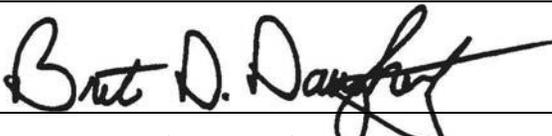




Department Policy No. HR-222-10

Subject:	Family and Medical Leave Act (FMLA)
Former Number:	Policy No. HR-222-10, Procedure No. HR-222a-10
Authorizing Source:	29 U.S.C. § 2601 et seq. 29 CFR 825 Revised Code of Washington (RCW) 49.78 Washington Administrative Code 357-31 Collective Bargaining Agreement by and between the State of Washington and the WPEA (Article 13) Collective Bargaining Agreement by and between the State of Washington and the WFSE (Article 15)
Information Contact:	Human Resource Director Building #33 (253) 512-7941
Effective Date:	May 1, 2010
Mandatory Review Date:	September 8, 2021
Revised:	September 8, 2017
Approved By:	 Bret D. Daugherty, Major General The Adjutant General Washington Military Department Director

Purpose

To provide family and medical leave guidance under the federal Family and Medical Leave Act (FMLA) of 1993, and any other related leave entitlements under state law, Washington Military Department (WMD) policy and collective bargaining agreements.

The FMLA allows an eligible employee up to 12 weeks of paid or unpaid leave in a 12-month period for listed reasons. The 2008 FMLA Amendments allow the 12-week FMLA entitlement to also be used for exigency leave for family members of military personnel relating to certain military duty. Those amendments include leave of up to 26 weeks in a single 12-month period for eligible employees to care for a covered service member injured in the line of duty.

Scope

This policy applies to all state employees within the WMD. It does not apply to National Guard personnel on state active duty or to federal personnel including Active Guard Reserve (AGR), traditional guard personnel in a federal Military Status, or Military Technicians.

Union Represented Employees – refer to the applicable provisions of the Collective Bargaining Agreement (CBA); if not specified in the CBA, the FMLA guidance in this policy applies.

Policy

The WMD recognizes the need to balance workplace demands and family needs, promote the stability and economic security of family, and promote national interests in preserving family integrity. The WMD will comply with applicable Washington Administrative Codes (WACs), federal laws, and collective bargaining agreements regarding family medical leave in making leave decisions for employees with qualifying conditions.

A. General Provisions

1. Leave Entitlement. FMLA entitles an eligible employee to take up to 12 weeks of paid or unpaid, job-protected leave in any 12-month period for specific family and medical reasons. FMLA leave may be used for one or more of the following reasons:
 - a. The birth and care of an employee's newborn child.
 - b. The placement for adoption or foster care of a child with the eligible employee and care for that child. Entitlement to FMLA leave for the care of a newborn child or newly adopted or foster child ends 12 months from the date of birth or placement of the foster or adopted child.
 - c. To care for an employee's spouse, parent or child (child must be under the age of 18 or over 18 and incapable of self-care due to a disability) with a serious health condition.
 - d. Due to the employee's own serious health condition.
 - e. Due to a qualifying exigency arising from the fact that spouse, child of any age, or parent of an eligible employee is on active duty or has been notified of pending call to active duty in the Armed Forces in support of a contingency operation.

This leave applies only to family members of the Reserves, National Guard and certain retired members of the Regular Armed Forces and Retired Reserves. Exigency leave does not apply to leave for family members of those in the regular Armed Forces on active duty.

Exigency leave may be taken for one or more of the following reasons and as

defined in the FMLA regulations:

- 1) Short-notice deployment – notified 7 days or less before deployment. Leave for this purpose can be used for up to 7 days.
 - 2) Military events and related activities. To attend official ceremonies or events related to active duty; to attend family support assistance programs, briefings, etc.
 - 3) Childcare and school activities.
 - 4) Financial and legal arrangements.
 - 5) Counseling.
 - 6) Rest and Recuperation (R&R). This is to spend time with covered military members. Eligible employees can take up to 5 days for each instance of R&R.
 - 7) Post-deployment activities.
 - 8) Additional activities. This includes anything that the employer and employee agree upon relating to the exigency.
- f. WMD will grant an eligible employee who is the spouse, child, parent of a child of any age, or next of kin of a covered service member up to 26 weeks of service member caregiver leave in a single 12-month period to care for the service member.

