

**STATE OF OHIO
ADJUTANT GENERAL'S DEPARTMENT
2825 West Dublin Granville Road
Columbus, Ohio 43235-2789**

MEMORANDUM

TO: SEE DISTRIBUTION

FROM: Gregory L. Wayt, Major General (Ohio),  The Adjutant General

DATE: January 5, 2005

SUBJECT: POLICY – State Employee Procedure Letter #29
Family and Medical Leave Act of 1993 (FMLA)

1. REFERENCES:

- a. Family and Medical Leave Act of 1993
- b. Article 31, OCSEA Contract for Bargaining Unit Employees

2. FAMILY AND MEDICAL LEAVE ACT (FMLA) DEFINITIONS: Attached to this Policy Letter (Enclosure 1) is a listing of definitions to be used for the purposes of FMLA leave.

3. SCOPE: This policy applies to all state employees regardless of gender, of The Adjutant General's Department who have been employed by the State of Ohio for at least twelve months and have been in an active pay status for at least 1,250 hours during the past twelve months. Previous employment with the state in which the employee was paid directly by warrant of the Auditor of State shall count toward meeting the twelve-month employment requirement.

Eligible employees are entitled to a full twelve weeks of FMLA leave even if their spouse also works for the state and has already exhausted leave for a qualifying event.

4. PURPOSE: The Family and Medical Leave Act (FMLA) allows eligible state employees to take up to twelve weeks of leave (i.e., up to 480 hours for employees working 40 hour weeks, up to 360 hours for employees working 30 hour weeks, etc.) per rolling twelve month period for the following qualifying events:

- a. The birth of a child;
- b. Placement with an employee of a child for adoption or foster care;
- c. Caring for a spouse, child, or parent with a serious health condition;
- d. The serious health condition of the employee.

5. REQUESTS FOR FMLA LEAVE:

- a. If the need for leave is foreseeable employees must submit leave requests to their supervisor at least thirty days prior to taking leave or, if this is not possible, as soon as practical.

***This memorandum supersedes State Employee Procedure Letter #29 dated May 6, 2003.**

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- b. Requests must be submitted on the standard Request for Leave form (ADM 4258).
- c. Employees who know the requested leave is for an FMLA-qualifying event may specify that the leave is requested pursuant to FMLA by checking the appropriate box on the Request for Leave form. Leave must be taken in increments of not less than 1/10 of an hour.
- d. Requests for FMLA leave must include a completed United States Department of Labor Form WH-380, "Certification of Health Care Provider" (Enclosure 3) or equivalent documentation in the case of adoption/foster care. The completed certification form shall be maintained separately from the personnel file in a confidential manner.
- e. Leave taken for the birth or placement of a child must be taken within one year of the date of birth or placement.
- f. A fact sheet on your rights under the Family and Medical Leave Act of 1993 is attached as Enclosure 2.

6. USE OF PAID LEAVE:

- a. Employees must use accrued sick, vacation, and/or personal leave balances as appropriate to receive paid FMLA leave. Use of accrued compensatory time is optional and will not be counted toward the twelve-week entitlement.
- b. When FMLA leave is used concurrently with Disability Leave, Workers' Compensation or Adoption/Childbirth Leave, the leave policies for those programs shall override the requirement of this policy for employees to exhaust all of their accrued leave.
- c. Whether leave is paid, unpaid, or a combination thereof, the employee is entitled to only twelve weeks of FMLA leave within a rolling twelve-month period.
- d. The Agency may designate paid or unpaid leave as FMLA leave, whether the employee designates it as such or not, if all of the following apply:
 - 1. The Agency has compelling information based on information provided by the employee that the leave was taken for an FMLA qualifying event; and
 - 2. The employee is properly notified of his/her FMLA rights.

7. NOTIFICATION REQUIREMENTS:

- a. The Agency shall at a minimum notify employees of their FMLA rights:
 - 1. Verbally within two days of their leave being counted as FMLA leave; and
 - 2. In writing by the payday following the date leave is designated as FMLA leave.
 - 3. If the following payday is less than one week from the date leave is designated as FMLA leave, the Agency shall provide written notice to the employee by the next payday.

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4. At a minimum, the Agency shall provide written notice to employees the first time they are granted FMLA leave in each six month period.
- b. If the employee fails to provide an FMLA related reason for his/her absence within two days of returning to work, then the absence is not protected.

8. WORKERS' COMPENSATION AND DISABILITY LEAVE: Employees requesting Workers' Compensation or Disability Leave who are also eligible for FMLA leave shall have up to twelve weeks of the non-working portion of the approved benefit period, including any required waiting period, count concurrently as FMLA leave. FMLA leave will also be granted to employees while their request is being reviewed. The granting of this leave shall have no bearing on the approval or disapproval of these requests.

