



FAMILY & MEDICAL LEAVE GUIDE

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REFERENCES

Article IX-41 Sec. 8(14)(b) 74th Texas Legislature

UHD/PS 02.A.08, 02.A.10, 02.A.11, 02.A.13, 02.B.01

The Family & Medical Leave Act of 1993
Federal Regulations Part 825, Final Rule,
November 17, 2008

SECTION 1

Introduction to Family Medical Leave

What is FMLA?

The Family and Medical Leave Act was enacted on February 5, 1993 by the United States Congress. According to the Department of Labor, “FMLA allows employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons.” Congress also proposes FMLA will minimize the potential for employment discrimination by allowing gender-neutral leaves in order to uphold the Equal Protection Clause of the Fourteenth Amendment. This gender-neutral entitlement allows employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition. The Department of Labor has also found a direct correlation between stability in the family and productivity in the workplace. Thus, FMLA is intended and expected to benefit both employees and employers by maintaining stable workplace relationships, which will not dissolve while workers attend to family obligations.

FMLA & Eligibility

FMLA provides employees with up to 12 weeks of *unpaid* job protection and continued insurance coverage for medical leave. FMLA applies to all:

- Public agencies, including State, local and Federal employers, and local agencies (schools).

To be eligible for FMLA, an employee must work for a covered employer and:

- Have worked for that employer for at least 12 months; and
- Have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and
- Have worked at a location where at least 50 employees are employed at the location or within 75 miles of the location.

In determining the 12-month period, the 74th Texas Legislature authorized FMLA leave for state of Texas employees provided the employee has been employed by the state for 12 **cumulative** months (not continuous). Regardless of the agency, if a state employee has worked at least 1,250 hours during the 12-month period preceding the commencement of leave, the employee is eligible for FMLA.

Normally, a part time employee would not qualify for FMLA. However, one must count all hours worked. In determining eligibility, “hours worked” does not include time paid but not “worked” (paid vacation, personal or sick leave, holidays), nor does it include unpaid leave or periods of layoff. Overtime hours are considered hours worked under FMLA.

When reapplying for FMLA, one must wait one year from the first date FMLA was used, known as a “rolling year” and the employee must meet the 12- month, 1,250 hour eligibility requirement.

Leave taken for FMLA must include:

- The birth of a child and the care of the newborn (If both spouses are employed by the University as eligible employees, they are entitled together a total of 12 weeks of leave).
- The placement of a child with an employee in connection with the adoption or state-approved foster care of the child. (For a seriously ill adopted or foster child, if both spouses are employed by the University as eligible employees, each is entitled to 12 weeks of leave).
- The serious health condition of a child, parent or spouse of the employee
- The Military Family Leave: Qualifying Exigency Leave or Military Caregiver Leave
- A serious health condition of the employee

Parental Leave & Eligibility

Parental Leave provides 12 weeks of *unpaid* approved parental leave in a year. One may use parental leave if they have not met the requirements under FMLA. Parental Leave applies to employees who have:

- Worked for the State of Texas for a period of less than 12 months; and
- Have fewer than 1,250 hours worked for the University of Houston-Downtown in the 12 months immediately preceding the qualifying leave

The State of Texas extended the leave benefits to employees who did not meet the eligibility requirements under FMLA.

Leave taken for parental leave must include:

- The birth of a child to the employee and the care of the newborn
- The placement of a child under three years of age with an employee in connection with the adoption or state-approved foster care of the child

Parental leave may start no earlier than the date of birth of a natural child or adoption or foster care placement of the child.

The leave of absence extends the probationary period of employment.

“Serious Health Condition”

In order to qualify for FMLA for a serious health condition, the employee or family member must be under continuing supervision of, but not necessarily receiving active treatment by a health care provider who must certify to one of the following:

- In the case of leave requested to care for a family member, the employee is needed to care for the family member
- In the case of leave requested for the serious health condition of the employee, the employee is unable to perform the essential functions of the position.

