

## 31.03.05 Family and Medical Leave

Revised [April 13, 2022](#)

Next Scheduled Review: April 13, 2027

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### Regulation Summary

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This regulation establishes the basis and procedure for administering the Family and Medical Leave Act (FMLA) in compliance with federal law and parental leave under state law.

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### Definitions

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### Regulation

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#### 1. ELIGIBILITY

- 1.1 A system employee is covered under Titles I and IV of the FMLA of 1993 if the employee has been employed for at least 12 months by the state (not necessarily 12 consecutive months) and has worked at least 1,250 hours (based on Fair Labor Standards Act [FLSA] hours-worked principles) for the state during the 12 months immediately preceding the beginning of the leave. A part-time employee and one who works variable hours must have at least 52 weeks of service, not necessarily within 12 consecutive months, and must have worked 1,250 hours for the state during the 12 months immediately preceding the beginning of the leave. Time spent on military leave counts as time worked in determining if the employee has been employed for at least 12 months by the state and also for the 1,250 hours worked requirement. Employment periods preceding a break in service of more than seven years are not required to be counted in determining if the employee has been employed by the state for at least 12 months unless the break in service is due to military service obligation. An employee on the payroll for any part of a week is credited with a week of service for purposes of calculating the 12-month requirement.
- 1.2 An employee who is not eligible for FMLA leave may be eligible for parental leave under state law, as described in Section 11 of this regulation, for the birth of a natural child or the adoption or foster care placement of a child younger than three years.

#### 2. LEAVE REQUIREMENTS

- 2.1 An eligible employee may take up to 12 weeks of leave during a fiscal year for any of the following reasons:
- (a) birth and care of a child within one year of birth. This may include leave taken for “bonding time” where there is no medical condition with respect to the parents or newborn;
  - (b) placement in the employee's home of a child for adoption or for foster care;
  - (c) care for a spouse, son, daughter or parent with a serious health condition;
  - (d) a serious health condition of the employee that prevents the employee from performing the essential functions of the employee’s position; and
  - (e) any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on active duty or has been notified of an impending call or order to active duty in support of a contingency operation. Federal regulations provide that qualifying exigencies include short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities and certain additional activities arising out of the covered military member’s active duty or call to active duty status provided that the member and employee agree that such leave qualifies as an exigency and agree to both the timing and duration of such leave.
- 2.1.1 Entitlement to leave for birth or placement of a child begins on the date of the birth or date of placement in the home, unless absence from work is required for the placement for adoption or foster care to proceed. Entitlement to leave expires 12 months after the birth or placement. Any period before and after birth, when a mother is not able to work for medical reasons, is considered leave for a serious health condition.
- 2.1.2 An employee may take leave to care for a family member, as defined in Section 2.1(c), who requires physical and/or psychological care. An eligible employee's right to take leave is not limited by the availability of another family member or third-party care provider.
- 2.2 An employee who is the spouse, son, daughter, parent or next of kin of a covered servicemember who is recovering from a serious illness or injury sustained in the line of duty on active duty is entitled to a total of 26 workweeks of leave during a single 12-month period to care for the servicemember. This military caregiver leave is only available during a single 12-month period; however, the employee is entitled to a combined total of 26 workweeks of leave under Sections 2.1 and 2.2. The employee is entitled to no more than 12 weeks of leave for the reasons stated in Section 2.1 during this single 12-month period. The entitlement for military caregiver leave as described in this section does not limit the availability of leave under Section 2.1 during any other 12-month period.
- 2.2.1 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 the eligible employee does not take all of the 26 workweeks of leave during

this single 12-month period, any remaining portion of the 26 workweeks is forfeited.

2.2.2 An eligible employee is entitled to more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or the same covered servicemember with a subsequent serious illness or injury; however, no more than 26 workweeks of leave may be taken during any single 12-month period.

2.2.3 Members must designate military caregiver leave in accordance with Section 9 of this regulation. If leave qualifies as military caregiver leave and leave to care for the same family member with a serious health condition during the single 12-month period, the leave must be designated as military caregiver leave and must not be designated and counted as both types of leave.

### 3. GENERAL

3.1 An eligible employee who takes FMLA leave is entitled to be returned to the same position that the employee held when the leave commenced or to an equivalent position with equivalent benefits, pay and other terms and working conditions of employment. In order to deny restoration to employment, the member must show that the employee would not otherwise have been employed at the time reinstatement is requested.