9. ADOPTION/CHILDBIRTH LEAVE: Employees requesting Adoption/Childbirth leave benefits who are also eligible for FMLA leave shall have the entire non-working portion of Adoption/Childbirth leave, including the required waiting period, count concurrently as FMLA leave. An employee who is not eligible for FMLA leave shall retain his/her right to Adoption/Childbirth leave upon meeting the Adoption/Childbirth leave eligibility requirements.

10. INTERMITTENT FMLA LEAVE:

- a. Employees are entitled to take intermittent leave for the his/her own serious health condition or due to the serious health condition of a parent, spouse, son or daughter.
- b. To be entitled to intermittent leave, the employee must submit certification to establish the medical necessity of the leave (e.g., periodic testing and treatments). In reviewing the request, the SHRD shall determine whether or not an acceptable leave schedule can be arranged and may consider a temporary transfer to an alternative, comparable position.
- c. Employees will not be required to provide re-certification of the medical necessity for intermittent leave more often than once every thirty days in conjunction with an absence unless:
 1. The employee requests an extension of leave.
 2. Circumstances described by the previous certification have changed significantly (e.g., duration or nature of the illness, complications, etc.).
 3. The Agency receives information that casts doubt upon the continuing validity of the certification.
- d. Employees may be granted intermittent leave for the birth or placement of a child. Intermittent leave for such reasons shall be granted upon approval of the employee's supervisor and the State Human Resources Division (SHRD). Employees should request such leave from their supervisors and may request a review from SHRD of any decision made.

11. EMPLOYEE BENEFITS:

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- a. The Agency will continue to pay the employer's portion of health insurance premiums during approved FMLA leave. Employees are required to continue paying their portion of health insurance premiums. Information on how the premium payments are to be submitted is available by contacting SHRD.
- b. Employees shall be granted a thirty-day grace period from the due date of their health insurance premium. Employees who fail to pay their portion of the premium within this grace period may, with fifteen days notice from the Agency, be removed from their respective health insurance plan.
- c. If an employee chooses not to continue health care coverage during FMLA leave, the employee will be entitled to reinstatement into the benefit plan upon return to work.
- d. The Agency may seek reimbursement for any health insurance premiums paid on behalf of the employee if the employee fails to return to work from FMLA leave. Reimbursement will not be sought if the reason for the employee failing to return to work is due to the continuation or recurrence of the serious health condition or is otherwise beyond the employee's control as defined in the FMLA.
- e. Employees who are reinstated will not lose any service credit and FMLA leave will be treated as continuous service for the purpose of calculating any benefits which are based on length of service.

12. MEDICAL CERTIFICATION:

- a. In addition to the certification required to be submitted with a request for leave that qualifies as a serious health condition, the employee may be required to obtain a second opinion from a second health care provider designated by and paid for by the Agency.
- b. If the first and second opinions conflict, the employee may be required to submit to a third examination at the Agency's expense by a health care provider chosen jointly by the employee and Agency. In choosing the third health care provider, both the employee and the agency must be reasonable and act in good faith. The opinion of the third health care provider is final and binding.
- c. Under this policy, employees may not be required to report their health status more often than once every thirty days. If reasons exist to believe that the employee's health status has changed in such a way that the employee may no longer be eligible for FMLA leave, he/she may be required to get a second or third opinion as previously outlined.

13. REINSTATEMENT:

- a. Employees are entitled to reinstatement to the same or similar position upon return from leave.
- b. If the same job is not available, SHRD will determine in which similar position the employee should be placed, ensuring that the position has equivalent pay, benefits and conditions of

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employment.

- c. Employees who take leave due to their own serious health condition may be required to provide certification from a health care provider that they are able to perform the essential functions of the position.

14. RECORDKEEPING:

- a. SHRD will maintain records of leave balances and FMLA leave use.
- b. Any medical records accompanying FMLA requests will be kept separate from personnel files.
- c. To the extent required by law, medical records related to FMLA leave shall be kept confidential.

Enclosures: (3)

1 – FMLA Definitions

2 - Certification of Health Care Provider Form WH-380

DISTRIBUTION:

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FAMILY AND MEDICAL LEAVE ACT (FMLA) DEFINITIONS

April 18, 2003

The following definitions shall be used for the purposes of FMLA leave:

HEALTH CARE PROVIDER:

1. A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices.
2. Podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law.
3. Nurse practitioners and nurse-midwives, and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law.
4. Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.
5. Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of an 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 or her practice as defined under such law.

INCAPABLE OF SELF-CARE: An individual that requires active assistance or supervision to provide daily self-care in several of the "activities of daily living." Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, eating, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

NEEDED TO CARE FOR A FAMILY MEMBER:

1. The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.
2. The term also includes situations where the employee may be needed to fill in for others who are

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caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

3. An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently -- such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

PARENT: Biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a child. This term does not include parents "in law."

PHYSICAL OR MENTAL DISABILITY: A physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR Part 1630, issued by the Equal Employment Opportunities Commission under the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., define these terms.

