

SECTION 6.90 FAMILY AND MEDICAL LEAVE ACT POLICY
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I. BACKGROUND

The Family and Medical Leave Act (FMLA) was signed into law on February 5, 1993, and was revised effective January 16, 2009. The National Defense Authorization Act (NDAA) amended the FMLA on January 28, 2008, and October 28, 2009. New regulations to implement certain aspects of the NDAA amendments became effective March 8, 2013.

The FMLA allows eligible employees to take job-protected leave for the birth, adoption, or foster placement of a son or daughter, the employee's own serious health condition, or to care for a child, spouse, or parent with a serious health condition. It also provides the right to take leave to care for an ill or injured covered servicemember or veteran, or when a qualifying exigency exists.

An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking leave. If an employee was paying all or part of the premium payments prior to leave, the employee continues to pay his or her share during the leave period.

The following information is intended to assist you in administering the FMLA. The State uses as guidance, Title 29, Part 825 of the Code of Federal Regulations to administer this policy.

Definitions of terms used in this document can be found in Section XXXV.

II. EFFECTIVE DATE

- A. FMLA leave was effective for noncontract employees on August 5, 1993, and for contract- covered employees on February 5, 1994.
- B. Military Family Leave to care for a covered servicemember with an illness or injury incurred in the line of duty was effective on January 28, 2008. Military family leave to care for a covered veteran was effective March 8, 2013.
- C. Military Family Leave for any qualifying exigency was effective January 16, 2009.
- D. Only leave taken on or after the effective date of the Act as amended is considered FMLA leave.

III. ELIGIBILITY

- A. Any employee who has been employed for at least 12 months and has worked for at least 1,250 hours in the 12-month period immediately preceding the commencement of leave is eligible.
 - 1. The 12 months that the employee must have been employed need not be consecutive. Employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed for at least 12 months, unless the break in service is due to the fulfillment of a Uniformed Services Employment and Reemployment Rights Act (USERRA) covered service obligation, or there is a written agreement concerning the intention to rehire the employee after the break in service. If the employee has been maintained on the payroll for any part of a week, including any periods of paid sick, vacation, or unpaid leave during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health benefits, etc.), the week counts as a week of employment. The period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months
 - 2. Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles of the Fair Labor Standards Act (FLSA) for determining compensable hours. The calculation is based upon hours actually worked, not hours in pay status, except for an employee who has performed USERRA-covered service. An employee returning from, or reemployed after, USERRA-covered service is credited with the hours of work that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service.

The 1,250 hours may be worked intermittently, and may involve multiple job classes and multiple branches of state government.

- B. The determination of whether an employee has worked 1,250 hours and has been employed for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave.
- C. An employee who fraudulently obtains FMLA leave from the employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

IV. LEAVE ENTITLEMENT

- A. An eligible employee is entitled to 12 weeks of FMLA leave in a fiscal year for any one, or more, of the following reasons:
 - 1. The birth of a child and to care for the newborn child,
 - 2. The placement of a child for adoption or foster care
 - 3. To care for the employee's spouse, child (under 18, unless incapable of self-care), or parent with a serious health condition
 - 4. Because of the employee's own serious health condition
 - 5. Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status.
- B. An eligible employee is entitled to up to a total of 26 weeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. The 12-month period begins on the first date the employee uses leave to care for the covered servicemember. During this period, an eligible employee's leave entitlement is limited to a combined total of 26 weeks of FMLA leave for any qualifying reason.
- C. When both spouses are employed by the State, they are limited to a combined total of 12 weeks of FMLA leave in a fiscal year for leave taken for:
 - 1. The birth of the employees' healthy child
 - 2. A bonding period
 - 3. Care for a healthy child after birth, adoption, or placement for foster care, or
 - 4. The care of a parent with a serious health condition.

Where the spouses each use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes.

When both spouses are employed by the State, they are each entitled to 12 weeks of FMLA leave in a fiscal year for leave involving the care of a son, daughter, or spouse with a serious health condition, or leave that involves the employee's own serious health condition.

- D. If an employee unequivocally advises the employer in writing that he or she does not intend to return to work for a reason other than the immediate serious health condition, the employee's entitlement to continued FMLA leave and associated benefits ceases.
- E. Leave may be taken on a continuous, intermittent, or reduced schedule basis. This leave may be paid or unpaid (see Section XV).

V. QUALIFYING REASONS FOR LEAVE

- A. Circumstances qualifying eligible employees to use FMLA leave include:
1. The birth of a son or daughter, and to care for the newborn child.
 2. Placement with the employee of a son or daughter for adoption or foster care.
 3. To care for the employee's spouse, son, daughter, or parent with a serious health condition.
 4. Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.
 5. Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty, or has been notified of an impending call or order to covered active duty in a foreign country.
 6. 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 covered servicemember.

VI. SERIOUS HEALTH CONDITION

- A. A serious health condition means an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.
- B. The term *incapacity* means inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.
- C. The term *treatment* includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves, or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.
- D. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

VII. INPATIENT CARE

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with such inpatient care.

VIII. CONTINUING TREATMENT

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

- A. Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
1. Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health

- care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
2. Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
 3. The requirement in (1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.
 4. Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.
 5. The term *extenuating circumstances* means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.
- B. Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care. Absences attributable to pregnancy or prenatal care qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee who is pregnant may be unable to report to work because of severe morning sickness.
- C. Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
1. Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
 2. Continues over an extended period of time (including recurring episodes of a single underlying condition); and
 3. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).
- D. Permanent or long-term conditions. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's disease, a severe stroke, or the terminal stages of a disease.
- E. Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:
1. Restorative surgery after an accident or other injury; or
 2. A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).
- F. Absences attributable to incapacity under B or C of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

IX. LEAVE FOR TREATMENT OF SUBSTANCE ABUSE

- A. Substance abuse may be a serious health condition if the conditions of V, VI, and VII are met. FMLA leave may only be taken for treatment of substance abuse. Absence because of the employee's use of the substance rather than for treatment does not qualify for FMLA leave.
- B. Treatment for substance abuse does not prevent an employer from taking employment action against an employee.
- C. An employee may take FMLA leave to care for a covered family member who is receiving treatment for substance abuse.

X. LEAVE FOR PREGNANCY OR BIRTH (ALSO SEE SECTION IV – LEAVE ENTITLEMENT)

- A. Both parents are entitled to FMLA leave for the birth of their child. Certification requirements are noted in the following subsections.
- B. Both parents are entitled to FMLA leave to be with the healthy newborn child (bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of birth. Under this section, both parents are entitled to FMLA leave even if the newborn child does not have a serious health condition. If neither of the parents or the child has a serious health condition, medical certification is not required. Pregnancy and recovery from childbirth are considered serious health conditions.
- C. Spouses who are eligible for FMLA leave and are employed by the same employer may be limited to a combined total of 12 weeks of leave during the FMLA leave year if leave is taken for the birth of a child or to care for the child after birth, for placement of a child for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition.
- D. The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. Medical certification is required.
- E. A spouse is entitled to FMLA leave if needed to care for their pregnant spouse who is incapacitated, or if needed to care for the spouse during her prenatal care, or if the spouse has a serious health condition following the birth of a child. Medical certification is required.
- F. Both parents are entitled to each take up to 12 weeks of FMLA leave to care for a child with a serious health condition. Medical certification is required.
- G. An employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. The employer's agreement is not required for intermittent leave when the mother or newborn child has a serious health condition.

