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# HRDG 4630 - Absence and Leave - Section F - Subsection a

Last Modified:

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**Section F - Family and Medical Leave Act (FMLA)**  
**Subsection a**

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The Family and Medical Leave Act (FMLA) entitles eligible employees to a maximum of 12 administrative workweeks of unpaid leave during a 12-month period for certain serious health conditions or needs of an employee or his/her family. An employee may elect to substitute paid leave, as appropriate, for any leave without pay (LWOP) used under the FMLA.

#### **Description**

Supervisors cannot use FMLA leave as a reason to deny employees opportunities for employment, promotions, training, awards, or participation in office activities.

Upon return from FMLA leave, an employee must be returned to the same position or an equivalent position at the same level in the organization and with equivalent duties, benefits, pay, status, and other terms and conditions of employment.

A family member means the following relatives of the employee:

- A spouse is a partner in any legally recognized marriage, regardless of the employee's state of residency. A same-sex spouse will be considered a "spouse" for FMLA purposes if the marriage was valid where and when it was entered into, *i.e.*, "celebrated," regardless of where the employee resides. This includes in the definition of "spouse" those individuals in legally recognized same-sex marriages, common law marriages, and marriages that were validly entered into outside of the United States. This does not, however, change the supervisor's ability to require employees who take FMLA leave to provide reasonable documentation confirming the existence of a familial relationship, including a copy of a marriage license or a court document, or a simple statement asserting that the requisite familial relationship exists. (See S. Brammer, Assistant General Counsel, OGC -USDA, email dated March 10, 2015.)

**Definition of  
Family Member**

- A son or daughter (a biological, adopted or foster child; a step child; a legal ward; or a child of a person standing in loco parentis who is:
  - Under 18 years of age, or
  - 18 years of age or older and incapable of self-care because of a mental or physical disability. A son or daughter incapable of self-care requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" [ADLs] or "instrumental activities of daily living" [IADLs]. ADLs including adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. IADLs include cooking, cleaning, shopping, taking public transportation, paying bills; maintaining a residence, using the telephone and directories, using a post office, etc. A "physical or mental disability" refers to physical or mental impairment that substantially limits one or more of the major life activities of an individual as defined in 29 CFR 1630.2 [h], [i], and [j].
- A parent (a biological parent or an individual who stands or stood in loco parentis to an employee when the employee

All employees are covered under the FMLA. However, employees must meet certain criteria in order to use FMLA leave:

**For:**

**These criteria apply:**

Temporary employees serving an appointment of 1 year or less; and intermittent employees (covered by FMLA, Title I)

Must have completed 12 months of service, of which at least 1250 hours were served during the 12-month period immediately preceding the start of FMLA leave.

Must have completed 12 months of creditable service. This service may include up to 6 months LWOP and need not be recent or continuous. It does not include service:

- Under a temporary appointment limited to 1 year or less,
- As an intermittent employee,
- With D.C. Government, **or**
- ~~With the military, or~~
- With any Federal executive branch agency covered by Title 1 or Title 4 of FMLA.

**Eligibility**

**Updated 03/24**

All other full-time and part-time employees (covered by FMLA Title II)

**Effective December 22, 2023, Section 1114 of the FY 2024 National Defense Authorization Act (NDAA) permits honorable active service in the Army Navy, Air Force, Space Force or Marine Corps of the United States as qualifying service for establishing eligibility for FMLA leave to include for paid parental leave. It does not include other active service such as in the Coast Guard or the commissioned corps of the Public Health Service. This type of service would count toward the 12-month service requirement**

**The examples below assume that an employee's service was honorable active service in the Army, Navy, Air Force, Space Force, or Marine Corps of the United States and that the employee is determined to be in a FMLA leave eligible position after enactment of the FY 2024 NDAA on December 22, 2023.**

**Example 1:**

**An individual has no prior Federal civilian service but served 8 years in the Marine Corps. The employee is hired into a Federal civilian position on January 29, 2024, and immediately meets the 12-month service requirement for FMLA leave and paid parental leave eligibility purposes due to having at least 12 months of service in the Marine Corps that qualifies as honorable active service.**

**Example 2:**

**An employee served in the Air Force for 4 years, but only had 3 months of Federal civilian service when her father was diagnosed with stage 4 pancreatic cancer in October 2023. Prior to enactment of section 1114 of the FY 2024 NDAA, she did not have enough qualifying service to be eligible for FMLA leave. She has exhausted her accrued sick leave and annual leave caring for him. Upon enactment of the FY 2024 NDAA on December 22, 2023, she is immediately eligible for FMLA leave to care for her father because of his serious health condition since she meets the 12-month service requirement based on her 5 months of Federal civilian service and 4 years of honorable active service in the Air Force.**

