

Administration Guidelines for
The Family And Medical Leave Act (FMLA)
For Employees of NH Executive Branch Departments/Agencies

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Administration Guidelines for
The Family And Medical Leave Act (FMLA)
For Employees of NH Executive Branch Departments/Agencies

See a version of the [FMLA](#)

I. Introduction

The State of New Hampshire will grant up to **12 weeks of family and medical leave** during any 12 months period, to eligible employees of the executive branch. In accordance with the Family and Medical Leave Act of 1993, and as specified in these guidelines, the leave may be paid, unpaid, or a combination of paid and unpaid leave, depending on the specific circumstances of the leave.

II. Eligibility

An employee is eligible for FMLA leave if the employee:

1. has worked for the State for at least **12 months** or 52 weeks (not necessarily consecutively) before taking the leave, **and**
2. has worked at least **1,250 hours** for the State during the 12 months period immediately prior to the date on which leave will begin. The principles established by the FLSA (Fair Labor Standards Act) determine the number of hours worked. No carrying over of hours is possible. To determine eligibility, time spent on leave (whether the employee was paid or not paid) can not be included in hours worked.

Eligible employees are entitled to take up to 12 work weeks of job-protected leave during any 12-month period, for one or more of the following reasons:

- For the birth and care of the newborn child of the employee; *or*
- For placement with the employee of a son or daughter for adoption or foster care; *or*
- To care for an immediate family member (spouse, child, or parent) with a serious health condition; *or*
- To take medical leave when the employee is unable to perform the essential functions of his position because of a serious health condition, or needs medical treatment.

Spouses employed by the same employer are jointly entitled to a combined total of 12 work weeks of family leave in any 12 month period for the birth and care of their newborn child, for placement of a child with them, for adoption or foster care, or to care for a parent who has a serious health condition. [*For purposes of this policy, "same employer" means "same department or agency."*]

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

If an employee and his/her spouse use a combined total of 12 work weeks of family leave as set forth above, each individual employee is **entitled to the remainder of the 12 weeks for his/her own medical condition.**

For instance, if an eligible husband and wife working for the same agency adopted a child, and each took 6 weeks leave, each spouse would still be entitled to take an additional 6 weeks of FMLA leave due to their own serious health condition or to care for a seriously ill family member.

III. Definitions

12 Month Period

New Hampshire State Government utilizes a "**rolling**" 12-month period for determining leave eligibility by **measuring backward 12 months** from the date an employee's current FMLA leave is expected to begin.

For instance, an eligible employee used 8 weeks of FMLA leave between May 15, 2000 and July 7, 2000. The employee requested 10 more weeks of FMLA leave starting on June 4, 2001. Measuring backward from the date on which the leave was expected to begin, the "rolling 12-month period" is used to determine eligibility for additional leave would run from June 4, 2000 to June 4, 2001. In this case, although the employee's last FMLA leave lasted for 8 weeks, only 5 of those weeks fell during the 12 last months period (June 4, 2000 to June 4, 2001). Therefore, the employee would be entitled to an additional 7 weeks (12-5=7) of job-protected FMLA leave, starting on June 4th, 2001.

Child (son or daughter) means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* (in place of a parent), 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 that limits one or more of the "major life activities".

Parent means a biological, adoptive, or foster parent, or an individual who stands or stood *in loco parentis* (in place of a parent), to an employee when the employee was a child. ("Parent" does not include mother-in-law or father-in-law.)

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

For proof of the relationship between an employee and the immediate family member for whom the leave is requested, employer shall rely on an honest statement from the employee. However, in special circumstances, the parties could ask the Division of Personnel to determine the sufficiency of the documentation and/or eligibility of the relationship.

Intermittent Leave/Reduced Schedule Leave

Eligible employees may take FMLA leave intermittently by taking leave in blocks of time, or on a reduced leave schedule, by reducing their normal weekly or daily work schedule if:

1. Such leave is **medically necessary** to care for a seriously ill family member, or because the employee has a serious health condition as defined below.
2. An **adequate notice** will have to be given in advance, or certification produced to the employer.

