium recovery method.

### Changed Circumstances and Intent to Return <sup>13</sup>

An employee must provide the Superintendent or designee reasonable notice of changed circumstances (i.e., within ~~two~~ business days if the changed circumstances are foreseeable) that will alter the duration of the FMLA leave. The Superintendent or designee, taking into consideration all of the relevant facts and circumstances related to an individual's leave situation, may ask an employee who has been on FMLA leave for ~~eight~~ consecutive weeks whether he or she intends to return to work.

### Return to Work

If returning from FMLA leave occasioned by the employee's own serious health condition, the employee is required to obtain and present certification from the employee's health care provider that he or she is able to resume work. <sup>14</sup>

An employee returning from FMLA leave will be given an equivalent position to his or her position before the leave, subject to: (1) permissible limitations the District may impose as provided in the FMLA or implementing regulations, and (2) the District's reassignment policies and practices. <sup>15</sup>

Classroom teachers may be required to wait to return to work until the next semester in certain situations as provided by the FMLA regulations. <sup>16</sup>

### Implementation

The Superintendent or designee shall ensure that: (1) all required notices and responses to leave requests are provided to employees in accordance with the FMLA;<sup>17</sup> and (2) this policy is implemented in accordance with the FMLA. In the event of a conflict between the policy and the FMLA or its regulations, the latter shall control. The terms used in this policy shall be defined as in the FMLA regulations. <sup>18</sup>

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<sup>13</sup> This section is optional but allowed by 29 C.F.R. §825.311. Either or both sentences may be changed or omitted, provided the policy is applied uniformly.

<sup>14</sup> Requiring *fitness for duty* certification is optional but allowed by 29 C.F.R. §825.312. This sentence may be deleted or changed in accordance with the rule.

<sup>15</sup> 29 C.F.R. §§825.214 - 825.216 & 825.604. An equivalent position must have the same pay (including any unconditional pay increases), benefits, and working conditions and involve the same or substantially similar duties (29 C.F.R. §825.215). Determining how an employee will be restored to an *equivalent position* is made on the basis of "established policies and practices" and collective bargaining agreements (29 C.F.R. §825.604).

<sup>16</sup> Optional but allowed by 29 C.F.R. §825.602.

<sup>17</sup> School districts must provide employees a general notice explaining the FMLA and the process for filing complaints (29 C.F.R. §825.300(a)). This notice must also be provided to FMLA-covered employees; distribution may be accomplished electronically. A poster is available at [www.dol.gov/WHD/fmla](http://www.dol.gov/WHD/fmla), [The Family and Medical Leave Act Poster](#).

When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for a FMLA-qualifying reason, the employer must provide the employee with a notice of eligibility (within 5 business days absent extenuating circumstances) (29 C.F.R. §825.300(b)). At the same time, the employer must provide the employee with a notice of rights and responsibilities (29 C.F.R. §825.300(c)). Finally, the employer must notify the employee whether it has designated the leave as FMLA-qualifying (29 C.F.R. §825.300(d)). The federal rules contain specific requirements for each of these notices. Fortunately, a prototype for each of these required notices is available at [www.dol.gov/WHD/fmla](http://www.dol.gov/WHD/fmla) (*WH-381 Notice of Eligibility and Rights & Responsibilities and WH-382 Designation Notice*). Willfully failing to provide the notices can subject an employer to a monetary penalty.

<sup>18</sup> 29 C.F.R. §825.102.

LEGAL REF.: Family and Medical Leave Act, 29 U.S.C. §2601 et seq., 29 C.F.R. Part 825.

CROSS REF.: 5:180 (Temporary Illness or Temporary Incapacity), 5:250 (Leaves of Absence),  
5:310 (Compensatory Time-Off), 5:330 (Sick Days, Vacation, Holidays, and  
Leaves)