**Example 3:**

**An employee was hired March 20, 2023, and therefore had less than 6 months of Federal civilian service when his baby was born on September 9, 2023. He previously served 20 years in the Navy. Upon the birth of his child in September 2023, he had inquired about using FMLA leave with the substitution of paid parental leave (PPL) but was told he would only be able to take FMLA leave as of March 20, 2024, when he would have the 12 months of**

The following table shows reasons for which FMLA leave may be used and the time limits for each:

<b>Conditions for Using FMLA Leave</b>	<b>Condition:</b>	<b>Time limit for completion:</b>
	Birth of a child and care of the newborn	Within 12 months of birth.
	Placement of a child with the employee for adoption or foster care	Within 12 months of placement.
	Care for a family member with a serious health condition	Within 12 months of the date the FMLA leave began.
	Serious health condition of the employee that makes him/her unable to perform one or more of the essential functions of the position	Within 12 months of the date the FMLA leave began.

An employee will take only the amount of FMLA leave needed to manage the circumstance requiring the leave.

For the purposes of administering family and medical leave, a detailed description of "serious health condition" is provided in this block. A **serious health condition** is an illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with the inpatient care; or
- Continuing treatment by a health care provider that includes, but is not limited to, examinations to determine if there is a serious health condition, and evaluations of such conditions if the examinations or evaluations determine that a serious health condition exists.

Continuing treatment by a health care provider may include one or more of the following:

- A period of incapacity of more than 3 consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:
  - Treatment two or more times by a health care provider, by a health care provider under the direct supervision of the affected individual's health care provider, or by a provider of health care services under the orders of, or on referral by, a health care provider; or
  - 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 (e.g., a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition).
- Any period of incapacity due to pregnancy, or for prenatal care, even if the affected individual does not receive active treatment from a health care provider during the period of incapacity or the period of incapacity does not last more than 3 consecutive calendar days.
- Any period of incapacity or treatment for such incapacity due to a chronic serious health condition that:

An employee must specifically ask for FMLA leave on their application for leave. The following table states the procedure for applying for FMLA leave:

<b>If:</b>	<b>Then the employee should:</b>
Leave is being requested for a serious health condition of a family member or self	<ul style="list-style-type: none"><li>• Provide medical certification within 15 calendar days of a supervisor's request for documentation, using the appropriate <a href="#"><u>U.S. Department of Labor Form WH-380</u></a>.</li><li>• Certification of Physician or Practitioner, or equivalent document. If this is not possible, despite an employee's diligent efforts, the medical certification must be provided within 30 calendar days. An employee who fails to provide the documentation within these time limits is not entitled to FMLA leave.</li><li>• Make a reasonable effort to schedule treatment to avoid disrupting agency operations.</li></ul>
An employee has advanced knowledge that leave will be requested	Provide up to 30 calendar days notice of the need for FMLA leave.
<b>Applying for FMLA Leave</b>	Provide notice as soon as he/she becomes aware of the need for leave.
An employee is unable to provide 30 calendar days notice	An employee may not retroactively invoke his/her entitlement to FMLA leave (5CFR 630.1203[b]) unless the employee or his/her personal representative was physically or mentally incapable of invoking FMLA during the entire period in which the employee was absent from work. In such a situation, an employee may only invoke FMLA within 2 workdays after returning to work. Written medical certification from a health care



Employees are required to obtain medical certification from the physician or practitioner supporting the need for FMLA leave. Use the appropriate version of the [U.S. Department of Labor Form WH-380](#), or equivalent document may be used for this purpose. The form, which can be locally reproduced, is provided at the beginning of this Subchapter.

The following table gives specific requirements regarding medical certification:

<b>If FMLA leave is being requested:</b>	<b>Then the medical certification must include:</b>
Due to the employee's own serious health condition	<ul style="list-style-type: none"> <li>• The date the condition began;</li> <li>• The probable duration;</li> <li>• The regimen of treatment (number of visits, general nature and duration of treatment, including referral to other provider of health services); and</li> <li>• A statement that the employee is unable to perform the essential functions of his/her position. (The health care provider may review the employee's position description and/or performance standards to assist in making this determination.)</li> </ul>

## **Medical Certification**

To care for a family member	<p>Items 1 through 3 above and a statement:</p> <ul style="list-style-type: none"> <li>• From the health care provider that the family member needs assistance for basic medical, hygienic, nutritional, safety, or transportation needs in making arrangements to meet such needs;</li> <li>• That the family member would benefit from the employee's care or presence (including psychological comfort); and</li> <li>• From the employee on the care he/she will provide and an estimate of the amount of time/time period during which the care will be provided.</li> </ul>
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**Periodic  
Recertification**

For leave taken for pregnancy, chronic conditions, or long-term conditions under the continuing supervision of a health care provider, subsequent medical recertification may be required at agency expense, on a periodic basis, but not more than every 30 calendar days. For leave taken for all other serious health conditions (including intermittent or reduced leave schedules) if the health provider has specified on the medical certification a minimum duration of the period of incapacity, recertification may **not** be requested until that period has passed.