The taking of such a leave shall not result in the reduction of the total amount of leave to which the employee is entitled, beyond the amount of leave actually taken.

When intermittent leave is required to care for an immediate family member or because of the employee's own illness, and the intermittent leave is for planned medical treatment, the employee must try to schedule the treatment **so as not to unduly disrupt the employer's operation**.

When an employee requires intermittent/reduced schedule leave for foreseeable medical treatment, the employer may transfer the employee temporarily to an **alternative job with equivalent pay and benefits** that **better accommodates recurring periods of leave** than the employee's regular job.

For the birth and care of a child, or for placement of a child with the employee for adoption or foster care, intermittent leave may NOT be used except with the employer's approval.

If after 12 weeks, an employee is still medically unable to perform his job, the Americans with Disabilities Act ([ADA](#)) may apply and require the employer to make a reasonable accommodation for that employee to enable him to perform the essential functions of his/her employment position.

If a reduced schedule or some special accommodations for an employee are related to a disability, please refer to the Division of Personnel for more information.

Serious Health Condition

As defined by the U.S. Department of Labor Compliance Guide to the Family and Medical Leave Act, "serious health condition" means "an illness, injury, impairment, or physical or mental condition that mainly involve:

- Any period of incapacity or treatment connected with **inpatient care** (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; *or*
- A period of incapacity requiring absence of more than **three consecutive calendar days** from work, school, or other regular daily activities that also involves **subsequent treatment** by (or under the supervision of) a **health care provider**; *or*
- Any period of incapacity due to pregnancy, or for prenatal care; *or*
- Any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.) which requires periodic visits to a health care provider and may involve occasional episodes of incapacity; *or*
- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); *or*
- Any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that is so serious that, if not treated, would likely result in a period of incapacity of more than three consecutive calendar days (e.g., chemotherapy, physical therapy, dialysis, etc.)."

Examples of serious health conditions include, but are not limited to heart attacks, heart conditions requiring heart bypass or valve surgery, cancers, back conditions requiring extensive therapy or surgery, strokes, severe respiratory ailments or conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, and injuries caused by serious accidents on or off the job. Serious health conditions DO NOT include cosmetic treatments, orthodonture, or other voluntary treatments, unless they result in hospitalization.

Employers should be aware that an incapacity due to pregnancy, prenatal care or chronic illness that requires periodic medical treatment is sufficient, even if the employee does not receive treatment from a health care provider during the absence from work, and even if the absence does not last more than three days, such as in the case of severe morning sickness and asthma attacks. In contrast, unless complication arise requiring further treatment, the common cold, the flu, minor ulcers, indigestion, headaches (except for migraines), stress and dental problems generally do not qualify for FMLA leave.

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-ray to exist) authorized to practice, and performing within the scope of their practice, under state law; *or*
- Nurse practitioners, nurse-midwives and clinical social workers 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.

NOTE: In order to ensure payment for authorized medical services under the State's health insurance plan, employees must continue to access the health care system in accordance with the terms and conditions of the plan documents themselves.

IV. Posting

Covered employers **must post a notice approved by the Secretary of Labor** explaining rights and responsibilities under FMLA (See a notice approved by Secretary of Labor [WH publication 1420](#)). An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense.

If the employer has written policies on benefits or leave rights in its employee handbook or manual, it must include a policy regarding the FMLA.

Covered employers must **inform employees of their rights and responsibilities under FMLA**, including giving specific information when an employee gives notice of FMLA leave on what is required of the employee and what might happen in certain circumstances, such as if the employee fails to return to work after FMLA leave.

An employer that **fails to post the required notice or to provide proper information, cannot take adverse action against an employee**, including denying FMLA leave or delaying leave because of an employee's failure to furnish the employer with advance notice of the need for such leave.