3.2 The employee's right to reinstatement does not override any other action a member is entitled to take under any other system policy.

3.3 It is unlawful to interfere with, restrain or deny the exercise of any right provided by the FMLA or to discharge or in any way discriminate against any individual because the individual opposed or complained about any unlawful practice under the FMLA, filed a charge or gave information or testified in connection with any inquiry or proceeding related to the FMLA.

### 4. LEAVE DURATION AND USE

#### 4.1 Intermittent Leave or Reduced Hours

4.1.1 An employee may request intermittent leave (separate blocks of time due to a single qualifying reason) or a reduced work schedule (less hours per workweek or work day) due to a qualifying exigency or if medically necessary because of 1) an employee's or an employee's family member's serious health condition, or 2) to care for a covered servicemember with a serious injury or illness. The medical necessity of intermittent or reduced leave must be certified as described in Section 6.2. Such leave may be taken for birth or adoption/foster care purposes only if the employee and member agree.

4.1.2 If intermittent leave or reduced hours are medically necessary and foreseeable, the employee must make a reasonable effort to schedule the treatments so as to not unduly disrupt the member's operations. If the treatments would be disruptive to the work schedule, the member may alter the employee's existing job or require the employee to transfer temporarily to an available alternative position that better

accommodates recurring periods of leave than the employee's current position. The alternative position must be one for which the employee is qualified and it must provide equal pay and benefits. The new position must not create a hardship for the employee, such as being located a significant distance from the regular position or being on a different shift.

4.1.3 For an employee who works part-time or variable hours, the FMLA leave duration is calculated on a pro rata or proportional basis.

## 4.2 Use of Leave

4.2.1 An employee will be required to take all paid leave, as part of the employee's 12 weeks. If an employee has less than 12 weeks of paid leave, the rest of the leave will be unpaid. An employee who is receiving temporary disability benefit payments or workers' compensation benefits is not required to use paid leave while on FMLA leave. If the employee remains on FMLA after these benefits end, the employee will then be required to use available paid leave before using unpaid leave.

4.2.2 Sick leave may be taken only in situations when such leave would normally be permitted.

4.2.3 FMLA leave runs concurrently with paid or unpaid leave when the reasons for leave meet the FMLA criteria.

4.2.4 An employee may not be required to use compensatory time as part of an FMLA leave. However, if an employee chooses to use FLSA or state compensatory time, that time will count as part of the 12 weeks of FMLA entitlement although it may fall in the middle of an FMLA leave.

4.2.5 An employee who is granted a partial day of FMLA leave will not lose the employee's exempt status under the FLSA.

4.2.6 When a holiday falls during a week, the week counts as a full week of FMLA leave. However, when a member is closed for five consecutive working days or longer, such as the Winter break, those days will not count as FMLA time.

4.2.7 An employee on leave is required to report periodically (two-week intervals are recommended) on the employee's status and intention to return to work. An employee should be encouraged to keep the employee's supervisor informed about the employee's intention to return to work.

## 5. MEMBER NOTICE REQUIREMENTS

5.1 General Notice: Each member is required to post a notice where it can be seen by employees and applicants that explains an employee's rights and responsibilities under the FMLA. The text must be fully legible and in languages in which significant portions of the workers are literate. Electronic posting is sufficient as long as it meets all

requirements. The Department of Labor's recommended poster is available on the DOL Wage and Hour website. The notice is available at all member human resources offices.

The member must also provide this notice to each employee to ensure that the employee is aware of FMLA obligations. This should be done by including the notice in written guidance on benefits or leave rights. Distribution may be accomplished electronically.