SERIOUS HEALTH CONDITION:

- a. For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:
 1. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform the regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or
 2. Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
 - (i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
 - A. Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
 - B. Treatment by a health care provider on at least one occasion which results in a regiment of continuing treatment under the supervision of the health care provider.
 - (ii) Any period of incapacity due to pregnancy, or for prenatal care.
 - (iii) Any period of incapacity or treatment for such incapacity due to a chronic serious condition. A chronic serious condition is one which
 - A. Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
 - B. Continues over an extended period of time (including recurring episodes of a single underlying

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condition); and

- C. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).
- (iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.
- (v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).
- b. Treatment for purposes of paragraph (a) of this section included (but not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a) (2) (i) (B), a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes FMLA leave.
- c. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this section are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.
- d. Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than treatment, does not qualify for FMLA leave.
- e. Absences attributable to incapacity under paragraphs (a) (2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than tree days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceed a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

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SON OR DAUGHTER: Biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability."

SPOUSE: Husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common-law marriages. Common-law marriages that came into existence in Ohio prior to October 10, 1991, or ones that came into existence after October 10, 1991 in another state or nation that recognizes the validity of such marriages, remain valid.

Certification of Health Care Provider
(Family and Medical Leave Act of 1993)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



(When completed, this form goes to the employee, **not to the Department of Labor.**)

OMB No.: 1215-0181
Expires: 07/31/03

1. Employee's Name

2. Patient's Name (If different from employee)

3. Page 4 describes what is meant by a "serious health condition" under the Family and Medical Leave Act. Does the patient's condition¹ qualify under any of the categories described? If so, please check the applicable category.

(1) _____ (2) _____ (3) _____ (4) _____ (5) _____ (6) _____, or None of the above _____

4. Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5. a. State the approximate **date** the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present **incapacity**² if different):

b. Will it be necessary for the employee to take work only **intermittently or to work on a less than full schedule** as a result of the condition (including for treatment described in Item 6 below)?

If yes, give the probable duration:

c. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated² and the likely duration and frequency of **episodes of incapacity**²:

¹ Here and elsewhere on this form, the information sought relates **only** to the condition for which the employee is taking FMLA leave.

² "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

6. a. If additional **treatments** will be required for the condition, provide an estimate of the probable number of such treatments.

If the patient will be absent from work or other daily activities because of **treatment** on an **intermittent** or **part-time** basis, also provide an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

b. If any of these treatments will be provided by **another provider of health services** (e.g., physical therapist), please state the nature of the treatments:

c. **If a regimen of continuing treatment** by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

7. a. If medical leave is required for the employee's **absence from work** because of the **employee's own condition** (including absences due to pregnancy or a chronic condition), is the employee **unable to perform work** of any kind?

b. If able to perform some work, is the employee **unable to perform any one or more of the essential functions of the employee's job** (the employee or the employer should supply you with information about the essential job functions)? If yes, please list the essential functions the employee is unable to perform:

c. If neither a. nor b. applies, is it necessary for the employee to be **absent from work for treatment**?

8. a. If leave is required to **care for a family member** of the employee with a serious health condition, **does the patient require assistance** for basic medical or personal needs or safety, or for transportation?

b. If no, would the employee's presence to provide **psychological comfort** be beneficial to the patient or assist in the patient's recovery?

c. If the patient will need care only **intermittently** or on a part-time basis, please indicate the probable **duration** of this need:

Signature of Health Care Provider

Type of Practice

Address

Telephone Number

Date

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

Employee Signature

Date

A “**Serious Health Condition**” means an illness, injury impairment, or physical or mental condition that involves one of the following:

1. Hospital Care

Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity² or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

(a) A period of incapacity² of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity² relating to the same condition), that also involves:

- (1) **Treatment**³ **two or more times** by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
- (2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment**⁴ under the supervision of the health care provider.

3. Pregnancy

Any period of incapacity due to **pregnancy**, or for **prenatal care**.

4. Chronic Conditions Requiring Treatments

A **chronic condition** which:

- (1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider;
- (2) Continues over an **extended period of time** (including recurring episodes of a single underlying condition); and
- (3) May cause **episodic** rather than a continuing period of incapacity² (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision

A period of **Incapacity**² which is **permanent or long-term** due to a condition for which treatment may not be effective. The employee or family member must be **under the continuing supervision of, but need not be receiving active treatment by, a health care provider**. Examples include Alzheimer’s, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for **restorative surgery** after an accident or other injury, or for a condition that **would likely result in a period of Incapacity² of more than three consecutive calendar days in the absence of medical intervention or treatment**, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis).

This optional form may be used by employees to satisfy a mandatory requirement to furnish a medical certification (when requested) from a health care provider, including second or third opinions and recertification (29 CFR 825.306).

Note: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

⁴C Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

⁵CA regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

Public Burden Statement

We estimate that it will take an average of 10 minutes to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

DO NOT SEND THE COMPLETED FORM TO THIS OFFICE; IT GOES TO THE EMPLOYEE.