V. Notices and Certifications

An eligible employee seeking to use FMLA leave is required to provide and receive:

A. Notice to the employer of need for a FMLA leave

A **30 calendar days advance notice** of the need to take FMLA leave should be given, in writing, to the appointing authority, when the need is foreseeable. (See Application [Form PD-8](#)). *If an employee fails to give proper advance notice when the leave is foreseeable, the appointing authority may deny the leave until 30 calendar days after the appropriate notice is provided.*

An eligible employee shall notify the appointing authority "**as soon as practicable**," in writing, when the need to take FMLA leave was not foreseeable. *In most cases, this means at least verbal notice to the employer within **one or two business days** of learning of the need to take FMLA leave.*

An employee shall provide **sufficient information** for the employer to understand that the employee needs leave for FMLA-qualifying reasons. *The employee is not required to mention the FMLA specifically when asking for the necessary leave; the employee need only explain why the leave is needed.*

Employers may not deny FMLA leave simply because the employee fails to provide written notice of the need for leave, nor may they delay the start of the leave unless the employee, without reasonable excuse, fails to give advance notice for leave that he or she knows will be needed.

Where the appointing authority was **not made aware that an employee was absent for FMLA** reasons and the employee wants the leave counted as FMLA leave, the employee must provide timely notice, *generally within **two business days** of returning to work, that the leave was taken for an FMLA-qualifying reason.*

B. Certifications of the need for an FMLA leave

1. Employees may be requested to provide a **medical certification**, supporting the need for leave due to a serious health condition affecting the employee or a serious health condition affecting the employee's parent, spouse, or child (See attached [form WH-380](#)). Employers should request such certification in writing.

If the leave is planned, the employee should provide the certification **before the leave begins**. Otherwise, unless the employer agrees to extend the deadline for submission of medical certification, employees have **15 calendar days** from the date on which the employer receives notice of the employee's need for leave, in which to obtain the medical certification and submit it to the employer.

Certification from the health care provider of the employee's serious health condition shall be deemed sufficient if it includes:

- the **date** that the serious health condition commenced,
- the **probable duration** of the condition,
- appropriate **medical facts** supporting the assessment,
- a statement that the employee is **unable to perform the functions of his or her job**,
- for intermittent leave or leave on a reduced schedule, planned medical treatment, the **dates on which such treatment is expected** to be given and duration of such treatment.

(See a Certification [form WH-380](#))

Certification from the health care provider of the child's, spouse's, or parent's serious medical condition shall be deemed sufficient if it includes the date the serious condition commenced, the probable duration of the condition, appropriate medical facts supporting the assessment, and a statement that the employee is needed to care for the family member.

The information requested from employee about his health situation, or about the health of the immediate family member he/she is requesting a leave for, shall remain **confidential**.

If a doubt arises about the authenticity of a medical certification, the parties should refer to the Division of Personnel for a final evaluation and decision. Serious disciplinary sanctions will be taken against an employee attempting to provide false certification.

Employer or agency shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

An employer can **delay the start or continuation of leave** until the employee provides an adequate certificate. If the employee never produces the certification, leave can be redesigned as some other qualifying leave or unexcused absence. (See Chapter IX, for disciplinary actions when failure to comply by a New Hampshire employee.)

2. The employer may, at its own expense, require the employee to obtain a **second or third medical certification** from a health care provider. The second opinion would be obtained from a health care provider chosen by the employer. If the first and second opinions differ, the employer may require the employee to obtain a third opinion. The health care provider must be approved jointly by the employer and the employee. The third opinion is final and binding.

3. Employee may be required to provide **periodic reports** during FMLA leave regarding his status and intent to return to work.

4. No **re-certification** however should be requested from the employee, more than every 30 days.

5. Employer may as well require a **fitness-for-duty certification** upon return to work, in appropriate situations. An Agency may deny an employee restoration to his or her former position until such time as the employee provides the agency with a fitness for duty certification following leave for the employee's own serious health condition. Agencies **must inform the employee of this requirement when the FMLA leave commences**, and the **requirement** for such certification **must be uniformly applied to all employees** returning from FMLA leave for a serious medical condition.