- 5.2 Eligibility Notice: When an employee requests FMLA leave or when the member acquires sufficient knowledge that an employee's leave may be for an FMLA-qualifying reason, the member must provide oral or written notice to the employee within five business days, absent extenuating circumstances, regarding the employee's FMLA eligibility. The eligibility notice must state if the employee is eligible for FMLA leave. If the member determines the leave is not for an FMLA-qualifying reason or if the employee is not eligible for FMLA leave, oral or written notice must be provided stating the reasons. A prototype notice is available on the Department of Labor website.
- 5.3 Rights and Responsibilities Notice: In addition to providing the eligibility notice referenced above, the member must provide written notice detailing the specific expectations and obligations of the employee and explaining the consequences of failure to meet these obligations. The notice must be in a language in which the employee is literate. A prototype notice is available on the Department of Labor website. At a minimum, the information must include:
- (a) that the leave will be counted against the employee's annual FMLA entitlement and the applicable 12-month period for FMLA entitlement;
  - (b) any certification requirements of a serious health condition, serious injury or illness or qualifying exigency arising out of active duty or call to active duty status and consequences of the employee's failure to provide the certification;
  - (c) the requirement that paid leave, if applicable, be used before unpaid leave and the employee's entitlement to take unpaid FMLA leave if not eligible for paid leave;
  - (d) that the employer contribution for benefits will continue during paid and unpaid FMLA leave, and the potential liability for payment of the employer contribution if the employee fails to return to work after taking FMLA leave;
  - (e) that any employee share of benefit premiums will continue to be deducted from pay during paid leave, that the employee will be billed for premiums during unpaid leave and that coverage will be cancelled as of the last day of the last month for which premiums were paid if premiums are not paid within 30 days of the due date;
  - (f) whether the employee will be required to present a fitness-for-duty certificate before returning to work; and
  - (g) the employee's rights to maintenance of benefits during FMLA leave and to be reinstated in the same or an equivalent job when returning from FMLA leave.

The notice must also outline the schedule for any periodic reports the supervisor will require during the leave and the process for notifying the supervisor of the expected return date. A new notice must be issued if circumstances require a change from the original notice.

5.4 Designation Notice: Each member must designate FMLA leave in accordance with Section 9.

5.5 Each member must keep related records for four years.

## 6. EMPLOYEE NOTICE AND CERTIFICATION REQUIREMENTS

### 6.1 Notice

6.1.1 When an employee plans to take unpaid leave under the FMLA, the employee must give the member 30 days' notice when possible or as soon as practicable under the circumstances.

6.1.2 Normal sick leave notice requirements apply for the paid portions of leave. The notice must comply with the usual rules for requesting leave, except in emergency situations. However, FMLA leave may not be denied if the employee gives timely oral, written or other notice of the need for leave, but fails to follow the system's or a member's leave request procedures.

6.1.3 Notice may be given by the employee's spouse, other adult family member or designee if the employee is unable to personally provide notice.

6.1.4 If the employee is undergoing planned medical treatment, the employee must consult with the member and make a reasonable effort to schedule the treatments so as to minimize disruption to the member's operations, subject to the approval of the health care provider.

6.1.5 For adoption or foster care placement of a child, the employee must submit a brief written statement to the member specifying the child's age, the anticipated or actual date of adoption or foster care placement in the employee's home and the number of days of FMLA leave requested. Proof of adoption or the placement of a foster child in an employee's home must also be provided.

### 6.2 Certification of Condition

6.2.1 Each member may require certification of a serious health condition and need for leave, whether paid or unpaid, from the employee's or family member's health care provider within 15 calendar days of the request for leave, unless 15 days is not practicable under the circumstances despite the employee's diligent, good faith efforts. The member must notify the employee of the certification requirement when leave is requested. All certifications are to be treated as confidential medical records and kept separate from personnel records.

The certification may be submitted on the form available on the Department of Labor website, or the same information may be submitted in a different format. No additional information may be required.

When using sick leave concurrently with FMLA leave in cases of serious health conditions, the employee must provide the same physicians' certifications required by System Regulation 31.03.02, *Sick Leave*.

- 6.2.2 If the member finds the submitted certification form to be incomplete or insufficient, the member must provide written notification to the employee stating what additional information is necessary to make the certification complete and sufficient and provide the employee with seven calendar days (unless not practicable despite the employee's diligent, good faith efforts) to clarify any such deficiency. A certification is considered incomplete or insufficient if one or more of the applicable entries have not been completed or if the information provided is vague, ambiguous or non-responsive. A certification that is not returned to the member is not considered incomplete or insufficient, but constitutes a failure to provide certification.
- 6.2.3 If the employee fails to provide the member with a complete and sufficient certification despite the opportunity to clarify the certification as per Section 6.2.2 or fails to provide any certification, the member may deny the FMLA leave as follows:
- 6.2.3.1 Foreseeable leave – If the employee fails to provide certification within 15 calendar days per Section 6.2.1, the member may deny FMLA coverage until the required certification is provided. For example, if the employee does not provide the certification for 45 days without sufficient reason for the delay, the member can deny FMLA coverage for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.
- 6.2.3.2 Unforeseeable leave – If the employee fails to provide certification within 15 calendar days per Section 6.2.1, unless not practicable due to extenuating circumstances, the member may deny FMLA coverage for the leave following the expiration of the 15-day time period until sufficient certification is provided.
- 6.2.4 If the employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. If the member needs clarification or authentication on a medical certification, a valid Health Insurance Portability and Accountability Act (HIPAA) authorization must be provided by the employee before contacting the employee's HIPAA-covered health care provider. A member must use a health care provider representing the member, a human resources professional, a leave administrator or a management official to contact the employee's health care provider to clarify and authenticate a medical certification. Under no circumstances may the employee's direct supervisor contact the employee's health care provider. The member may not ask for information not requested on the form. When FMLA runs concurrently with workers' compensation, the member may contact the employee's workers' compensation health care provider if allowed by workers' compensation statutes to request additional information