XI. LEAVE FOR ADOPTION OR FOSTER CARE (ALSO SEE SECTION IV – LEAVE ENTITLEMENT)

- A. Employees may take FMLA leave before the actual placement or adoption of a child if the absence is required for the placement or adoption to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with an attorney, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.
- B. An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement.
- C. Spouses who are employed by the same employer are limited to a combined total of 12 weeks of leave if leave is taken for the adoption or placement of a child.

- D. Each parent is entitled to take up to 12 weeks of FMLA leave to care for an adopted or foster child with a serious health condition.
- E. An employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. The employer's agreement is not required for intermittent leave when the adopted or foster child has a serious health condition.

XII. LEAVE BECAUSE OF A QUALIFYING EXIGENCY

- A. Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent is a covered military member 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, in a foreign country. The active duty orders will generally specify if the member is deployed to a foreign country.
 - 1. *Deployment to a foreign country* means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters.
 - 2. A *call to active duty* refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States.
- B. The employee must 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 supervisor. See Section XXVI for certification requirements.
- C. Qualifying exigencies include:
 - 1. Short Notice Deployment
 - a. To address any issue that arises from the fact that a military member is notified of an impending call or order to covered active duty (in a foreign country) **seven or less calendar days** prior to the date of deployment.
 - b. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty.
 - 2. Military events and related activities
 - a. To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member.
 - b. To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member.
 - 3. Childcare and school activities
 - a. The child must be the military member's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the military member stands in loco parentis, who is either under 18 years of age or older and incapable of self-care at the time FMLA leave is to commence.
 - b. The military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.
 - c. Leave for childcare and school activities can be used:
 - 1) To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status of a military member necessitates a change in the existing childcare arrangement.
 - 2) To provide childcare on an urgent, immediate need basis, but not on a routine, regular, or everyday basis, when the need to provide such care arises from the covered active duty or call to covered active duty status of a military member.

- 3) To enroll in or transfer to a new school or day care facility the child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of a military member.
 - 4) To attend meetings with staff at a school or daycare facility when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of a military member.
4. Financial and legal arrangements
 - a. To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and
 - b. To act as the military member's representative before a federal, state, or local agency for the purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status.
 5. Counseling

To attend counseling provided by someone other than a health care provider for oneself, for the military member, or for the biological, adopted, or foster child, stepchild, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care, at the time FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call to covered active duty status of a military member.
 6. Rest and recuperation
 - a. To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment.
 - b. Eligible employees may take up to 15 days of leave beginning on the date the military member begins each instance of Rest and Recuperation leave.
 - c. A copy of the military member's Rest and Recuperation leave orders, or other documentation issued by the military setting forth the dates of the military member's leave may be required.
 7. Post-deployment activities
 - a. To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status.
 - b. To address issues that arise from the death of a military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services.
 8. Parental care
 - a. For FMLA leave for parental care, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age.
 - 1) A parent who is incapable of self-care requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

- b. The military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.
- c. Parental care leave can be used:
 - 1) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent;
 - 2) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;
 - 3) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and
 - 4) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings.

9. Additional activities

To address other events that arise, provided that the employers and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

XIII. LEAVE TO CARE FOR A COVERED SERVICEMEMBER (MILITARY CAREGIVER LEAVE)

- A. Eligible employees are entitled to FMLA leave to care for a covered servicemember with a serious illness or injury.
- B. *Covered servicemember* means:
 - 1. A current 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.
 - 2. A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. A covered veteran is an individual who was a member of the Armed Forces, including the National Guard or Reserves, and was discharged or released under conditions other than dishonorable at any time during the five year period prior to the first date the employee takes leave to care for the covered veteran.
 - a. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the single 12-month period may extend beyond the five-year period.
 - b. For an individual who was a member of the Armed Forces, including the National Guard or Reserves, and who was discharged or released prior to March 8, 2013, the period between October 28, 2009 and March 8, 2013 shall not count toward the determination of the five-year period for covered veteran status.
- C. *Serious injury or illness* means:
 - 1. In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

2. In the case of a covered veteran, an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran, and is
 - a. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
 - b. A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
 - c. A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
 - d. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.
- D. In order to care for a covered servicemember, the employee must be the spouse, son, daughter, or parent, or next of kin of the covered servicemember.
- E. An eligible employee is entitled to up to a total of 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a single 12-month period.
 1. The single 12-month period begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of the 26 workweeks of leave entitlement is forfeited.
 2. The leave entitlement is on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period.
 3. An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period. However, the employee is entitled to no more than 12 weeks of leave for one or more of the following:
 - a. The birth of a son or daughter of the employee and to care for such son or daughter
 - b. Placement of a son or daughter with the employee for adoption or foster care
 - c. To care for the employee's spouse, son, daughter, or parent with a serious health condition
 - d. Because of the employee's own serious health condition
 - e. Because of a qualifying exigency
- F. Spouses who are eligible for FMLA leave and are both employed by the State are limited to a combined total of 26 workweeks of leave during the single 12-month period described in E above if the leave is taken:
 1. For the birth of the employee's son or daughter or to care for the child after birth
 2. For the placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement
 3. To care for the employee's parent with a serious health condition
 4. To care for a covered servicemember with a serious injury or illness.
- G. The employee must submit a complete and sufficient "Certification for Serious Injury or Illness of Covered Servicemember" form (U.S. Department of Labor [Form WH-385](#)) or Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave (U.S. Department of Labor [Form WH-385-V](#)). See Section XXVII for certification requirements.