C. Notice to the employee of the nature of the leave.

The employer must provide his employee with a **notice, in writing, that the leave will be counted as FMLA leave**. Such notice should generally be provided within **two business days** of the notice from employee of a need for a leave.
(See form for employer's notice [WH-381](#)).

If the employee is not made aware that his/her leave is being designated as FMLA leave and later challenges it, the leave will not count against the employee's 12 weeks entitlement.

An employer may designate leave as FMLA qualifying **even if the employee does not request it**, if the employer has sufficient information to determine that the leave is FMLA qualifying. (See Chapter IX for New Hampshire employees, employer has the final decision).

An **employer may require or an employee may opt to substitute vacation time or other paid time off during family and medical leave**, instead of unpaid leave. (See Chapter IX for New Hampshire employees, employer has the final decision).

However, employees on leave for their own serious health condition who are receiving Workers' Compensation or state disability insurance benefits, cannot be required or allowed to substitute vacation or other paid time off if the employer wishes to count the time against the employee's FMLA entitlement. (See Chapter IX for concurrent use of Workers' Compensation benefits and FMLA leave).

Absences due to the employee's own serious medical condition, including disability or incapacitation due to pregnancy or the birth of a child, **shall be deducted from the employee's available balance of accrued sick leave first**. If the employee **exhausts sick leave during the period of an approved FMLA leave** due to the employee's own serious medical condition, the employee **may elect to use any other accrued paid leave for the remainder of the FMLA leave, or the employee may elect to take the remainder of such leave without pay**.

If the employer's **notice is late**, the employer may not count the leave taken prior to providing the notice towards an employee's 12 weeks entitlement.

The only times employers may **designate a leave as FMLA retroactively** is when:

- The employer did not know the reason for the leave at the time the leave was taken but makes the designation within two business days after the employee returns to work; or
- The employer has preliminarily designated the leave as FMLA qualifying and notified the employee but is awaiting medical certification.

A **proper notice** must include, if applicable, that:

(See form for employer's [notice WH-381](#)).

- The leave will count as a FMLA leave;
- Medical certification is required, and explain the consequences of failing to provide it;
- Substitution of available paid time-off is allowed or required;
- Premium payments for maintenance of health benefits must be made and what the arrangements are for making such payments;
- A fitness-for-duty certification is required before an employee can return to work following a leave for his or her own serious health condition;
- Periodic reports or re-certification will be required;

- Employee has the right to return to the same or equivalent job;
- Employee is potentially liable for premiums paid by the employer in the event the employee fails to return to work.

VI. Benefits During Approved FMLA Leave

Medical and Dental Insurance

Full-time employees who are eligible for fully-paid medical and/or dental insurance will **continue to receive coverage** during the course of an approved FMLA leave, whether the employee is absent with or without pay.

The **State will continue to pay its pro rata share of the medical and dental insurance premiums** for eligible part-time employees during an approved FMLA leave; however, if the employee fails to pay his/her share of the premiums within 30 calendar days of the due date, the State will not be obligated to continue the coverage or its pro rata premium payment. This obligation extends only for the 12 weeks of legally mandated leave, even if the employee is on leave longer than 12 weeks.

Life Insurance

Employees who have elected to participate in the \$10,000 group term life insurance plan will be required to make bi-weekly payments of their portion of the premium. If an employee fails to pay his/her portion of the premium within 30 calendar days of the due date, the State shall not be obligated to continue coverage during the remainder of the unpaid leave.

Additional Benefits

Employees who have additional life insurance, disability insurance and/or deferred compensation should contact the carrier for guidance on making payments or contributions during any period of unpaid FMLA leave.

Recovery of premiums

If an employee who is able to return to work **fails to return to work** following FMLA leave, and/or if the employee **does not stay for 30 calendar days following restoration** to the employee's position, the appointing authority may **recover from the employee all premiums paid by the State** for health insurance during the FMLA leave.

