

**NEW MEXICO JUDICIAL BRANCH
GENERAL PERSONNEL POLICY AND PROCEDURE**

FAMILY AND MEDICAL LEAVE ACT POLICY

Reference NMBPR & NMJBPAWE 5.10
The Family and Medical Leave Act of 1993; Judicial Branch Policy Revised August 2009
Title 29, Chapter V of the Code of Federal Regulations, CFR 825.

1. PURPOSE

To establish guidelines for taking leave under the Family and Medical Leave Act (FMLA).

2. DEFINITIONS

- A. Active Duty (or call to active duty)** - Duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation. A call to active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty, not a state call, unless under order of the President of the United States. (29CFR 825.126(b)(2)). (Added 08/09)
- B. Administrative Compensatory Time** - Time worked by exempt, non-covered and at-will employees in excess of 80 hours in a pay period.
- C. Administrative Leave** - Paid leave authorized by the Chief Justice or Administrative Authority. (Amended 08/09)
- D. Covered Military Member** - The employee's spouse, son, daughter, domestic partner, or parent on active duty or call to active duty status who is a member of the National Guard or Reserves. (29CFR 825.126) (Added 08/09)
- E. Covered Servicemember** - A 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. (29CFR 825.127) (Added 08/09)
- F. Compensatory Time** - Time worked by FLSA non-exempt employees in excess of 40 hours during a designated work week.
- G. Domestic Partner** - A person who is in a mutually exclusive committed relationship with an at-will employee or employee and who both share a primary residence for 12 or more consecutive months and who are jointly responsible for the common welfare of each other and who share financial obligations, as evidenced by an Affidavit of Domestic Partnership executed by the employee and the domestic partner as required by Executive Order 2003-010.

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- H. Employee** - A person (including an at-will employee for purposes of this policy) who holds a permanent or term position within the Judicial Branch excluding a justice or judge.
- I. Employer** - The State of New Mexico Judicial, Executive or Legislative Branch (for purposes of this policy).
- J. Equivalent Position** - One that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites (perks) and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.
- K. Exigent Circumstances Leave** - Leave taken by an eligible employee who is the spouse, son, daughter, parent or domestic partner of the covered service member on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation. (Added 08/09)
- L. Health Care Provider** - Any of the following (29CFR 825.125):
- (1) A doctor of medicine or osteopathy, authorized to diagnose, practice medicine or surgery by the State in which the doctor practices.
 - (2) Podiatrists, dentists, clinical psychologists, optometrists, chiropractors authorized to practice in the State and performing within the scope of their practice under State law.
 - (3) Nurse practitioners, nurse-midwives, clinical social workers authorized to practice in the State and performing within the scope of their practice under State law.
 - (4) Christian Science practitioners listed with the First Church of Christ, Science in Boston, Massachusetts.
 - (5) Any health care provider from whom a State of New Mexico's contracted health plan will accept a certification for the existence of a serious health condition to substantiate a claim for benefits.
 - (6) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his/her practice as defined under such law.

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- M. Immediate Family Member** - A child for whom the at-will employee or employee has acted as parent, regardless of the blood relation; biological parents or anyone who acted as a parent when the at-will employee or employee was a child; and husband or wife as defined under the laws of the State of New Mexico.
- N. Intermittent Leave** - Leave taken at separate blocks of time due to a single qualifying reason, and may include leave of periods from a half hour or more for several weeks. (Added 08/09)
- O. Military Caregiver Leave** (aka Covered Servicemember Leave) - Leave taken to care for a service member, due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from a half hour or more to several weeks. An eligible employee who is the spouse, son, daughter, parent, domestic partner, or next of kin of a covered service member who is entitled to a total of 26 workweeks of leave during a single 12-month period to care for the service member. (Added 08/09)
- P. Next of Kin of a Covered Servicemember** - The **nearest blood relative** other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purpose of military caregiver leave under the FMLA. (29CFR 825.122(d)). (Added 08/09)
- Q. Qualifying Exigency Family Medical Leave** - Short-notice deployment (where the servicemember must leave within seven (7) days notice or less); military events and related activities (e.g., to attend informational briefings and learn about family support programs); childcare and school activities (e.g., to arrange for alternative childcare or to attend meetings related to school); financial and legal arrangements (e.g., to make a will or sign a power of attorney); counseling; rest and recuperate (up to five days); and spend time with a covered military member who is on short-term leave during the period of deployment; post-deployment activities (e.g., ceremonies to address issues that arise from the death of a covered military member; additional activities/other events which arise out of the covered military member's active duty or call to active duty provided that the employer and employee agree that such leave qualifies). (29CFR 825.126) (Added 08/09)
- R. Reduced Leave Schedule** - A leave schedule that reduces an employee's usual number of working hours per work week, or hours per workday. (Added 08/09)