XIV. INTERMITTENT OR REDUCED SCHEDULE LEAVE

- A. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.
- B. When leave is taken intermittently or on a reduced leave schedule basis, there must be a medical need for leave, and it must be that the medical need can be best accommodated through intermittent leave or a reduced leave schedule. The treatment regimen and other information described in the medical certification must address the necessity of intermittent or reduced schedule leave.
- C. Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency.
- D. Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to:
 - a. The serious health condition of a covered family member
 - b. The serious health condition of the employee
 - c. The serious injury or illness of a covered servicemember
- E. Intermittent or reduced schedule leave may be taken to provide care or psychological comfort to an immediate family member with a chronic or serious health condition.
- F. Intermittent or reduced schedule leave may be taken for absences where the employee is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.
- G. Intermittent leave may be taken for a serious health condition that requires treatment by a health care provider periodically, rather than one continuous period of time, and may include leave periods from one hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.
- H. If an employee needs intermittent or reduced schedule leave for planned medical treatment, the employee must make a reasonable effort to schedule treatments so as not to disrupt the employer's operations.
- I. If an intermittent or reduced leave schedule is necessary is based on a planned course of medical treatment, the employer may temporarily assign an employee to another position, or alter his or her current position during the period that the leave is required to better accommodate recurring periods of leave. The assignment or alteration to the position cannot result in a loss of pay or benefits for the employee. Assignment of the employee will be in accordance with DAS-HRE rules or applicable collective bargaining agreement. Any reassignment or adjusted schedule will end at the expiration of the FMLA leave entitlement.
- J. When FMLA leave is taken intermittently or on a reduced leave schedule, full-time employees who work 40 hours per week are entitled to 480 hours (12 weeks) of leave in a fiscal year. When leave is taken intermittently or on a reduced leave schedule to care for a covered servicemember with a serious injury or illness, full-time employees who work 40 hours per week are entitled to 1,040 hours (26 weeks) of leave in the 12-month period. There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave provided it is not greater than one hour. The FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.
- K. Hours for part-time employees are prorated based on the average number of hours worked weekly during the previous six months of state employment. For example, if a part-time employee worked an

average of 30 hours in the previous 6 months, he or she would be entitled to a maximum of 360 hours (12 weeks times 30 hours) of FMLA leave in a fiscal year.

- L. If an employee's schedule varies from week to week to the extent that the employer is unable to determine with certainty how many hours the employee would have worked, but for the taking of FMLA leave, a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave will be used for calculating the leave entitlement. Hours for which the employee took any type of leave will be included in this calculation.
- M. When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. The employer's agreement is not required for intermittent leave required when the mother or the newborn child has a serious health condition.
- N. An employee's entitlement to FMLA leave after the birth, adoption, or foster placement of a son or daughter expires 12 months after the date of the birth or placement.

XV. PAID AND UNPAID LEAVE

- A. **FAMILY LEAVE:** An employee taking FMLA leave for the birth, adoption, or foster placement of a son or daughter, or the care of a seriously ill son, daughter, spouse, or parent, is required to exhaust any family (enforced) leave, accrued vacation, personal leave and compensatory leave for any part of the 12-week FMLA period before unpaid leave is granted. Substitution of paid leave may be elected to the extent the circumstances meet the usual requirements for that leave. See H below for SPOC employees. [For central payroll: when paid leave is exhausted, the employee must be placed in leave code 50 (leave without pay).]
- B. **MEDICAL LEAVE:** For the employee's own serious health condition, the employee must exhaust any accrued sick leave, accrued vacation, compensatory leave and personal leave before unpaid leave is granted. See H below for SPOC employees. [For central payroll: when paid leave is exhausted, the employee must be placed in leave code 54 (medical leave without pay). This allows the State's share of life and LTD insurance to be paid automatically.]
- C. **LEAVE FOR THE BIRTH OF A CHILD:** An employee who requests FMLA leave after the birth of a child and who has not received a medical release to return to work must exhaust any accrued sick leave, vacation, compensatory leave and personal leave before unpaid leave is granted. When the employee's physician releases the employee to return to work, the employee is no longer eligible to use paid sick leave; however, the employee may use personal leave or accrued vacation. See H below for SPOC employees.
- D. **QUALIFYING EXIGENCY LEAVE:** An employee taking qualifying exigency leave is required to exhaust any accrued vacation, personal leave, compensatory leave, and family (enforced) leave (if applicable), for any part of the 12-week FMLA period before unpaid leave is granted. Substitution of paid leave may be elected to the extent the circumstances meet the usual requirements for that leave. See H below for SPOC employees. [For central payroll: when paid leave is exhausted, the employee must be placed in leave code 50 (leave without pay).]
- E. **MILITARY CAREGIVER LEAVE:** An employee taking military caregiver leave is required to exhaust any family (enforced) leave, accrued vacation, compensatory leave, and personal leave for any part of the 26-week FMLA period before unpaid leave is granted. Substitution of paid leave may be elected to the extent the circumstances meet the usual requirements for that leave. [For central payroll: when FMLA is exhausted, the employee must be placed in leave code 50 (leave without pay).]

Employees covered by the State Police Officers Council (SPOC) collective bargaining agreement may, but are not required to, substitute accrued paid leave for 12 weeks of the 26-week period. Upon the expiration of the 12 week period, use of appropriate paid leave is required.
- F. **COMPENSATORY LEAVE:** Employees are required to use accrued compensatory leave during periods of FMLA leave. See H below for SPOC employees.
- G. **LEAVE RETENTION:** Non-contract, AFSCME, and UE/IUP employees who are qualified for FMLA leave, including Regents and Community Based Corrections employees who are covered by the

AFSCME collective bargaining agreement, are eligible to elect to retain up to two weeks (80 hours) of accrued annual leave (vacation) once each fiscal year.

- H. SPOC-COVERED EMPLOYEES: Employees covered by the State Police Officers Council (SPOC) collective bargaining agreement may, but are not required to, substitute appropriate accrued paid leave for any part of the twelve (12) week leave period the employee is entitled to under the FMLA as stated in the SPOC Collective Bargaining Agreement.

XVI. PAY AND STATUS CHANGES

An employee's pay will be adjusted for across-the-board increases, and pay grade or pay plan changes that may occur while he or she is on FMLA leave.

XVII. EMPLOYER NOTICES REQUIRED

- A. The employer must post and keep posted the Department of Labor Publication 1420 ([WHD Publication 1420](#)) on its premises in conspicuous places where it can be seen by employees and applicants.
 - 1. Notification of FMLA rights afforded to employees must be given to persons with disabilities in a format that accommodates their disability or disabilities.
 - 2. Future publication of department's employee handbooks must include the notice of employee rights as detailed in [WHD Publication 1420](#).
- B. When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must issue a Notice of Eligibility and Rights & Responsibilities ([CFN 552-0730](#)) to notify the employee of the employee's eligibility to take FMLA leave within five business days. Employee eligibility is determined at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility does not change during the 12-month period.
- C. The employer is responsible in all circumstances for designating leave as FMLA qualifying, and for giving a Designation Notice ([CFN 552-0762](#)) to the employee.
- D. The Designation Notice must be given within five business days after the employer has enough information to determine that the leave is FMLA-qualifying. Only one notice is required for each FMLA-qualifying reason during the leave year. The employer must also give the employee a Designation Notice if it is determined that the leave is not FMLA-qualifying. If the leave is not FMLA-qualifying, the employer must provide a reason for the ineligibility.
 - 1. If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the need for leave, the designation notice may be provided to the employee at that time.
 - 2. If a Return to Work Certification will be required, the employer must provide the employee with a list of the essential functions of the employee's job no later than when the Designation Notice is provided to the employee.
 - 3. If the information provided in the Designation Notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer must provide written notice of the change within five business days of receipt of the employee's first notice of need for leave subsequent to any change.
 - 4. The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the start of the leave, this information must be included in the Designation Notice. If it is not possible to provide this information in the Designation Notice, the employer must provide notice of the amount of FMLA leave used upon request by the employee, but not more often than once in a 30-day period, and only if leave was taken in the period.