During the single 12-month period, an eligible employee is limited to a combined total of 24 weeks of leave for service member caregiver leave and FMLA leave for other qualifying reasons.

Caregiver leave applies to care for current members (or those on temporary disability) of the Armed Forces, National Guard or Reserves. It is not available to care for former members of the Armed Forces, National Guard or Reserves and members on the permanent disability list.

B. Eligibility

To be eligible for FMLA, an employee must meet all of the following conditions:

1. Have worked for the WMD or another Washington state agency or institution of higher education for at least 12 months (need not be consecutive) prior to the commencement of leave.
2. Have worked at least 1,250 hours during the 12 months immediately preceding the request for FMLA. Paid time off such as vacation leave, sick leave, personal holidays, exchange time, compensatory time off, or shared leave does not count.

3. Have worked at a work site which employs at least 50 employees within a 75-mile radius.

C. Health Care Provider Certification

1. Employees may be required to provide a health care provider certification of the need for leave due to a personal or family member's serious health condition. Where required, employees must complete a "[Certification of Health Care Provider](#)", and return it within 15 days to the Human Resources Office or provide a reasonable explanation of the delay. Failure to provide the requested certification may result in the denial of continuation of leave. All applicable information should be included.
2. Certification will normally be required for any request for military exigency leave.
3. If the WMD has questions regarding the initial medical certification they may, with a release from the employee, contact the employee's health care professional to clarify the original certificate. The WMD Human Resources Office or other authorized WMD staff may also contact the employee's health care professional to authenticate the certificate.

D. Employee Request for Leave and Employer Designation

1. FMLA designation is the responsibility of the WMD. Upon receipt of an employee's FMLA qualifying reason leave request, the WMD will normally determine eligibility and notify the employee of their rights and responsibilities within five business days, absent extenuating circumstances. The WMD may request appropriate certification to support the request for leave, including military exigency leave. After receipt of complete and sufficient information to allow the WMD to determine that the leave is FMLA qualifying, the WMD will notify the employee within five business days, absent extenuating circumstances, that the leave is being designated as FMLA leave. FMLA leave can also be designated retroactively if:
 - a. It does not cause the employee to suffer injury or harm as a result of the retroactive designation, or
 - b. The employee and the employer agree.
2. It is the employee's responsibility to notify their supervisor at least 30 days in advance of the duration and reason for leave when the absence is foreseeable. When the need for leave is not foreseeable, notice must be given as soon as possible. The notice must include sufficient information for the employer to determine if the leave qualifies for FMLA.
 - a. The employer may inquire further regarding the need for leave if the employee does not initially provide enough information to determine if the leave request qualifies for FMLA designation.

- b. The employer will provide the employee with a FMLA request form to be completed by the employee and a medical certification form to be completed by the employee's or family member's health care provider, or the covered service member's health care provider.
- c. The employee requesting military family leave will be provided with certification forms to be completed and a request for a copy of the Active Duty Orders of the military member.

The employee should return the forms within 15 calendar days, absent extenuating circumstances, after the employee receives them. Employees should remain in communication when extenuating circumstances are involved.

3. Measuring the 12-Month Period

The WMD will measure the 12-month period from the date the requesting employee's FMLA leave begins. The employee's next FMLA leave year would begin the first time FMLA leave is taken after completion of the previous 12-month period.

- a. Should WMD elect to change the 12-month period, employees will be given a minimum of 60 days' notice to the change.
- b. The 12-month period for Caregiver leave for a covered service member will always begin on the first day leave is taken.