and the information received under those statutes may be considered in determining the employee's entitlement to FMLA leave.

- 6.2.5 If the member has reason to doubt the certification's validity, the system can pay (including reasonable out-of-pocket travel expenses) for an opinion from another health care provider, but the provider may not be employed on a regular basis by the system. If the second opinion disagrees with the first opinion, the member and employee must agree on a health care provider to give a third opinion. The member will pay for the third opinion and it will be final and binding on all parties. Upon the employee's request, a member must provide copies of any second or third medical opinion within five business days, unless extenuating circumstances prevent compliance.
- 6.2.6 With 15 days notice, recertification of the medical condition may be required every 30 days or more frequently if the circumstances of the illness or injury change or if the member receives information that the most recent certification may not be valid. Recertification will be at the employee's expense and no second or third opinions can be requested.
- 6.3 Certification of the employee's ability to resume work may be required if leave was due to the employee's serious health condition. The member may delay restoring the employee to employment without such certification relating to the health condition which caused the employee's absence. The certification provision does not supersede valid state or local laws that govern the employee's return to work. The employee must be notified when requesting leave if this certification will be required and this requirement must be uniformly applied to employees in similar situations.
- 6.4 If an employee is able to return to work earlier than anticipated, the employee must give the employee's supervisor two work days notice of the return date, when feasible. The employee must be reinstated.
- 6.5 Recertification at New Fiscal Year
  - 6.5.1 Since the system administers FMLA on a fiscal year basis, members must review and note the leave records of those employees whose FMLA-related absences (continuous or intermittent) will carry into the next fiscal year. Those selected employees will have to requalify for FMLA benefits and have their family and medical leave recertified.
  - 6.5.2 The evaluation of the eligibility period must begin with the **first** FMLA-related absence of the new fiscal year. To determine eligibility, each member must confirm the employee has worked the requisite 1,250 hours in the 12 months preceding the first request for FMLA leave in the new fiscal year.
  - 6.5.3 Upon completion of the eligibility test, the employee must be given an FMLA packet and advised by written notice as to whether or not the employee qualifies for FMLA leave. Members must use caution before requiring an employee to also provide an updated certification form, as FMLA law does not allow an employer

to arbitrarily require recertification more than every 30 days and only in conjunction with the employee's absence.

## 7. CERTIFICATION FOR QUALIFYING EXIGENCIES

An employee requesting FMLA leave for a qualifying exigency must comply with the certification requirements set out in 29 C.F.R. § 825.309.

## 8. CERTIFICATION FOR MILITARY CAREGIVER LEAVE

An employee requesting FMLA military caregiver leave must comply with the certification requirements set out in 29 C.F.R. § 825.310.

## 9. MEMBER DESIGNATION OF FMLA LEAVE

9.1 When the member has received sufficient information from the employee or the employee's spokesperson to determine if the leave is for an FMLA-qualifying reason, the member must notify the employee and designate the leave, whether paid or unpaid, as qualifying or nonqualifying for FMLA in writing within five business days absent extenuating circumstances. The written confirmation must include the notice requirements outlined in Section 5.3. A prototype notice is available on the Department of Labor website. If the leave is not designated as FMLA leave because it does not meet the requirements of the FMLA, the notice may be in the form of a simple written statement. The member must make this designation if the paid or unpaid leave is for an FMLA reason even if the employee does not specify FMLA in the employee's leave request.

The member must notify the employee of the number of hours, days or weeks that will be counted against the employee's FMLA entitlement. If this is not possible, such as in the case of unforeseeable intermittent leave, then such notice must be provided upon the employee's request, but not more than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the FMLA leave entitlement may be made orally, but must be followed by written confirmation no later than the following payday or the next payday if the following payday is less than one week after the oral notice.