- E. Failure to follow notice requirements may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be held liable for compensation and benefits lost by reason of the violation.

XVIII. DESIGNATION OF LEAVE

- A. The employer's decision to designate leave as FMLA must be based only on information received from the employee or the employee's spokesperson (if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc. may provide notice to the employer).
- B. In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further to determine if the leave is FMLA qualifying.
- C. Once the employer has knowledge that leave is FMLA qualifying, a Designation Notice must be provided.
- D. The employer will make an FMLA designation within five business days of receiving sufficient information to make a determination.
- E. FMLA leave will be designated for the employee's own serious health condition that renders the employee unable to work at all or perform any one of the essential functions of his or her job.
- F. FMLA leave will be designated for the birth, adoption, or foster placement of a son or daughter, or to care for a son, daughter, spouse, or parent with a serious health condition.
 - 1. An employee's entitlement to FMLA expires at the end of the 12-month period beginning on the date of the birth or placement for adoption or foster care.
 - 2. The son or daughter must be under 18 years of age, unless incapable of self-care because of a physical or mental disability.
- G. FMLA leave will be designated for leave taken to care for an ill or injured covered servicemember or for leave taken due to a qualifying exigency for a military member.
- H. If the employer has a reasonable basis to know that leave is taken for an FMLA-qualifying reason, the employer will designate the leave as FMLA leave even if the employee does not desire the leave to be designated as such.
- I. An employee may not be required to take more FMLA leave than necessary to address the circumstances that caused the need for leave.
- J. The employer may retroactively designate leave as FMLA leave with appropriate notice to the employee, provided that the employer's failure to designate leave does not cause harm or injury to the employee.
- K. If a holiday occurs during a period of continuous FMLA leave, the holiday will be designated as FMLA leave used. If an employee is using intermittent FMLA leave, the holiday will not be designated as FMLA leave unless the employee was scheduled and expected to work during the holiday.
- L. If an employee would normally be required to work overtime, but is unable to do so because of an FMLA-qualifying reason that limits the employee's ability to work overtime, the hours that the employee would have been required to work may be counted against the employee's FMLA entitlement. Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

XIX. EMPLOYEE NOTICES REQUIRED

- A. When an employee provides initial notification of the need for an absence, the employee must explain the reasons for the needed leave so as to allow the employer to determine whether the leave is FMLA qualifying. The employee merely stating that he or she is sick is not enough to trigger the FMLA. If the employee fails to explain the reasons, leave may be denied. Employees also must inform the employer if the requested leave is for a reason for which leave was previously taken or certified.

- B. An employee must provide the employer with at least 30 calendar days notice of his or her need to take foreseeable FMLA leave (i.e., birth of a child, adoption of a child, planned medical treatment). For foreseeable leave due to a qualifying exigency, notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. In cases where the employee is required to provide at least a 30-day notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.
- C. When the need for FMLA leave is unforeseeable, the employee must provide notice as soon as practicable, either orally or in writing. The employee must also comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.
As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for leave less than 30 days in advance, it should be practicable for the employee to provide notice either the same day or the next business day. Untimely requests or failure to provide mandatory information to the employer may result in delay or denial of the FMLA leave.
- D. When an employee seeks leave due to an FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave.
- E. When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries may result in denial of FMLA protection.
- F. When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider.
- G. When the employee is unable to provide notice because of his or her illness or injury, notice may be given by a family member or a spokesperson as soon as practicable.

XX. CERTIFICATION OF A SERIOUS HEALTH CONDITION

- A. The employee, family member, or spokesperson must complete a "State of Iowa Family and Medical Leave Act (FMLA) Application" ([CFN 552-0599](#)) form and submit it to his or her supervisor. If the employer has reason to know that the employee qualifies for FMLA leave, then FMLA applies whether the employee has submitted the application or not.
- B. If requested, the employee must provide medical certification to support the FMLA leave. ***An employee can be disciplined for failing to return the appropriate medical certification. If the employer requests medical certification for an absence, the employer must also advise the employee of the anticipated consequences of an employee's failure to provide adequate certification. Medical certification shall be obtained and returned to the employer within 15 calendar days of the request or upon return to work from an absence that may qualify as FMLA leave (absent extenuating circumstances). It is the employee's responsibility to pay the fee for completion of the medical certification and travel costs (if applicable).*** If second or third opinions are required, the employer is responsible for the costs.
- C. When leave is for the employee's serious health condition, the health care provider must complete the "Certification of Health Care Provider for Employee's Serious Health Condition" ([CFN 552-0755](#)) to satisfy the certification requirement. If the employee qualifies for workers' compensation benefits, his or her medical documentation will be accepted for FMLA purposes.
- D. When leave is for a family member's serious health condition, the health care provider must complete the Certification of Health Care Provider for Family Member's Serious Health Condition (U.S. Department of Labor [Form WH-380-F](#)). Medical confirmation is required, except in the case of birth, adoption, or foster placement.

- E. When leave is for a covered servicemember's serious health condition, the health care provider must complete the Certification for Serious Illness or Injury of Covered Servicemember (U.S. Department of Labor [Form WH-385](#)). See Sections XIII and XXVII.
- F. When leave is for a covered veteran, the health care provider must complete the Certification for Serious Illness or Injury of a Veteran for Military Caregiver Leave (U.S. Department of Labor [Form WH-385-V](#)). See Section XXVII.
- G. If a workers' compensation absence meets the definition of a serious health condition (see Section VI), FMLA will be designated. A Certification of Serious Health Condition is not required. See Section XXXI for workers' compensation information.

XXI. AUTHENTICATION AND CLARIFICATION OF CERTIFICATIONS

- A. At the time the employer requests certification, the employer must also advise the employee of the anticipated consequences of an employee's failure to provide adequate certification, which could include delay, denial, designation without certification, or discipline. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.
- B. If an employee submits a complete and sufficient certification signed by a health care provider, the employer may not request additional information from the employee's health care provider regarding the certification.
- C. If the certification is incomplete or insufficient, the employer shall advise the employee and state in writing what information is necessary to make the certification complete and sufficient. The employer must allow the employee seven calendar days to cure any deficiency. If the deficiencies are not cured, FMLA leave may be denied. A certification that is not returned is not considered incomplete or insufficient, but constitutes a failure to provide certification. This provision applies whether it is the initial certification, a recertification, a second or third opinion, or a return to work certification, including any clarifications necessary.
- D. The employer may contact the health care provider directly for purposes of clarification and authentication of the medical certification after the employer has given the employee the opportunity to cure any deficiencies. The employee's consent to this contact is not required. The employer contact must be made by a health care provider, human resources professional, a leave administrator, or a management official. **Under no circumstances may the employee's direct supervisor contact the employee's health care provider.**
- E. If the health care provider requires a HIPAA release, the employee is responsible for providing such a release. If the employee fails to provide the release, and the employer cannot obtain clarification, FMLA leave will be denied.
- F. If an employee is on FMLA leave that is running concurrently with a workers' compensation absence, the employer may contact the workers' compensation provider directly for the purpose of clarifying or checking the authenticity of a medical certification.

