

The Family and Medical Leave Act: WHAT MANAGERS NEED TO KNOW

The Family and Medical Leave Act (FMLA) provides faculty and staff the opportunity to balance the demands of the workplace and their families by providing paid or unpaid leave for certain medical reasons.

What events qualify for FMLA leave?

FMLA leave must be approved for:

- prenatal care, birth of a child and/or the care of a newborn child;
- the placement of a child with an employee for foster care or adoption;
- care of the employee's spouse, child, or parent (or "next of kin" if covered service member) with a serious health condition; and
- the employee's serious health condition (including medical appointments for on-going treatment of chronic conditions).

What is a serious health condition?

A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that requires either:

- 1) inpatient care (overnight) in a hospital, hospice, or residential treatment center; or
- 2) "continuing treatment" by a health care provider, including:
 - a period of incapacity of more than three consecutive calendar days and subsequent care that involves at least two treatments by the health care provider or a single treatment that results in a regimen of continuing treatment (i.e. antibiotics);
 - any period of incapacity due to pregnancy or prenatal care (including morning sickness);
 - any chronic serious health condition which requires periodic treatment by a health care provider, continues over an extended period of time, and may cause episodic periods of incapacity (i.e. asthma);
 - incapacity due to a permanent or long-term condition for which treatment may not be effective (i.e. Alzheimer's disease);
 - any period of absence (not necessarily over three days) in order to receive multiple treatments for a condition that would likely result in a three-day period of incapacity in the absence of medical intervention;
 - medical evaluation for any of the above;
 - substance abuse treatment by a health care provider (not absences for substance use); or
 - absence to care for spouse, child, parent, or next of kin (if covered service member injured in line of duty on active duty), with a serious health condition; care may be physical or psychological.

Who's eligible for FMLA leave and how is it taken?

To be eligible for FMLA leave, an employee must have been employed by VCU or the State for at least 12 months (not consecutively and subsequent to any five-year break in service) and must have worked at least 1,250 hours during the 12-month period immediately preceding the FMLA leave request.

An eligible employee may take up to 12 workweeks (480 hours) of leave during a calendar year for qualified FMLA absences. The 12 weeks are prorated for eligible employees working less than full time. The leave may be taken all at once or on an intermittent basis if medically necessary.

Exceptions: ① If both spouses work for VCU, they only can take a combined total of 12 weeks for the birth or placement of a child. ② Department approval is required for intermittent leave for the birth or placement of a child. ③ FMLA is extended to 26 workweeks (1040 hours) to care for a family member with a serious health condition when the spouse, child, parent, or "next of kin" is a covered service member and the health condition is incurred in the line of duty on active duty. This leave is only available once and is combined with all other FMLA leave that year limiting FMLA for all purposes to 26 weeks during a 12-month period.

It is unlawful for any employer to interfere with or deny any right provided under the FMLA. It also is unlawful to terminate or discriminate against any person for involvement in any proceeding related to FMLA.

Is FMLA leave paid or unpaid?

The employee may choose to use accrued leave so that his/her salary may continue without interruption during the time away from work on FMLA leave. If the employee does not choose to substitute accrued paid leave for FMLA leave, the department may require the substitution. An employee who runs out of accrued leave balances while on FMLA leave can be docked or placed on leave without pay. Specific leave rules are available in the attached "FMLA and the Sick Leave Plans."

Note: As a public employer, VCU cannot require an employee to substitute compensatory leave for unpaid FMLA. The voluntary use of compensatory time may not be counted against the employee's FMLA entitlement.

How does Workers' Compensation leave interface with FMLA?

Workers' compensation (WC) benefits run concurrently with FMLA usage for injuries or illnesses that are covered by WC and which also qualify as FMLA. Although the timesheets will reflect WC leave usage, the time may count towards the employee's 480 hours of FMLA. An employee covered by both WC and FMLA who accepts a light-duty position retains the right to return to his/her same or equivalent position until all 12 weeks of FMLA leave have been taken.

How much notice is the employee required to give?

If foreseeable, the employee must give 30 days' notice that FMLA leave is needed. In all other cases, the employee should notify you as soon as practicable after becoming aware of the need for leave but no later than two work days after returning to work. Failure to do so means a loss of the FMLA protections for that absence and the time away from work could be counted as an unexcused absence.

