

137 – FAMILY AND MEDICAL LEAVE ACT

A. The Family and Medical Leave Act (FMLA) allow employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. An employee is required to use all eligible paid leave, according to the leave policies, in conjunction with FMLA leave before taking unpaid leave.

B. Eligibility

Employees are eligible if they have worked for the State of North Dakota for at least one year and for 1,250 hours over the previous 12 months.

C. Qualifying Reason for FMLA

1. Certain Serious Family and Medical Reasons

a. Up to 12 weeks of unpaid leave must be granted:

- (1) For incapacity due to pregnancy, prenatal medical care or child birth;
- (2) To care for the employee's child after birth or placement for adoption or foster care;
- (3) To care for the employee's spouse, child or parent who has a serious health condition; or
- (4) For a serious health condition that makes the employee unable to perform at least one essential function of the employee's job.

b. Serious Health Condition. A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either:

- (1) An overnight stay in a medical care facility; or
- (2) Continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities. Subject to certain conditions, the continuing treatment includes any one or more of the following:
 - (a) A period of incapacity of more than three consecutive calendar days combined with at least two visits to a health care provider within a 30-day period (unless extenuating circumstances exist) or one visit and a regimen of continuing treatment; or
 - (b) Any period of incapacity due to prenatal care or pregnancy; or

(c) Incapacity due to a chronic condition.

2. Military Family Leave for a Qualifying Exigency

- a. Eligible employees with a spouse, child, or parent on active duty or call to active duty status in the regular Armed Forces, National Guard, or Reserves to a foreign country may use their 12-week leave entitlement to address certain qualifying exigencies.
- b. A “qualifying exigency” is defined as at least one of nine categories of events:
 - (1) *Short notice deployment* - leave is limited up to seven calendar days or less.
 - (2) *Military events and related activities* such as official, sponsored, or promoted ceremonies, programs, events or information briefings related to active duty or a call to active duty.
 - (3) *Childcare and school activities* – includes when the call to active duty necessitates a change in childcare arrangements, and to provide childcare on an urgent, immediate (but not routine, everyday) basis.
 - (4) *Financial or legal arrangements.*
 - (5) *Counseling*, provided that the need for the counseling arises from the call to active duty.
 - (6) *Rest and recuperation* – up to 15 days to spend time with a covered military member on short-term, temporary, rest and recuperation leave.
 - (7) *Post-deployment activities* – attending events such as arrival ceremonies for up to 90 days after termination of the military member’s active service, and to address issues arising from the death of a covered military member.
 - (8) *Care of the military member’s parent* who is incapable of self-care.
 - (9) *Additional activities*, as mutually agreed by the employer and employee.

3. Military Family Leave to Care for a Covered Service Member

- a. An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member is entitled to up to 26 weeks of leave in a single 12-month period to care for the service member with a serious injury or illness.
 - (1) A serious injury or illness is one that was incurred or aggravated in the line of duty on active duty that may render the service member

medically unfit to perform the duties of his or her office, grade, rank, or rating.

A serious injury or illness also includes an injury or illness that qualifies the veteran for benefits from the Department of Veterans Affairs or substantially impairs the veteran's ability to work. Those benefits are:

- (a) a physical or mental condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and the need for military caregiver leave is related to that condition; *or*
- (b) a physical or mental condition that substantially impairs the veteran's ability to work because of a disability or disabilities related to military service, or would do so absent treatment; *or*
- (c) an injury that is the basis for the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

- (2) Next of kin of a covered service member means the nearest blood relative other than the covered service member's spouse, parent, or child, in the following order of priority:

Blood relatives who have been granted legal custody of the covered service member by court decree or statutory provisions, siblings, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA.

- b. A covered service member is defined as one of the following:

- (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 that manifested itself before or after active duty.
- (2) A veteran who was a member of the Armed Forces, including a member of the National Guard or Reserves, who was discharged or released under conditions other than dishonorable at any time during the period of five years preceding the first date the eligible employee takes FMLA leave to care for the veteran undergoing medical treatment, recuperation, or therapy for a serious injury or illness that manifested itself before or after the member became a veteran.