XXII. SECOND AND THIRD OPINIONS

- A. An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense (including travel). The employee must submit the claim to his or her health insurance carrier for payment; the employer is responsible for the remaining dollar amount, if any. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. Pending receipt of the second medical opinion, the employee is provisionally entitled to FMLA leave.
- B. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain a third medical opinion at the employer's expense. The third opinion shall be final and binding. The health care provider selected for a third medical opinion must be acceptable to both the employee and employer. Upon request, the employee shall be

provided with a copy of the second and third medical opinions, where applicable, within five business days.

XXIII. RECERTIFICATION OF MEDICAL CONDITIONS

- A. An employer may request recertification no more often than every 30 calendar days and only in connection with an absence by the employee, unless B or C below apply.
- B. If the medical certification indicates that the minimum duration of the condition is more than 30 calendar days, the employer may not request recertification until that minimum duration has passed unless:
 - 1. The employee requests an extension of leave; or
 - 2. Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, or frequency of absences, the nature or severity of the illness, complications); or
 - 3. The employer receives information that casts doubt upon the continuing validity of the certification.
- C. The employer may request recertification in less than 30 calendar days if:
 - 1. The employee requests an extension of leave; or
 - 2. Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, or frequency of absences, the nature or severity of the illness, complications); or
 - 3. The employer receives information that casts doubt upon the continuing validity of the certification.
- D. As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.
 - 1. The employee must provide the requested recertification to the employer within 15 calendar days after the employer's request unless it is not practicable under the particular circumstances. Any recertification shall be at the employee's expense.
 - 2. No second or third opinion may be required following a recertification.
- E. Recertification does not apply to leave taken for a qualifying exigency.

XXIV. NEW CERTIFICATION OF ONGOING MEDICAL CONDITIONS

Where the employee's need for leave lasts beyond a single leave year, the employee must provide a new medical certification in each subsequent leave year. Such certifications are subject to the provisions for authentication and clarification, including second and third opinions.

XXV. RETURN TO WORK CERTIFICATION

When the leave involves the employee's own serious health condition, the employer may require a Return to Work Certification Form ([CFN 552-0731](#)) from the employee's health care provider as evidence that the employee is able to perform the essential functions of his or her position. The employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, the employer must provide the employee with a list of the essential functions of the employee's job no later than when the Designation Notice is provided to the employee. The employer may contact the employee's health care provider for purposes of clarifying and authenticating the Return to Work Certification. The employee is required to pay for any costs associated with the release including travel. Failure to provide a Return to Work Certification may result in discipline up to and including discharge.

XXVI. CERTIFICATION FOR QUALIFYING EXIGENCY

- A. An employee requesting qualifying exigency leave must submit a complete and sufficient “Certification of Qualifying Exigency for Military Family Leave” (U.S. Department of Labor [Form WH-384](#)) form.
- B. The first time an employee requests leave because of a qualifying exigency, the employee must provide a copy of the military member’s active duty orders or other documentation issued by the military. This documentation must include the dates of the military member’s active duty service. This information need only be provided to the employer once.
- C. A copy of new active duty orders or other documentation issued by the military shall be provided to the employer 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 military member.
- D. Leave for any qualifying exigency must be supported by a certification from the employee that sets forth the following information:
 1. A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which leave is requested, and any available written documentation which supports the request for leave. For example, a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs.
 2. The approximate date on which the qualifying exigency leave commenced or will commence.
 3. The beginning and end dates for leave requested for a single, continuous period of time.
 4. An estimate of the frequency and duration of the qualifying exigency if leave is requested on an intermittent or reduced schedule basis.
 5. If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting, including a brief description of the purpose of the meeting.
 6. No recertification may be requested for qualifying exigency leave.

XXVII. CERTIFICATION FOR MILITARY CAREGIVER LEAVE

- A. An employee requesting leave to care for a covered servicemember must submit a complete and sufficient “Certification for Serious Injury or Illness of Covered Servicemember” (U.S. Department of Labor [Form WH-385](#)) or “Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave” (U.S. Department of Labor [Form WH-385-V](#)).
 1. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete the certification:
 - a. A United States Department of Defense (DOD) health care provider;
 - b. A United States Department of Veterans Affairs (VA) health care provider
 - c. A DOD TRICARE network authorized private health care provider; or
 - d. A DOD non-network TRICARE authorized private health care provider; or
 - e. Any health care provider that is authorized to certify a serious health condition.
 2. If the authorized health care provider is unable to make military-related determinations, the health care provider may rely on determinations from an authorized DOD representative (such as a DOD Recovery Care Coordinator) or an authorized VA representative.
 - a. Certification for a current member of the Armed Forces must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember’s office, grade, rank, or rating, and whether the member is receiving medical treatment, recuperation, or therapy.
 - b. Certification for a covered veteran must include:

- 1) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is the continuation of an injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating; or
 - 2) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
 - 3) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
 - 4) Documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.
3. The certification must contain information sufficient to establish that the covered servicemember is in need of care.
 - a. If leave is continuous, the certification must include an estimate of the beginning and ending dates for the leave.
 - b. If leave is intermittent, the certification must include the frequency and duration of the periodic care.
 4. If the covered servicemember is a veteran, the employer may require the employee to provide documentation issued by the military, which indicates that the covered servicemember is a veteran, the date of separation, and that the separation is other than dishonorable. Where an employer requires such documentation, an employee may provide a copy of the veteran's Certificate of Release or Discharge from Active Duty issued by the U.S. Department of Defense (Form DD-214) or other proof of veteran status.
 5. No information beyond that required on the certification may be required.
 6. The employer may seek authentication and/or clarification of the certification.
 - a. Second and third opinions may not be requested when the certification has been completed by a health care provider other than:
 - 1) A United States Department of Defense (DOD) health care provider;
 - 2) A United States Department of Veterans Affairs (VA) health care provider;
 - 3) A DOD TRICARE network authorized private health care provider; or
 - 4) A DOD non-network TRICARE authorized private health care provider.
 - b. Second and third opinions may be requested when the certification has been completed by any health care provider other than those listed in 6 a. above.
 - c. Recertifications are not permitted for leave to care for a covered servicemember.
 7. The employee may be required to provide confirmation of family relationship to the seriously injured or ill servicemember.
 8. The employer must accept, in lieu of the certification form, "invitational travel orders" ("ITOs") or "invitational travel authorizations" ("ITAs") issued to any family member to join an ill or injured servicemember regardless of whether the employee is named in the order or authorization. No additional certification may be required for the duration of time specified in the ITO or ITA.
 - a. If leave is needed beyond the expiration date in an ITO or ITA, the employer may request a Certification of Serious Injury or Illness of a Covered Servicemember.