4. When Both Spouses Are Employed by the WMD

- a. If a husband and wife both work for the WMD, they may only take a combined total of 12 weeks of FMLA leave in the 12-month period for the purpose of the birth and care of a child, adoption and care of a child, placement and care of a child in foster care, or to care for the employee's parent with a serious health condition. If either spouse uses a portion of the 12-week entitlement for the above reasons, they would still have their remaining entitlement for other FMLA purposes. For example, if a husband and wife each use six weeks of FMLA to care for a newborn child, they would each have an additional six weeks available for their own serious health condition or to care for a sick child or spouse with a serious health condition.
- b. If a husband and wife both work for WMD, they may be limited to a combined total leave of 26 weeks during the single 12-month period described for service member caregiver leave if taken for the birth and care of a child, adoption and care of a child, placement and care of a child in foster care, to care for the employee's parent with a serious health condition, or to care for a covered service member with a serious injury of illness.

E. Leave

1. Types of Leave available

- a. For all employees covered by a collective bargaining agreement, the provisions for substitution of paid leave will apply.
 - b. For all non-represented employees, the WMD will not require an employee to substitute paid leave for otherwise unpaid FMLA leave, unless otherwise specified in the collective bargaining agreement for a represented employee.
 - 1) WMD employees may use any combination of paid or unpaid leave to which they are entitled toward the FMLA entitlement.
 - 2) The use of any leave paid or unpaid (excluding compensatory time earned under the Fair Labor Standards Act) for a FMLA qualifying event will run concurrently with, and not in addition to, the use of FMLA for that event.
 - 3) The types of leave that can be substituted for otherwise unpaid FMLA leave include annual leave, sick leave, shared leave, exchange time and/or personal holidays. Leave without pay for an absence covered by the worker's compensation will also run concurrently with FMLA.
 - c. Substitution of sick leave is allowed only for those purposes for which sick leave is normally allowed pursuant to state laws or WMD policy, as applicable.
 - d. Compensatory time earned pursuant to the Fair Labor Standards Act will not be counted toward the FMLA entitlement, although an employee is allowed to use compensatory time for a FMLA qualifying event.
2. Newborn Child or Newly Adopted Foster Child. Entitlements to FMLA leave for the care of a newborn child or of a newly adopted foster child expires 12 months from the date of birth or adoption.

F. Accounting for Leave

1. Employees are responsible to submit leave requests to cover FMLA absences and indicate that the leave is being taken under FMLA on the leave request form. The FMLA leave codes for sick, vacation, personal holiday and leave without pay are listed on the leave request form.
2. Supervisors/managers will review leave requests and contact Human Resources if there are questions regarding FMLA qualifying conditions. The supervisor/manager will then process the leave requests in accordance with WMD Leave Policy HR 218-10.
3. Use of leave will be accounted for on an hourly basis. A full-time employee would thus be entitled to 480 hours of FMLA leave during the 12-month period.
4. For employees who normally work less than a full-time schedule, the amount of leave will be determined on a pro rata basis and will be determined based on the employee's status at the time of the request for leave. For example, an employee working 30 hours

on a weekly basis will be entitled to 12 weeks or 360 hours of FMLA leave in each 12-month period.

5. FMLA leave and time off work due to a job-related injury can run concurrently, provided the reason for the absence meets the definition of Intermittent or Reduced Work Schedules.
 - a. Intermittent leave or leave on a reduced schedule will be granted if medically necessary for an eligible employee's own serious health condition or to care for a family member with a serious health condition. Medical documentation of the need for the leave on an intermittent basis or for leave on a reduced schedule will be required.
 - b. Employees needing intermittent leave on a reduced schedule for foreseeable medical treatment must work with their supervisor to schedule the leave, subject to the approval of the health care provider, so as not to unduly disrupt WMD operations.
 - c. Intermittent leave may be granted for the care of a newborn child, foster, or adopted child on a case-by-case basis. If approved, the employee and supervisor must mutually agree on a schedule prior to the employee taking intermittent leave.
 - d. The WMD may temporarily transfer an employee using intermittent leave for planned medical treatment, including during a period of recovery from one's own serious health condition, to an alternate position for which the employee is qualified, with equivalent pay and benefits if the alternate position would better accommodate the intermittent schedule.
6. Additional Leave for Disability Related to Pregnancy and Child Care

Pursuant to Washington state law, RCW 49.78.390, leave provided for the birth and care of a child or placement for adoption or foster care shall be in addition to any leave used by the mother for sickness or temporary disability because of pregnancy or childbirth.