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- S. Serious Health Condition** - An illness, injury, impairment, or physical or mental condition that involves either: (29CFR 825.113) (Amended 08/09)
- (1) Inpatient care (e.g., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (e.g., inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care: (Amended 08/09) or
 - (2) Continuing treatment by a health care provider which includes:
 - a. A period of incapacity lasting more than **three (3) consecutive, full calendar days**, and any subsequent treatment or period of incapacity relating to the same condition, that **also** includes: (Amended 08/09)
 - 1. treatment two (2) or more times by or under the supervision of a health care provider (e.g., in-person visits, the first within seven (7) days and both within 30-days of the first day of incapacity); (Added 08/09) or
 - 2. one (1) treatment by a health care provider (e.g., an in-person visit within seven (7) days of the first day in incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy); (Added 08/09) or
 - b. Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or
 - c. Any period of incapacity or treatment for a chronic serious health condition, which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence (e.g., asthma, diabetes, epilepsy, etc.); (Amended 08/09) or
 - d. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment (e.g., Alzheimer's, stroke, terminal diseases, etc.); or
 - e. Any absences to receive multiple treatments for restorative surgery or for a condition that likely would result in incapacity of more than three (3) consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.). (Amended 08/09)
- T. Serious Injury or Illness** (of a covered service member)- An injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the

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servicemember medically unfit to perform the duties or his or her office, rank or rating. (29CFR 825.127(a)(1)) (Added 08/09)

- U. **Work Week** - Regularly scheduled work hours between 12:01 a.m. on Saturday and 12:00 midnight the following Friday. (Added 08/09)

3. FAMILY MEDICAL LEAVE (FML) EMPLOYEE ELIGIBILITY

- A. An eligible employee must have been employed by the employer for at least 12-months (need not be consecutive) within the last seven (7) years, and must have been employed for at least 1,250 paid work hours of service during the 12-month period immediately preceding the commencement of the FML. When determining the number of hours an employee has worked for the employer reference the Fair Labor Standards Act. (29CFR 825.110)
- B. Part-time employees are eligible on a pro-rata basis if they meet the criteria listed above. (29CFR 825.205(b))
- C. An employee shall not accrue sick or annual leave while on unpaid FML.

4. FMLA QUALIFYING REASONS FOR LEAVE

- A. Eligible employees will be granted up to a total of 12 work weeks of leave during any single 12-month period for one or more of the following reasons: (29CFR 825.112)
 - (1) for an expectant mother's prenatal care or pregnancy related incapacity, or the spouse or domestic partner caring for an expectant mother; (29CFR 825.120(4&5)) (Added 08/09)
 - (2) for the birth and care of the newborn child of the employee; (29CFR 825.120)
 - (3) for placement with the employee of a child for adoption or foster care; (29CFR 825.121)
 - (4) to care for an immediate family member or domestic partner with a serious health condition; or

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- (5) when the employee is unable to work because of a serious health condition; or
- (6) because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, parent or domestic partner 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 as a member of a reserve component or a retired member of the Regular Armed Forces or Reserve. An employee whose family member or domestic partner is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency (29CFR 825.126(b)(2)(i)). A call to active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States. (29CFR 825.126) (Added 08/09)

B. Military Caregiver Leave (aka Servicemember Family Leave).

(29CFR 825.124 & 825.127) (Section Added 08/09)

- (1) An eligible employee who is the spouse, son, daughter, parent, domestic partner, or next of kin of a covered servicemember shall be entitled up to a total of 26 work weeks of leave during any single 12-month period to care for a covered servicemember with a serious injury or illness that occurred in the line of duty on active duty. This leave may be used for both physical and/or psychological care of the covered service member.
- (2) To qualify, the serious illness or injury must be incurred in the line of duty on active duty, and encompasses both physical and psychological care. If an eligible employee does not take all of his or her 26 work weeks of leave entitlement to care for the covered servicemember it is forfeited.