- b. The employer may seek authentication and clarification of the ITO or ITA. The second or third opinion process or recertification process may not be used during the period of time specified by the ITO or ITA.
 - c. The employer may require the employee to provide confirmation of covered family relationship when the leave request is supported by an ITO or ITA.
- 9. The employer must accept as sufficient certification documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family caregivers. Such documentation is sufficient certification of the servicemember's serious injury or illness to support the employee's request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation.
 - a. An employer may seek authentication and clarification of the documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.
 - b. Second or third opinions or recertifications may not be requested when the servicemember's serious injury or illness is shown by documentation of enrollment in this program.
 - c. An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember when an employee's request for FMLA leave is supported by a copy of such enrollment documentation.
 - d. The employee may be required to provide documentation, such as a veteran's Form DD-214, showing that the discharge was other than dishonorable and the date of the veteran's discharge.
- 10. When medical certification is requested by an employer, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents.
- 11. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification. Failure to do so may result in the denial of FMLA leave.
- 12. The employee may be required to report periodically on the employee's status and intent to return to work.

XXVIII. RETURNING FROM LEAVE

- A. Upon returning from FMLA leave, an employee is entitled to the same position, or an "equivalent position." An equivalent position is 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.
 - 1. If a layoff occurs while the employee is on leave, the employee's right to a position shall be established in accordance with the DAS-HRE Rules Chapter 11, the applicable collective bargaining agreement, or the applicable Regents Institution's policies.
 - 2. The employee's pay increase eligibility date shall be adjusted for unpaid absences of more than 30 calendar days.
 - 3. The FMLA does not prohibit an employer from accommodating, consistent with the Americans with Disabilities Act, an employee's request to be restored to a different shift, schedule, position, or location, which better suits the employee's personal needs on return from leave. However, accommodating an employee in this manner must also be in compliance with any applicable collective bargaining agreement.
- B. If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. The employer's obligations may be governed by the Americans with Disabilities Act (ADA).

- C. An employee may be placed in a position in the same class, and must be reinstated to the same or a geographically proximate work site (i.e., one that does not involve significant increase in commuting time or distance) from where the employee had previously been employed when he or she returns from FMLA leave.
- D. Upon returning from FMLA leave, an employee is entitled to no more rights or benefits than he or she would have received had the leave not been taken.
- E. An employee must work at least 30 calendar days after his or her return to be considered “returned” to work.
- F. If the employee does not return to work because of the serious health condition of the employee or family member, the employer will require written certification from the health care provider. If the employee fails to respond within 30 calendar days, the employer may recover the State’s share of health and dental plan premiums paid during periods of unpaid leave greater than 30 days.
- G. If the employee does not return to work and the reason for not returning to work is not due to either:
 - a. The employee’s serious health condition, or
 - b. Circumstances beyond the employee’s control,
 the employer may recover the State’s share of health and dental plan premiums paid for the employee during periods of unpaid leave greater than 30 days.
- H. If the employee does not or cannot return to work because of the employee’s serious health condition, the employer will discuss the possibility of applying for long-term disability insurance (LTD) benefits with the employee.
- I. The employer may request periodic updates from the employee concerning the employee’s status, and the date he or she intends to return to work. Requests for periodic updates will be made no more often than necessary depending on the facts and circumstances of each case. The employer must take into account all of the relevant facts and circumstances related to the employee’s leave situation.
- J. If an employee is unable to return from FMLA leave on the expected date and FMLA leave has not been exhausted, the employee shall contact his or her supervisor about an extension. If FMLA leave has been exhausted, published leave procedures will apply.

XXIX. RECORDKEEPING

- A. The employer must keep, for at least three years, records pertaining to compliance with the FMLA. Upon request, records will be provided to the Department of Labor (DOL) by the Iowa Department of Administrative Services – Human Resources Enterprise.
- B. Records kept in accordance with the FMLA must disclose the following:
 - 1. basic payroll and identifying employee data; and
 - 2. dates FMLA leave is taken by employees; and
 - 3. if FMLA leave is taken in increments of less than one full day, the hours of the leave; and
 - 4. copies of employee notices of FMLA leave furnished to the employer, and copies of all general and specific notices given to employees; and
 - 5. records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer and employee of the reasons for the designation and for the disagreement.
- C. Records and documents relating to medical certifications, recertifications, or medical histories must be treated as confidential and maintained in the employee’s confidential medical files. Supervisors, managers, first aid, and safety personnel may be provided relevant information on a need-to-know basis.

XXX. AMERICANS WITH DISABILITIES ACT

- A. The ADA and the FMLA provide substantially different protection, but have important areas of overlap. The FMLA does not amend the ADA, but it does affect the rights and protection provided by the ADA. In some ways, the FMLA is broader than the ADA in its protection; in other ways, it is more limited.
- B. The ADA and the FMLA differ with respect to coverage of employees. To be protected under the ADA, an individual:
 - 1. can be either an “applicant” or “employee;” and
 - 2. must be “qualified;” and
 - 3. must have a “disability;” or
 - 4. have a history of “disability;” or
 - 5. be perceived as having a “disability;” or
 - 6. working on behalf of someone with a “disability.”

In addition, the ADA covers employees regardless of how long or how much they have worked. By contrast, the FMLA does not apply to applicants, and it protects employees who have been employed for at least 12 months and who have worked at least 1,250 hours during that 12-month period. The FMLA does not require that employees be “qualified,” or that they have a “disability.” Rather, the FMLA requires that employees have a “serious health condition.”