4. Bereavement Leave for the Death of a Child

Up to four weeks of unpaid leave may be granted, and may be taken intermittently, if approved and must be concluded within six months of the child's death.

D. Requirements

1. Notice

- a. An employee must provide 30 days advance notice when the leave is foreseeable. When leave is not foreseeable, the employee must provide notice as soon as practicable.
- b. If an employee's leave may potentially qualify as FMLA, the supervisor must immediately contact the Human Resource Director whether or not the employee has requested FMLA leave. An employee may not choose that qualified leave not be considered FMLA leave.

2. Certification

- a. In most cases the Court System will require certification to support a request for leave. Employees may also be required to provide periodic recertification supporting the need for continued leave.
- b. For medical certifications the Court System may require a second or third opinion (at the Court System's expense) and a fitness-for-duty report to return to work.
- c. Certification forms may be obtained on the intranet under the Human Resource page. <http://admin.ndcourts.gov/hr/default.htm>

3. Paid Leave

- a. An employee is required to use all eligible paid leave, according to the leave policies, in conjunction with FMLA leave before taking unpaid leave.
- b. On exhaustion of all paid leave, an exempt employee's pay will be reduced by the hours missed even if it is less than a full day.

4. Use of Leave

- a. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the Court System's operations.
- b. Leave can be taken intermittently or on a reduced leave schedule when medically necessary.
- c. Leave due to qualifying exigencies may also be taken on an intermittent basis.

5. Leave Measurement
 - a. The 12-month leave period is measured as a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.
 - b. The 26 weeks of Military Family Leave to Care for a Covered Service Member is available during a single 12-month period.
 - c. During any single 12-month period, the employee's total leave entitlement is limited to a combined total of 26 weeks for all qualifying reasons under FMLA.

6. Spousal State Employment
 - a. If both the employee and the employee's spouse are employed by the State of North Dakota and are eligible for FMLA leave, their combined leave may not exceed 12 weeks if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's child or to care for the child after the birth, or for placement of a child with the employee for adoption or foster care or to care for the child after placement.
 - b. Even if the employee and spouse are employed by the State of North Dakota, an employee with the Court System may take 12 weeks of FMLA leave if needed to care for a newborn child or an adopted or foster child with a serious health condition.
 - c. The employee and the spouse are limited to a combined total of 26 weeks of leave when care for a covered service member with a serious injury or illness is taken as military family leave in addition to leave for birth of the employee's child or to care for the healthy child after birth, for placement of a healthy son or daughter with the employee for adoption or foster care, to care for the child after placement, or to care for the employee's parent with a serious health condition during a single 12-month period.

7. Outside Employment
 - a. An employee may not engage in similar outside employment, while on FMLA leave, if it interferes with the proper and complete discharge of the employee's responsibilities and duties to the Court System. For the purposes of this section the term "outside employment" means any gainful employment other than the performance of functions and duties related to the Court System, including, but not limited to, management or operation of a business or consulting work.
 - b. Prior to pursuing outside employment, an employee must seek the written approval of the State Court Administrator or Chief Justice to determine whether such outside employment presents a conflict of interest or the appearance thereof, or interferes with the employee's responsibilities and duties.

- c. The State Court Administrator or Chief Justice will give or deny approval, in writing, within a reasonable time. The decision will be placed in the employee's personnel file.

E. Job Benefits and Protection

1. During FMLA leave, the Court System must maintain the employee's health coverage. The Court System may recover the premiums paid for an employee if the employee does not return from leave.
2. When an employee returns from FMLA leave, an employee must be reinstated to the employee's original or equivalent position with equivalent pay, benefits, and terms and conditions of employment.
3. However, if the employee's former position is eliminated because of a reduction-in-force, and the position would have been eliminated if the employee was not on such absence, the employee is not entitled to reinstatement.

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