- a. Leave under this chapter and leave under the federal FMLA of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6) is in addition to any leave for sickness or temporary disability because of pregnancy or childbirth.
- b. Leave taken under this chapter must be taken concurrently with any leave taken under the federal FMLA of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6). [2006 c 59 § 20] RCW 49.78.390
- c. Therefore, if the mother takes time off due to a disability relating to her pregnancy or childbirth, she is still entitled to use the full 12 weeks for other FMLA qualifying purposes, assuming she is eligible and has not already used those 12 weeks.

- d. If the WMD has reason to question the medical certification, they may elect to seek a second opinion from a health care provider of their choosing at the WMD's expense. If the second opinion conflicts with the first opinion, a third opinion may be obtained at the WMD's expense. The opinion from a third health care provider will be mutually chosen by the employee and the employer, and will be controlling. The employee will be considered provisionally entitled to leave pending the second and/or third opinion.
- e. The WMD may ask for recertification under the provisions of the FMLA. Recertification is provided at the employee's expense.
- f. The employee should provide their supervisor/manager with periodic reports on status and intent to return to work as requested.
- g. The WMD may ask for fitness for duty certifications under the provisions of the FMLA. Fitness for duty certifications are at the employee's expense.
- h. All medical information is confidential and will be kept in the employee's Employee Occupational Health Record file (EHOR) separate from the personnel file

G. Benefit Coverage During FMLA Leave.

During a leave covered by the FMLA, employees who receive employer paid basic insurance benefits have the employer paid portion of the benefits coverage continued. However, the employee remains responsible for any insurance co-payments, extra premiums to cover family members, life insurance, long term disability insurance, or other payroll deductions while on leave.

- 1. Employees whose leave extends beyond the period covered by the FMLA will have benefits coverage continued for each month that the employee is in pay status for at least eight hours. Employees who do not have paid leave that can be applied to the leave may self-pay to retain basic insurance benefits coverage.
- 2. If the employee allowed his/her optional employee-paid insurance benefits to lapse during the FMLA covered absence, those benefits will be reinstated upon return to work without any additional medical exams, exclusions of medical conditions, etc. Coverage for family members will also be reinstated the same as it was before the absence. New enrollment forms will be required within 31 days of returning to work along with payment of the required contributions.
- 3. If an employee fails to return to work at the conclusion of an approved absence, including any approved extension of the absence, the employee will be required to repay the costs of the medical insurance premiums to the WMD unless it is due to the employee's own serious health condition or that of a spouse, parent, or child or another reason beyond the employee's control.

H. Returning to Work

1. When notified in advance, employees returning to work after FMLA approved absence for their own qualifying illness will be required to provide a fitness for duty certificate from a health care provider. The fitness for duty certificate should be job-related and consistent with business necessity. A fitness for duty certificate will not be required for intermittent leave usage unless there are safety concerns regarding the employee's ability to perform their duties based on the serious health condition.
2. Upon returning to work from an approved FMLA event, an employee shall return to the same or an equivalent position as the one held immediately prior to the absence.
3. An employee returning from FMLA leave has no greater entitlement to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the leave period.

I. Miscellaneous

1. Employees may seek assistance from the Human Resources Office to determine if they are eligible for other types of leave in addition to the leave covered by this policy; e.g., disability leave, parental leave, leave to care for a sick child or family member with a serious health condition, shared leave, etc.
2. This policy will be construed in accordance with the FMLA and its accompanying regulations. To the extent where items or aspects of the FMLA or its accompanying regulations are not covered in this policy, those gaps will be construed in accordance with the FMLA and its regulations.
3. The WMD will utilize the Department of Labor FMLA Forms.

Definitions

Covered Service Member: A member of the Armed Forces, including 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.

Family Member: children, spouse, and parents, excluding son-in-law, daughter-in-law or parents-in-law.