- C. The ADA and the FMLA also differ with regard to the actual protections provided to employees. These protections may be broken down into two categories: (1) medical leave and (2) family leave.
 - 1. **Medical Leave for Employees.** The ADA prohibits an employer from discriminating against a qualified applicant or employee with a disability. *Disability*, under the ADA, means that the individual has a physical or mental impairment that substantially limits a major life activity; has a record of such an impairment; or is regarded as having such an impairment.
 - a. Under the ADA, employers are required to provide reasonable accommodations for known disabilities, such as making facilities accessible and providing unpaid leave, as well as making any number of modifications to the actual job. However, an employer is not required to make accommodations that create an “undue hardship.”
 - b. The FMLA requires only that an employer provide up to 12 weeks of leave for an employee who has a “serious health condition” that makes the employee unable to perform the functions of his or her position. *Unable to perform the functions of the position* means that the employee is “unable to work at all or is unable to perform any one of the essential functions of the employees position” within the meaning of the ADA. Unlike the ADA, the FMLA does not have an “undue hardship” defense to the employer who fails to provide the required leave.
 - c. The employer must carefully consider its responsibilities under the ADA and FMLA and understand how they relate. The differences between the ADA’s and FMLA’s definitions and substantive requirements have important practical consequences. They are:
 - 1) The definition of *disability* under the ADA clearly differs from the definition of a *serious health condition* under the FMLA. Therefore, the employee may be protected under one statute and not the other. For example, an employee with a mild hernia requiring an operation involving inpatient care would be protected under the FMLA but not the ADA because this condition would not appear to qualify as a disability under the ADA.
 - 2) The nature and extent of protection differs under the ADA and FMLA. If the employee has an ADA-defined *disability*, the ADA may provide greater protection than the FMLA. An employee with a disability may be entitled to 12 weeks of leave under the FMLA and additional “reasonable accommodation” under the ADA. For example, suppose an employee develops cancer and undergoes debilitating surgery and therapy. The employee would presumably be entitled to 12 weeks leave under the FMLA. If the employee has a “disability” under the ADA, the employer must provide a reasonable accommodation. If the employee requires a modified leave schedule or additional leave

beyond that which was provided under the FMLA, the employer must provide this accommodation unless it would impose an “undue hardship” on the employer. The employer, however, can factor into the “undue hardship” determination the fact that the employee was previously provided 12 weeks of FMLA leave.

- 3) The ADA may also give greater protection in terms of the actual position held open for the employee. Under the FMLA, an employer is required to place an employee returning from a 12-week leave in the job he or she held or in “an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.” The employer does not have to establish an “undue hardship” in order to assign an employee to an equivalent position. Therefore, the employee may have stronger return rights under the ADA.
 - 4) There is a difference in how the employer may request medical certification between the ADA and FMLA. Under the ADA, the employer may ask employees disability-related questions or require employee medical examinations only if they are “job-related” and “consistent with business necessity.” However, under the FMLA, an employer may require certain medical documentation before an employer will designate an absence as FMLA leave. This documentation is the only medical information the employer may access with exception of a second or third opinion.
2. **Family Leave for Employees.** The ADA prohibits employers from discriminating against qualified individuals because they have a relationship with someone who has a disability. However, the ADA specifically restricts an employer’s obligation to provide reasonable accommodations to the “known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee.” Therefore, the ADA does not require an employer to provide a reasonable accommodation to an applicant or employee without a disability simply because that person has a relationship with someone with a disability. On the other hand, the FMLA imposes an affirmative obligation on employers with respect to an employee without a disability who must care for a spouse, son, daughter, or parent who has a serious health condition. Specifically, the FMLA requires an employer to allow an employee without a disability to take up to 12 weeks of leave so that the employee can care for a sick family member. Therefore, with respect to family leave, the FMLA provides employees protection not provided under the ADA.

XXXI. WORKERS’ COMPENSATION

- A. FMLA leave runs concurrently with a workers’ compensation absence. In this instance, under the State’s workers’ compensation program, employees are not required to supplement workers’ compensation benefits with paid leave.
- B. Under the FMLA, an employer may offer restricted duty. However, it cannot compel or take any detrimental action if the employee declines restricted duty while the employee is on FMLA leave. Under the State’s workers’ compensation program, an employee who is offered and refuses restricted (light) duty may lose his or her workers’ compensation benefits.
- C. Employees on workers’ compensation who are on FMLA leave concurrently and are unable to return to work after the exhaustion of FMLA leave are subject to state workers’ compensation laws and will have no job restoration rights under FMLA.

XXXII. HEALTH, DENTAL, LIFE, AND LONG-TERM DISABILITY (LTD) INSURANCE

- A. The State of Iowa is required to maintain an employee’s health insurance coverage during periods of FMLA leave by paying the State’s share of the insurance premium. The employee must continue to pay his or her share, if any.
- B. The State of Iowa will maintain an employee’s dental, basic life and LTD insurance during periods of FMLA leave. (See section XV, Paid and Unpaid Leave, for leave code and state premium information.) An employee is responsible for paying any supplemental life insurance premiums due during unpaid FMLA leave. If an employee does not pay the supplemental life premiums, and he or she passes away, only the basic amount of life insurance will be paid to the beneficiary.

- C. When approved for FMLA leave, the State's share of applicable insurance premiums will begin the first of the month in which FMLA leave begins.
- D. If an employee is on paid FMLA leave, his or her share of the health, dental and supplemental life insurance premiums will be deducted and no billing adjustments will be necessary. If an employee is in unpaid status, the personnel assistant will need to obtain the employee's share of health, dental and supplemental life insurance premiums, and make the necessary billing adjustments to ensure payment of the State's share of premiums. The date FMLA leave began and the last date the employee was in pay status must be included on the "State Share Transfer" (CFN 552-0335) form. The State's share will be paid through the end of the month in which FMLA leave ends.
- E. If an employee does not pay his or her share of the health or dental insurance premium and the insurance payment is 30 calendar days past due, the employee's coverage and claim payments will be canceled retroactively to the first day of the month in which the premium was not paid. **The employer must provide notice to the employee 15 calendar days prior to any retroactive cancellation of insurance coverage.**
- F. Upon return from FMLA leave, employees who have dropped or canceled their health, dental or supplemental life insurance while on FMLA leave will have coverage reinstated in accordance with the IRS Cafeteria Plan rules. If the employee's absence is less than one year, insurance coverage will be effective the first of the month following the employee's return to work. If the employee's absence is one year or more, see the appropriate collective bargaining agreement or DAS Administrative Rules.
- G. During the annual enrollment and change period, employees on FMLA leave must be provided notice of the opportunity to make changes to benefit elections. If an employee on FMLA leave elects to make any changes during this period, the changes must be completed by the end of the published enrollment and change period.
- H. When taking FMLA leave, an employee must use paid leave in an amount equal to his or her regularly scheduled hours of work. Altering an employee's work schedule for the purpose of extending his or her benefits is not permitted.

XXXIII. DEFERRED COMPENSATION

- A. While on FMLA leave, an employee remains a participant in the deferred compensation program.
- B. Deferrals are made while an employee is on paid leave, but are not made if he or she is on unpaid leave. If an employee wants to stop deferrals while on paid leave, an RIC Account Form (CFN 552-0317) must be completed and submitted to the personnel assistant.
- C. If deferrals are stopped because an RIC Account Form was completed or an employee went on unpaid leave, an employee must complete a new RIC Account Form to restore deferrals upon returning to work. Published enrollment and change policies and procedures will apply.
- D. The deferred compensation information system will automatically zero out deductions for an employee in an unpaid leave status code.