C. FML shall be paid leave:

- (1) To the extent of the employee's available annual, sick, personal leave day, and accrued administrative compensatory or compensatory time. (29CFR 825.207) (Amended 08/09)
- (2) If an observed paid holiday occurs within a week of paid FML, the holiday is counted towards the FML entitlement, as well as any administrative leave time granted for holidays.

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- A. However, if an employee is using FML in increments of less than one week, the holiday does not count against the employee's FML entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

- B. Employees shall not be paid for observed holidays while on unpaid FML. (Amended 08/09)

- (3) In no case shall administrative leave granted for inclement weather or emergency situations be used for paid leave.

- (4) The substitution of disability benefits and workers' compensation indemnity benefits will be subject to the terms and conditions of the benefit plans. (Added 08/09)

- (5) All other FML shall be unpaid.

- D. Spouses or domestic partners** employed by the same employer are jointly entitled to a combined total of 12 work weeks of FML: (29CFR 825.201)
 - (1) for an expectant mother's prenatal care or pregnancy related incapacity, or the spouse or domestic partner caring for an expectant mother; (Added 08/09)

 - (2) for the birth and care of the newborn child of the employee;

 - (3) for placement with the employee of a child for adoption or foster care;

 - (4) to care for the employee's parent with a serious health condition.

- E.** An employee eligible for servicemember family leave is entitled to a combined total of 26 workweeks in a single 12-month period for any FMLA qualifying reason during the single 12-month period. For example, an eligible employee may during the single 12-month period, take 16 weeks of FML to care for a covered Servicemember and 10 weeks of FML to care for a newborn. An eligible employee is entitled to no more than 12 weeks of FML in regard to Section 4 of this policy. (29CFR 825.127(c) (Added 08/09)

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- F.** Leave for birth and care, or placement for adoption or foster care must conclude within 12-months of the birth or placement.

- G.** Under some circumstances, eligible employees may take FML intermittently, which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule. (29CFR 825.202)
 - (1)** If FML is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the Administrative Authority's approval.

 - (2)** FML may be taken intermittently whenever medically necessary to:
 - a.** care for a seriously ill immediate family member or domestic partner; or
 - b.** care for a covered servicemember with a serious injury or illness; (Added 08/09) or
 - c.** for a qualifying exigency arising out of the active duty status or call to active duty of a covered military member; (Added 08/09) or
 - d.** because the employee is seriously ill and unable to work.

 - (3)** When intermittent leave is needed, and is for planned medical treatment the employee has a statutory obligation to make a reasonable effort to schedule such leave so as not to unduly disrupt the employer's normal business operation. (29CFR 825.203) (Amended 08/09)

5. MAINTENANCE OF HEALTH BENEFITS

- A.** Except in emergency situations, an employee shall before taking FML, make arrangements to pay his/her share of health insurance premiums.

- B.** The employer will maintain group health insurance coverage for employees on FML whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. The employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FML.

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6. JOB RESTORATION

- A. Upon return from FML, an employee will be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. (29CFR 825.215)
- B. An employee's use of FML will not result in the loss of any employment benefit that the employee earned or was entitled to before using FML, nor be counted against the employee under an attendance policy.

7. NOTICE AND CERTIFICATION

- A. **Foreseeable Leave** - When the need to take FML is foreseeable, employees seeking to use FML are required to provide a 30-day advance notice to the employer for the need to take FML by submitting a completed FMLA Request form. If the employee fails to provide certification in a timely manner as required, FML coverage may be denied until the required certification is provided. (29CFR 825.305 & 812.313) (Amended 08/09)
- B. **Unforeseeable Leave** - When the need to take FML is unforeseeable, employees seeking to use FML shall give notice to the employer immediately and shall submit a completed FMLA Request form as soon as possible and practical under the circumstances. An employer may deny FML coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. (Amended 08/09)
- C. **The FMLA Request:**
 - (1) Shall contain complete information regarding the request; and as appropriate:
 - (2) Shall include the Certification of the Healthcare Provider for the Employee's Serious Health Condition completed by a healthcare provider when the purpose of the FML is because of the employee's own serious health condition. (Form - WH-380-E - Certification of Health Care Provider for Employee's Serious Health Condition)
 - (3) Shall include the Certification of Healthcare Provider for a Family Member's Serious Health Condition completed by a healthcare provider when the purpose of