Employees should be reminded that department call-in requirements must be followed whenever they are absent from work. They must explain the absence in enough detail so as to notify you that the absence is due to a FMLA-qualifying reason; calling in sick is inadequate to obtain FMLA protection. Please note that the employee's adult relative, spouse, attorney or health care provider also may notify you of the employee's need for FMLA leave.

What are my notification requirements to the employee?

You are required to inform employees of their FMLA rights whether or not they specifically request the leave. Failure to do so automatically entitles the employee to the provisions of the Act for qualified FMLA absences. In addition, within two working days of receiving the employee's request (verbal or written) for leave, you are required to confirm in writing that the leave has been designated as FMLA and whether it will be paid or unpaid. Providing a copy of the fact sheet entitled *The Family and Medical Leave Act: What Faculty and Staff Need to Know* and the attached designation form to the employee will fulfill both notification obligations.

Note: You may designate the employee's leave as FMLA without a specific request if you have enough information to determine the employee's eligibility and qualification. You also may designate the leave pending receipt of appropriate medical documentation.

Can I request medical certification?

You should require written certification from a health care provider to verify the need for FMLA. If medical certification is not provided, the employee's leave may be denied or, in cases where sick leave has been used pending receipt of the certification, the leave time may be amended to reflect the use of annual leave. The employee must be given at least 15 calendar days to provide the medical certification after your request and the certification should include the following information:

- *medical facts supporting the need for leave;*
- *probable duration of the condition;*
- *an estimate of the number of treatments;*
- *a general description of the treatment;*
- *whether intermittent leave will be necessary;*
- *any work limitations; and*
- *a description of the need for leave to care for a family member.*

Note: You can only request a note from the health care provider once every 30 days for absences due to the same medical condition.

Use the "Certification of Health Care Provider" form located at www.hr.vcu.edu/forms/Certification_of_Health_Care_Provider.pdf to ensure the best documentation.

What can I do if I question the medical documentation?

If you question the validity of the medical documentation or need to clarify information provided by the health care provider, **you must work through the employee or VCU's Director of Employee Health Services to obtain clarification.** The employee should give permission and again has 15 calendar days to comply.

Can I require a return-to-work note from the employee's health care provider?

You should request a "fitness for duty" or return-to-work note from the employee's physician before reinstatement to the position. Return-to-work certification cannot be required in cases of intermittent leave.

What happens when the employee returns to work?

At the conclusion of FMLA leave, the employee must be returned to the same or similar job with equivalent pay, benefits, and working conditions as when the leave began. If the employee is unable to perform essential job functions upon his/her return to work or if there is a need for a reduced schedule, you should work with the employee and his/her physician to attempt to find appropriate accommodations.

Can I designate FMLA leave retroactively?

Time off may be designated retroactively as FMLA leave once you have enough information to determine the qualifying reason for the leave. If you know the reason for the leave but have not yet received confirming medical documentation, you should give the employee a preliminary designation on the attached form.

What happens if an employee continues to be out of work after exhausting FMLA?

The options that are available depend upon the specific circumstances of the employee, the leave plan in which he/she participates, the expected duration of the leave and the needs of the department. Specific situations should be discussed with the Employee Relations staff for guidance.

How do departmental absenteeism policies work with FMLA?

Departmental policies may not include FMLA-related absences as causes in determining excessive absenteeism. If the department's policy provides any type of attendance incentive (i.e. perfect attendance rewarded with first choice of days off), an employee cannot be disqualified or the award reduced for having taken FMLA leave.

What can supervisors do to manage employees with serious absentee?

Absenteeism control is difficult to maintain in the context of FMLA. In essence, the legislation is designed to prohibit employers from taking adverse action against employees with FMLA-qualifying needs. The best way to manage sick leave usage is to maintain rigorous attention to employee requests for this leave and follow proper notification requirements. When in doubt, give the employee a copy of the fact sheet entitled *The Family and Medical Leave Act: What Employees Need to Know* so that he/she is aware of FMLA benefits.

What records should be kept related to FMLA?