To require medical certification more frequently than every 30 calendar days or than the minimum duration, the employee must have requested that the original leave period be extended, the original circumstances described must have changed significantly, or the agency must have received information that caused doubt on the continuing validity of the medical certification.

The following table lists responsibilities of supervisors administering leave under the FMLA. Contact your servicing leave specialist or ERS for assistance in any of these matters.

<b>If:</b>	<b>Then the supervisor's responsibility is to:</b>
	<p>Begin a discussion of FMLA leave, in case the employee is unaware or hesitant to bring it up.</p> <p>An employee does not ask specifically for FMLA leave and the supervisor has reason to believe the absence is FMLA-type</p> <p>The supervisor should determine at the time leave is requested whether it is being requested under the provisions of FMLA. The supervisor may not subtract leave from the 12-week FMLA entitlement without confirmation from the employee of his/her intent to invoke FMLA.</p>
<b>Responsibilities of Supervisors</b>	<p>An employee submits an application for FMLA leave on the appropriate <a href="#">U.S. Department of Labor Form WH-380</a> or equivalent document</p> <ul style="list-style-type: none"><li>• Determine how the agency mission can be accomplished if leave is granted on an intermittent or continuous basis. The agency may, for justifiable cause, request that medical treatment be rescheduled, subject to health care provider's approval.</li><li>• Request additional medical certification if necessary.</li></ul>
	<p>The supervisor doubts the validity of the original certification</p> <p>Request that the employee provide additional information and/or provide an agency-designated second medical opinion, at the agency's expense.</p>
	<p>The supervisor approves the employee's FMLA request</p> <ul style="list-style-type: none"><li>• Remind employee to schedule, in writing, and obtain written approval of annual leave in order to prevent possible forfeiture.</li><li>• Request periodic recertifications if</li></ul>

A total of 12 administrative workweeks will be made available to full-time and part-time employees. The exact number of hours of leave employees are entitled to under the FMLA is in direct proportion to the number of hours in their regularly scheduled administrative workweek.

The 12 administrative workweeks of leave will be calculated on an hourly basis and will be equal to 12 times the average number of hours in the employee's regularly scheduled administrative workweek.

**Example:** A full-time employee who works 40 hours per week.

FMLA Provision:	12
Avg. # of hours	
<u>worked per week:</u>	<u>x 40</u>
FMLA Entitlement:	480 hours

**Example:** A part-time employee who works 32 hours per week.

FMLA Provision:	12
Avg. # of hours	
<u>worked per week</u>	<u>x 32</u>
FMLA Entitlement:	384 hours

### **Calculating FMLA Entitlements**

FMLA leave is only charged on days an employee would be in a duty status. FMLA leave cannot be charged for existing holidays, holidays established by Executive Order, nonworkdays or an administrative order.

If the number of hours in an employee's workweek varies from week to week, a weekly average of the hours scheduled over the 12 weeks prior to the date the leave begins will be used as the basis for this calculation.

Employees should be advised of the number of hours of FMLA entitlement at the time it is requested.

If the number of hours in an employee's regularly scheduled administrative workweek is changed during the 12-month period of FMLA leave, the employee's entitlement to any remaining FMLA leave will be recalculated based on the number of hours in the employee's current regularly scheduled administrative

Employees will schedule and use FMLA leave during a 12-month period. (Refer to the "Conditions for Using FMLA Leave" table). The 12-month period begins on the date the employee first takes FMLA leave and continues for 12 months. When the 12-month period expires, another 12-month period begins.

**12-Month Period** An employee is not entitled to 12 additional workweeks of leave until the previous 12-month period ends and a situation occurs that entitles the employee to another period of FMLA leave. (This may include a continuation of the previous situation.) Unused FMLA leave from one 12-month period may not be carried over into the next 12-month period.

FMLA leave may be used continuously or intermittently. Intermittent leave means leave taken in separate blocks of time, rather than for one continuous period of time, and may include leave periods of less than 1 hour to several weeks. This may be applicable if there is more than one situation in which an employee is entitled to FMLA leave, or for ongoing medical treatment and he/she has not exhausted the amount available for the 12-month period.

### **Example: Continuous Use of FMLA Leave**

Employee goes on leave from January 1 through March 31, using 12 administrative workweeks of leave.

### **Example: Intermittent Use of FMLA Leave**

A full-time employee splits the 12-week leave entitlement into segments:

- Jan 1 - Jan 22 (using 3 wks/120 hours),
- May 1 - June 30 (using 8 wks/320 hours), and
- Sept 1 - Sept 8 (using 1 wk/40 hours).