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the FMLA leave is to provide care for an immediate family member or domestic partner who has a serious health condition. (Form - WH 380-F - Certification of Health Care Provider for Family Member's Serious Health Condition)

- (4) Shall include the Certification of the Qualifying Exigency for Military Family Leave form completed by a healthcare provider for an eligible employee when the purpose of the FML is for one of the qualifying exigencies. (29CFR 825.309) (Form - WH-384 Certification of Qualifying Exigency for Military Family Leave) (Added 08/09)

- (5) Shall include the Certification of Serious Injury or Illness of a Covered Servicemember form completed by a health care provider for an eligible employee when the purpose of the FML is to care for a covered servicemember with a serious injury or illness. (Form - WH-385 Certification for Serious Injury or Illness of Covered Servicemember-for Military Family Leave) (Added 08/09)

D. Recertification - The Administrative Authority may:

- (1) Require recertification no more than every 30-days regarding the employee's status and intent to return to work during FML, unless:
 - a. 30-day Rule - If the medical certification indicates that the minimum duration of the condition is more than 30-days (e.g., the employee will be unable to work, whether continuously or on an intermittent basis, for 40 days), then the Administrative Authority must wait until the minimum duration expires before requesting recertification. (Added 08/09) (29CFR 825.308(b))

 - b. Less than 30 Days, if: (29CFR 825.308(c)) (Added 08/09)
 - 1. The employee requests an extension of leave.
 - 2. Circumstances described in the previous certification have changed significantly.
 - 3. The employer received information that casts doubt upon the employee's stated reason for the absence of the continuing validity of the certification.

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- F. Fitness for Duty** - The employee may be required to provide a fitness for duty certification to return to work from the health care provider, with regard to the particular health condition that caused the employee's need for FML. (29CFR 825.312) (Amended 08/09)

- G. Employer Notice Requirements** - The Administrative Authority or Human Resources representative shall provide a response by sending to the requesting employee the Designation Notice, form WH 382, within five (5) business days from the date the employee submitted to the appropriate Human Resources representative a completed FMLA Request form with the necessary Certificate of Healthcare Provider Form; or when the Administrative Authority, supervisor, or Human Resources Representative acquires knowledge that an employee's leave may be for an FMLA qualifying reason, the Administrative Authority or Human Resources representative must notify the employee of the employee's eligibility to take FML within (5) five business days, absent extenuating circumstances. (29CFR 825.300) (Amended 08/09)

8. LEAVE DESIGNATION

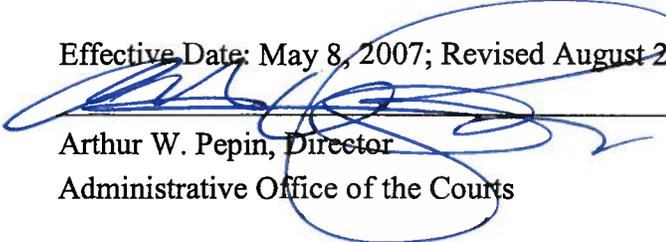
- A.** An employee wishing to substitute accrued paid leave for a period of FML is subject to the terms and conditions of the Judicial Branch normal leave policies. (29CFR 825.207) (Amended 08/09)

- B.** Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. (29CFR 825.220 (d)). (Added 08/09)

- C.** The Administrative Authority may count any type of leave authorized under this policy as FML retroactively by notifying the employee in writing that the absence is being designated as FML. (29CFR 825.127(b)(4) & 825.301(d)) (Amended 08/09)

- D.** The designation of FML must be done while the employee is absent or within two business days of the employee's return to work.

Effective Date: May 8, 2007; Revised August 2009



Arthur W. Pepin, Director
Administrative Office of the Courts

8/30/09

Date