Health care provider:

- Doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctors practice; **or**
- Podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to manual manipulation of the spine to correct a subluxation as demonstrated by X-rays)

authorized to practice, and performing within the scope of their practice, under state law;
or

- Nurse practitioners, nurse-midwives, clinical social workers and physician assistants authorized to practice, and performing within the scope of their practice, as defined under state law; **or**
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; **or**
- Any health care provider recognized by the employer or the employer's group health plan benefits manager.

In loco parentis: Persons who are *In loco parentis* include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child.

Next of kin: Used with respect to an individual means the nearest blood relative of that individual other than spouse, parent or child, in the following order of priority:

1. Blood relatives who have been granted legal custody of the service member;
2. Brothers and sisters;
3. Grandparents;
4. Aunts and uncles;
5. First Cousins.

If the covered service member designates another blood relative as their nearest blood relative that designation takes precedent over the above list. That person would be the only next of kin.

Parent: A biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was a child. This term does not include "parents-in-law".

Serious health condition: An illness, injury, impairment, or physical or mental condition that involves either:

1. Inpatient care including a period of incapacity or subsequent treatment in connection with the overnight stay, or
2. Continuing treatment by a health care provider (HCP). This includes any one or more of the following:
 - a. 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) Two or more in-person visits to a health care provider for treatment within 30 days of the first day of incapacity, absent extenuating circumstances, or

- 2) At least one in-person visit to a health care provider for treatment within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of the HCP, or
 - 3) Incapacity due to pregnancy.
- b. Incapacity due to chronic serious health condition (SHC). A chronic SHC is one which:
- 1) Requires periodic visits (at least twice per year) to HCP, etc.; and
 - 2) Continues over extended period; and
 - 3) May cause episodic rather than continuing incapacity (asthma, diabetes, epilepsy, etc.).
- c. Incapacity which is permanent or long term where treatment may not be effective (Alzheimer's, severe stroke, terminal stages of a disease, etc.).
- d. Absence to receive multiple treatments for restorative surgery after an accident or other injury, or for a condition that would result in incapacity for three consecutive full calendar days or more absent medical intervention (cancer, kidney disease, etc.).

Serious Injury or Illness: In the case of a member of the Armed Forces or National Guard or Reserves, means an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating.

Son or daughter for purposes of FMLA used for care of a family member with a serious health condition that is not military caregiver leave: A biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* who is either under age 18 or who is age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. The onset of a disability may occur at any age for purposes of the definition of an adult "son or daughter" under the FMLA.

Son or daughter for purposes of FMLA used for military family leave, an exigency, or military caregiver leave for a covered service member: A biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* who is of any age.

Spouse: A husband or wife as defined or recognized in the state where the individual was married, including a common-law marriage or same-sex marriage. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States, if the marriage could have been entered into in at least one state.

Process for Requesting FMLA	
Person Responsible	Action
Employee or Supervisor	Notifies HR of employee's need for FMLA.
HR	<ul style="list-style-type: none"> • Reviews hours worked for FMLA eligibility. • Responds to employee within 5 days of notification. <ul style="list-style-type: none"> ○ If eligible, sends FMLA Poster, WMD Leave Policy, Notice of Rights and Responsibilities, and Certification of Health Care Provider that is appropriate for their situation. ○ If ineligible, sends denial notice.
Medical Provider	Fills out the Certification of Health Care Provider and either gives it to employee or faxes it to HR within 15 calendar days, OR
Employee	Returns Certification of Health Care Provider Form to HR within 15 calendar days
HR Director	<ul style="list-style-type: none"> • Reviews Certification of Health Care Provider Form for completeness. • Sends approval letter and Designation Notice, or denial letter within 5 days of receiving Certification of Health Care Provider Form.
HR	<ul style="list-style-type: none"> • Will keep track of number of FMLA hours used. • Will normally notify employee when their FMLA authorization has ended.
Employee	<ul style="list-style-type: none"> • Fills out leave requests using FMLA codes and submits to supervisor. • Keep supervisor informed of status and return to work date. • May be requested to submit additional medical documentation after the initial approval period.