9.2 The member may retroactively designate leave as FMLA leave with appropriate notice to the employee as required under Section 5 provided that the member's failure to timely designate leave does not cause harm or injury to the employee. The member and employee can mutually agree that leave be retroactively designated as FMLA leave.

9.3 The member is considered to have learned the reason for a leave when an employee informs the employee's supervisor or designee of the reasons for the employee's absence. If the employee does not provide enough information to make a designation, the member may request the additional information needed to determine if the leave qualifies for FMLA.

- 9.4 If an employee requests FMLA leave before the employee is eligible, the member must notify the employee that the employee is not eligible for FMLA leave. Otherwise, the employee will be considered eligible for FMLA leave.

## 10. BENEFITS DURING LEAVE

- 10.1 An employee may continue to participate in all insurance benefit plans while on FMLA leave. Coverage can continue for the leave's duration at the same level of benefits and contributions as if the employee had continued in employment. If an employee chooses not to retain coverage during FMLA leave, the employee is entitled to have the employee's benefits reinstated upon returning to work on the same terms as prior to taking the leave.
- 10.2 While an employee is on paid leave, the employee's share of premiums will continue to be deducted from pay. Once an employee goes on unpaid leave, the employee's share of premiums for health care and other coverage will be collected monthly. Arrangements for premium payments must be specified before the leave begins or as soon as practicable in case of an emergency. If the employee on unpaid leave fails to make arrangements to pay premiums or fails to make payments within 30 days of the due date, all benefits will be dropped except those fully paid by the employer contribution. The member must mail a notice to the employee at least 15 days before the end of the grace period advising the employee that the premium has not been received and that coverage will end on a specific date unless payment is received by the end of the grace period. The employee must continue to contribute to the employee's Health Care Spending Account during unpaid leave to continue participation. However, the employee may continue to receive reimbursements (until the balance is exhausted) from the employee's Dependent Day Care Account whether or not the employee continues contributions during unpaid leave.
- 10.3 An employee will not accrue state service or employment benefits during unpaid leave, nor is an employee subject to any penalty or entitled to any right, benefit or position of employment other than any to which the employee would have been entitled had the employee not taken paid or unpaid FMLA leave. However, an employee on leave will retain the employment benefits accrued before the leave began, and the leave will not constitute a break in service.
- 10.4 If an employee does not return from leave, Consolidated Omnibus Budget Reconciliation Act (COBRA) procedures will be implemented on the day the employee's employment terminates.

## 11. PARENTAL LEAVE

- 11.1 An employee, including a student or wage employee, who is not eligible for FMLA leave is entitled to a parental leave of absence, not to exceed 12 weeks, for the birth of a natural child or the adoption or foster care placement of a child younger than three years. This period begins with the date of birth or the date of the adoption or foster care placement. However, no parental leave may be taken more than 12 weeks after the birth or adoption or foster care placement.

- 11.2 An employee may take parental leave on an intermittent or reduced work schedule if the employee and member agree.
- 11.3 An employee must use all available paid leave as part of the parental leave before using leave without pay. However, use of sick leave is limited to those situations within the definition of sick leave in System Regulation *31.03.02*.
- 11.4 The employee notice and certification requirements set out in Section 6.1.5 also apply to parental leave available under this section.
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## **Related Statutes, Policies, or Requirements**

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[29 C.F.R. Pt. 825, The Family and Medical Leave Act of 1993](#)

[29 C.F.R. § 825.309, Certification for leave taken because of a qualifying exigency](#)

[29 C.F.R. § 825.310, Certification for leave taken to care for a covered servicemember \(military caregiver leave\)](#)

[The United States Department of Labor](#)

[Tex. Gov't Code, § 661.912, Family and Medical Leave Act](#)

[Tex. Gov't Code, § 661.913, Parental Leave for Certain Employees](#)

[System Policy \*31.03, Leaves of Absence\*](#)

[System Regulation \*31.03.01, Vacation\*](#)

[System Regulation \*31.03.02, Sick Leave\*](#)

[System Regulation \*31.03.04, Leave of Absence without Pay\*](#)

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## **Member Rule Requirements**

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A rule is not required to supplement this regulation.

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## **Contact Office**

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Human Resources  
(979) 458-6169