In this example, as of September 8, the employee has exhausted his/her entitlement of 480 hours for that 12-month period.

### **Continuous and Intermittent Use of FMLA Leave**

Another way an employee can use FMLA leave intermittently is to reduce the work schedule. A **reduced work schedule** is one where the employee continues to work, but the number of hours regularly worked per workday or workweek is reduced by using amounts of FMLA leave intermittently.

**Example:** A full-time employee with a regular work schedule of 40 hours per workweek (five 8-hour days) is entitled to 480 hours of FMLA leave.

The employee reduces 3 days of each workweek from 8-hour workdays to 4-hour workdays by using 4 hours of FMLA leave each of the days (or 12 hours of FMLA leave per week). The employee can do this for 40 weeks, until the 480 hours of FMLA leave are exhausted ( $480 \div 12 = 40$ ).

**Example:** A part-time employee with a regular work schedule of 32 hours per workweek (four 8-hour days) is entitled to 384

Although the FMLA entitles employees to 12 weeks of unpaid leave, employees can request to substitute paid leave (i.e., sick leave, annual leave, or advance annual or sick leave) instead of LWOP, but supervisors may not require them to do so. At the time the FMLA leave is initially requested, supervisors should remind employees of this option. Employees must indicate their preference when FMLA leave is initially requested. Employees may not substitute paid time off for LWOP retroactively.

### **Substitution of Paid Leave**

**Note:** Because compensatory time and credit hours are forms of pay, not leave, they may not be used as part of an FMLA period. Compensatory time and credit hours may be used only before the FMLA entitlement is invoked or after the entitlement period expires.

**The maximum amount of FMLA leave to which an employee is entitled in any 12-month period is 12 administrative workweeks, regardless of the type(s) of leave the employee wishes to use.** This does not change further entitlement to other annual leave, sick leave, or LWOP that is not requested under the FMLA if the supervisor would have approved such leave.

### **Use of Sick Leave**

If sick leave is used as part of the FMLA entitlement, it must be consistent with the conditions for use of sick leave and the amount of sick leave that may be granted as stated in [Section C](#) , Sick Leave.

### **Using One Type of Leave**

Employees have the option of using one type of leave exclusively throughout the entire period of FMLA leave.

**Example:** The employee uses only LWOP for the entire 12 administrative workweeks of leave from July 1 through September 30.

Employees also can request that paid leave be substituted for LWOP.

### **Combining Two or More Types of Leave**

**Examples:** Employee combines two or more of the following: sick leave, annual leave, and LWOP throughout the duration of the FMLA leave.

- Sick leave from Dec 1 - Dec 31 and LWOP from Jan 1 - Feb 28.
- LWOP and annual leave alternated every other week for 6 weeks followed by 6 weeks of sick leave.

### **Effect of LWOP on Benefits and Service Credit**

Refer to [Section E](#) , Nonpay Status, for information on how benefits and service credit may be affected by an FMLA absence involving LWOP.

### **Impact of the FMLA on Other Types of Leave Assistance**

The FMLA has no impact on the rules for granting advance sick or annual leave. Annual leave may still be advanced up to the amount that would be earned during that leave year. In some circumstances, up to 240 hours of sick leave may be advanced to an employee for his/her medical condition.

Also, an employee may be eligible to apply for the Voluntary Leave Transfer Program if his/her situation meets the criteria for a personal emergency, or the medical emergency of a family member.

### **Unions**

The agency will comply with any collective bargaining agreement or any agency employment benefit program or plan that provides greater family or medical leave entitlements to employees than those provided under the FMLA.

The entitlements established for employees under the FMLA may not be diminished by any collective bargaining agreement or any employment benefit program or plan.



**Denial of FMLA**

Employees can grieve denial of FMLA leave. Employees in bargaining units must use the negotiated grievance procedure; other employees must use the administrative grievance procedure. Contact your servicing ERS for guidance.

**Adverse Actions**

An employee's decision to invoke FMLA does not prevent an agency from taking performance-based actions or disciplinary actions against that employee. FMLA does not make an employee immune from the impacts of a reduction-in-force before, during, or after a period of FMLA leave. Prior to taking an adverse action, supervisors must contact the servicing Employee Relations Specialist to determine if FMLA obligations exist.

**Return to Work Certification**

A program may establish a uniformly applied practice or policy that covers all similarly-situated employees to obtain medical return to work certification from the health care provider. The agency assumes the responsibility to pay for the expenses of obtaining such documentation since the request is at the agency's discretion and direction. The program cannot require a second or third opinion for return to work certification.

Before establishing any practices or policies, programs should contact their servicing ERS. Programs must notify employees of any policy before leave begins (or as soon as possible in emergency medical situations).

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