Employers are NOT required to continue FMLA benefits or to reinstate employees who would have been laid off or otherwise would have had their employment terminated had they continued to work during the FMLA period as, for example, due to a general lay-off.

VII. Job Restoration

Upon return from FMLA leave, an **employee must be restored to the employee's original position, or to an equivalent position with the same pay, benefits, and other terms and conditions of employment**, except when:

- The leave exceeded 12 weeks;
- The employee is medically unable upon return to work to perform the essential requirements of the employee's position; and/or
- The position has ceased to exist due to legitimate business reasons unrelated to the employee's leave; and/or
- Reinstatement would cause an undue hardship to the agency.

In addition, an employee's use of FMLA leave **can not result in the loss of any employment benefit** that the employee earned or was entitled to before using FMLA leave, nor be counted against the employee under a "no fault" attendance policy. All **benefits that may have been suspended during an**

unpaid FMLA leave (i.e., life insurance) **should be reactivated IMMEDIATELY** when an employee returns from FMLA leave.

If an employee gives his or her agency **unequivocal notice that the employee does NOT intend to return to work, the agency is not obligated to maintain** the employee's health and dental insurance or **the employee's position regardless of the reason for leave**. COBRA information should be sent to the terminating employee as usual (See a full version of the [Consolidated Omnibus Budget Reconciliation Act](#)).

An Agency may **deny an employee restoration to his or her former position until such time as the employee provides the agency with a fitness for duty certification** following leave for the employee's own serious health condition. Agencies must inform the employee of this requirement when the FMLA leave commences, and the requirement for such certification must be uniformly applied to all employees returning from FMLA leave for a serious medical condition.

Very specific, very limited policies may apply to restoring a "key" employee following an approved FMLA leave. A "key" employee is identified as a salaried "eligible" employee who is among the highest paid ten percent of employees within 75 miles of the work site. **Due to the compensation practices of New Hampshire State government, the State would not expect this provision to apply to any of its classified, unclassified or non-classified employees.** Identification of an employee as a "key" employee can not occur without the Division of Personnel's agreement.

Employers are not required to continue FMLA benefits or to reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA period as, for example, due to a general lay-off.

VIII. Compliance with FMLA

It is **unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA**. It is also unlawful for an employer to **discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA**.

Employers who fail to comply with FMLA expose themselves to damages for lost pay and employment benefits or other compensation denied or lost to an employee because of the violation. If the violation is willful, the damage award may be doubled. Prevailing plaintiffs receive interest on damages and may be awarded costs and attorney's fees

The dependent care provisions of the current [Collective Bargaining Agreement](#) shall apply to employees who take approved FMLA leave to care for a family member during the family member's serious illness (See full text of the Collective Bargaining agreement).

The FMLA does not affect the [Workers' Compensation](#) regulations and both run concurrently when the situation allows it. (See section on Workers' Compensation in Chapter IX, for New Hampshire employees.)

The FMLA does not affect any other **Federal or State laws** which prohibit discrimination, provide more generous family or medical leave protection. Nor does it affect an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan.

FMLA is **enforced, including investigation of complaints, by [the Wage and Hour Division](#) of the U.S. Department of Labor's Employment Standards Administration**. If violations cannot be satisfactorily resolved, the Department may bring action in court to compel compliance. An employee may also bring a **private civil action against an employer for violations**.

Disclaimer: These guidelines are offered for informational and educational purposes only. They do not create legal advice or opinion on specific matters, nor new obligations for the State of New Hampshire. Readers should not act upon this information without seeking professional counsel. These guidelines are continually under development. Efforts will be made to clarify or correct any errors or new developments that are brought to our attention.

*More Help: Additional information including the complete text of the FMLA can be found on the U.S. DOL's website at <http://www.dol.gov/esa>
For more information you can also contact the nearest office of the Wage and Hour Division, or their webpage at <http://www.dol.gov/esa/whd>.*