XXXIV. FLEXIBLE SPENDING ACCOUNTS (FSA)

- A. Dependent Care FSA:
 - 1. An employee on paid or unpaid FMLA leave who is capable of self-care must immediately stop deductions by completing the Flexible Spending Account Change Form and submitting it to the personnel assistant. Employees who are capable of self-care are not eligible to participate in the dependent care FSA while on leave.
 - 2. Within 30 days of return to work, an employee may elect to be reinstated in the plan by completing the Flexible Spending Account Change Form and submitting it to the personnel assistant.
- B. Health Care FSA:
 - 1. An employee on paid or unpaid FMLA leave may elect to cancel or to continue participation in the health care FSA. Employees on unpaid FMLA leave who wish to continue health care FSA

coverage must make arrangements prior to the commencement of the leave to pay for the coverage. Employees whose coverage terminates while on FMLA leave are not entitled to receive reimbursements for services incurred during the period when the coverage is terminated.

2. Within 30 days of return to work, an employee may elect to be reinstated in the plan by completing the Flexible Spending Account Change Form and submitting it to the personnel assistant. If an employee elects to be reinstated in the Health FSA upon return from leave for the remainder of the plan year, the employee may not retroactively elect Health FSA coverage for services incurred during the period when the coverage was terminated.

XXXV. DEFINITIONS

Adoption means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child is not a factor in determining eligibility for FMLA leave.

Business day means the part of a day during which most state offices are operating, usually from 8:00 a.m. to 4:30 p.m., Monday through Friday.

Continuing treatment by a health care provider means any of the following:

1. **Incapacity and treatment.** Incapacity of more than three consecutive, full, calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:
 - a. Treatment two or more times by a health care provider within the first 30 days of incapacity, unless extenuating circumstances exist, or
 - b. Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

Treatment by a health care provider means an in-person visit to a health care provider. The first visit must take place within seven days of the first day of incapacity.

Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.
2. **Pregnancy or prenatal care.** Any period of incapacity due to pregnancy, or for prenatal care.
3. **Chronic conditions.** A chronic serious health condition is one which:
 - a. Requires **periodic visits** (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
 - b. Continues over an **extended period of time** (including recurring episodes of a single underlying condition); and
 - c. May cause **episodic** rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).
4. **Permanent or long-term conditions.** A period of incapacity, which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.
5. **Conditions requiring multiple treatments (non-chronic conditions).** Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for **restorative surgery** after an accident or other injury, or for a condition **that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment**, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

Covered active duty means duty of a member of the Armed Forces, including a member of the National Guard or Reserves, during deployment to a foreign country.

Covered active duty or call to covered active duty status means:

1. In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and
2. In the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to Section 688 of Title 10 of the United States Code, Sections 12301(a), 12304, 12305, and 12406 of Title 10 of the United States Code, and chapter 15 of Title 10 of the United States Code.

Covered servicemember means:

1. A current 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
2. A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.

Employer means the State of Iowa through the Department of Administrative Services – Human Resources Enterprise (DAS-HRE). When applicable, it also means an appointed or elected chief administrative head of a department, commission, board, independent agency, or statutory office or that person's designee.

Essential functions means those job functions that an individual must be able to perform in order to hold a position. Essential functions focus on what must be done and not on how it is accomplished.

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

Foster Care means 24-hour care for children in substitution for, and away from, their parents, or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves the agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

Health Care Provider means:

1. A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices; or
2. Any other person determined by the Department of Labor (DOL) to be capable of providing health care services. Others "capable of providing health care services" include only:
 - podiatrists
 - dentists
 - clinical psychologists
 - optometrists
 - chiropractors (limited to treatment consisting of manual manipulation of the spine to correct subluxation as demonstrated by x-ray to exist)
 - nurse practitioners
 - nurse midwives
 - clinical social workers

- physician assistants
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts
- any health care provider from which the State's health insurance plans will accept certification that a serious health condition exists
- a health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using a telephone and directory, using a post office, etc.

Incapacity means the inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with such inpatient care.

Intermittent Leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of several months, such as for chemotherapy.

Invitational Travel Authorization (ITA) or Invitational Travel Order (ITO) are orders issued by the Armed forces to a family member to join an injured or ill servicemember at his or her bedside.

Leave Year means the State of Iowa's fiscal year, July 1 to June 30.

Medically Necessary means that there must be a medical need for the leave (as distinguished from voluntary treatments and procedures), and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule.

Military Caregiver Leave means leave taken to care for a covered servicemember with a serious injury or illness.

Military member for purposes of qualifying exigency leave means the employee's spouse, son, daughter, or parent who is on covered active duty or call to active duty status in a foreign country.

Needed to care for a family member or covered servicemember means both physical and psychological care. It includes situations where, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance, which would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care. The term also includes situations where an employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember

has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin.

Outpatient Status means, with respect to a covered servicemember who is a current member of the Armed Forces, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to an employee when the employee was a son or daughter as defined below. Persons in loco parentis include persons with day-to-day responsibilities to care for and/or financially support a child, regardless of whether the person has a legal or biological relationship to the child. This term does not include parents "in-law."

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents "in-law."

Physical or Mental Disability means a physical or mental impairment that substantially limits one or more major life activities of an individual. The American with Disabilities Act, Title 42 United States Code section 12101 et seq., as amended, defines the terms.

Qualifying Exigency Leave means leave taken by an eligible employee while a covered member of the Armed Forces, including the National Guard or Reserve, is on active duty or call to active duty status in a foreign country for one or more of the qualifying exigencies.

1. Short-notice deployment
2. Military events and related activities
3. Childcare and school activities
4. Financial and legal arrangements
5. Counseling
6. Rest and recuperation
7. Post-deployment activities
8. Additional activities

Reduced Leave Schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Reserve Components of the Armed Forces, for purposes of qualifying exigency leave, include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation.

Serious Health Condition means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions, provided all other

conditions are met. Mental illness or allergies may be serious health conditions, but only if all other conditions are met.

Serious injury or illness means

1. In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and
2. In the case of a covered veteran, an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran, and is
 - a. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
 - b. A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
 - c. A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
 - d. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Son or daughter means a biological, adopted or foster child, a stepchild, legal ward, or a child of a person standing in loco parentis, who is either under the age of 18, or age 18 or older and "incapable of self-care because of a mental or physical disability," at the time FMLA leave is to commence.

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the servicemember stood in loco parentis, and who is of any age.

Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

Spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state in which the marriage was entered into. Marriages entered into outside of any state are valid if the marriage is valid in the place where entered into and could have been entered into in at least one State. The term, "spouse," includes same-sex and common law marriage, but does not include domestic partners.

TRICARE is the health care program serving active duty servicemembers, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

Unable to perform the functions of the position means the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended. An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

USERRA is the Uniformed Services Employment and Reemployment Rights Act, [38 U.S.C. 4301](#).