FMLA documentation is maintained by the department for a period of three years and should include:

- *copies of employee FMLA requests;*
- *records of what time was designated as FMLA (both paid and unpaid) in order to monitor the 480-hour maximum;*
- *detailed records of any disputes regarding the designation of leave as FMLA; and*
- *copies of medical certifications (must be treated as confidential records and maintained separately from the employee's personnel file).*

For assistance, contact:

Employee Relations at 828-1510 or by e-mail at emprel@vcu.edu

Leave Administration at 828-1712 or visit www.hr.vcu.edu/leave/FMLAinfo.htm

FMLA and the Sick Leave Plans

The following VCU leave policies apply to faculty and staff in the two available sick leave plans: Traditional Sick Leave Plan (TSLP) and Virginia Sickness and Disability Program (VSDP). *Exception:* Nine-month faculty do not have access to 33% of their sick balances for FMLA family-related illnesses without prior written approval of the appropriate Vice President and Dean.

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| Traditional Sick Leave Plan (TSLP) | <p>Personal illness - sick leave is used to cover the absence certified as medically necessary by a health care provider. After all sick leave is used, any additional time off for personal illness may be covered by annual or holiday leave balances or leave without pay.</p> <p>Family* illness - employees may use up to six days (48 hours) of family sick leave to cover a short-term family illness. Additional time off for FMLA-covered family illness may be reported using up to 33% of remaining sick leave balance; or annual/holiday balances; or leave without pay. Annual/holiday balances or leave without pay must cover additional time off for family illness that does not qualify for FMLA.</p> <p>Maternity/paternity - for absences due to pregnancy, sick leave may be used by the woman to cover the period of time she is medically disabled (normally six weeks). Additional time taken may be covered by up to 33% of her remaining sick leave balance; or annual/holiday balances; or leave without pay. Paternity leave is covered by the same rules as shown above under family illness.</p> <p>Adoption/foster care – employees may use up to 33% of their existing sick leave balance. Annual or holiday balances, or leave without pay may cover additional time off. In cases where the child has a medical condition, up to three days (24 hours) of family sick leave may be used before using other balances.</p> |
| Virginia Sickness and Disability Plan (VSDP) | <p>Personal illness - sick leave is used to cover absences certified as medically necessary by a health care provider. Generally, after all sick leave is used, additional time off for personal illness may be covered by personal and family leave, annual or holiday leave balances, or leave without pay. After seven calendar days of absence, employees may apply for short-term disability (STD).</p> <p>Family* illness – employees may use personal and family leave, annual or holiday balances, or leave without pay to cover an occurrence of family illness. Additional time off for FMLA-covered family illness may be reported using up to 33% of available sick leave balance, annual/holiday balances, or leave without pay. Annual/holiday balances or leave without pay must cover additional time off for family illness that does not qualify for FMLA.</p> <p>Maternity/paternity - for absences due to pregnancy, sick leave, personal and family leave, annual or holiday balances, or leave without pay may be used by the woman to cover the seven day waiting period. After seven calendar days of absence, an employee may apply for short-term disability coverage for the time she is medically disabled (normally, six weeks). Additional time taken after the STD claim has been closed may be covered by up to 33% of her remaining sick leave balance, personal and family leave, annual or holiday balances, or leave without pay. Paternity leave is covered by the same rules as shown above under family illness.</p> <p>Adoption/foster care – employees may use up to 33% of their existing sick leave balance. Personal and family leave, annual or holiday balances, or leave without pay may cover additional time taken.</p> |

*Family member under FMLA includes:

- spouse (as defined or recognized by law);
- biological parent or individual who stood in loco parentis to an employee (having day-to-day care and financial responsibility for); does not include parents “in law”;
- biological, adopted or foster child, stepchild, legal ward, or child of a person standing in loco parentis, who is either under age 18, or age 18 and over and “incapable of self-care because of mental or physical disability;” and
- “next of kin” defined as the employee’s nearest blood relative - only applicable to leave to care for injured service member.

Family member for non-FMLA family sick reasons is defined as:

- spouse (as defined or recognized by law);
- parents, including step-parents;
- children, including step-children and foster children; and
- any relative, by blood or marriage, living in the employee’s household.

For assistance, contact Leave Administration at 827-1770 or by e-mail at leave@vcu.edu.

Note: Bone Marrow and Organ Donor leave is **not** considered FMLA leave and does not count toward an eligible employee’s FMLA allotment.