A serious health condition includes any of the following conditions:

- A period of incapacity of more than three consecutive calendar days, involving treatment by a health care provider two or more times, or at least one time that results in a regimen of continuing treatment. In both instances the first visit to the health care provider must occur within 7 days of the first day of incapacity. If a second visit is required, it must occur within 30 days of the first day of incapacity.
- Any period of incapacity due to pregnancy or prenatal care.
- Any period of incapacity due to chronic serious health condition which continues over an extended period of time, requires at least two visits to a health care provider during a year.
- A period of incapacity that is permanent or long-term for which treatment may not be effective (e.g. Alzheimer’s, severe stroke, terminal stages of a disease).

- Any period of absence to receive multiple treatments either for restorative surgery after an accident or injury or for a condition that would likely result in an incapacity of three or more days in the absence of medical treatment (e.g., cancer, severe arthritis);
- Allergies or mental illness resulting from stress, but only if they meet all of the other criteria of a serious health condition;
- Substance abuse, but only if the employee is taking leave for treatment by a health care provider

Conditions for which treatment does not qualify for FMLA leave include: cold, flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental, orthodontia problems and periodontal disease. Cosmetic treatments are not considered a serious health condition unless medically required or unless complications arise.

Parent, Spouse, and Children

FMLA may be used to care for a child, parent, or spouse with a serious health condition.

A child includes:

- A biological, adopted, or foster child; a stepchild; a legal ward; or a person for whom the employee has (or had during the person's youth) daily responsibility to care and financially support and who is either under 18 years of age or is incapable of self-care because of a physical or mental disability

A parent includes:

- A biological (*or in loco parentis*) "parent" but the entitlement does not extend by regulation to parents "in law"

A spouse includes:

- Husband or wife as defined or recognized under state law for purposes of marriage, including common law marriage

Intermittent Leave

FMLA may be granted on a reduced leave schedule if there is medical need for such leave. (See Serious Health Condition.) Intermittent leave is FMLA leave taken in separate blocks of time due to

a single qualifying reason. It is calculated on an hourly basis, as a proportion of the employee's normal workweek.

During Intermittent Leave:

- The health care provider's certification must state that medical need can best be accommodated through an intermittent or reduced leave schedule.
- An employee must attempt to schedule their leave so as not to disrupt the employer's operation.
- An employer may assign an employee to an alternate position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

Examples of intermittent leave include taking leave for several days at a time spread over a period of six months, such as for chemotherapy or leave taken on a reduced schedule for an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

Paid and Unpaid Leave

FMLA is unpaid leave. However, an employee must use all accrued paid leave balances at the start of the leave (including sick leave and vacation) while taking family and medical leave, unless the employee is receiving temporary disability benefit payments or workers' compensation benefits. The use of accrued sick leave is, however, restricted to those circumstances that would otherwise qualify the employee for sick leave usage under state law and university rules and regulations governing the use of sick leave (UH System Administrative Memorandum 02.D.01, UHD Policy Statement 02.A.08). Federal regulations prohibit the substitution of compensatory time for unpaid FMLA leave. Any compensatory time taken may not be counted against the employee's family and medical leave.

Accruing time while on FMLA:

- While on leave *without pay*, the employee is not eligible for holiday pay
- The employee will not accrue vacation, sick or longevity pay while on FMLA without pay for any full calendar month. An employee will accrue these credits if any part of a month is paid. An employee who is on paid leave on the first workday of a month may not use the sick leave or vacation leave that the employee accrues for that month until after the employee returns to duty.

- If a holiday(s) falls during a week when an employee is on family medical leave, whether paid or unpaid, the holiday(s) is treated as a day on family medical leave, except when the university is closed for the entire week (five or more consecutive working days).

Insurance Coverage while on FMLA

Group health plan benefits must be maintained on the same basis, as coverage would have been provided if the employee had been continuously employed during the FMLA leave period.

- During FMLA the employee is entitled to receive the State of Texas premium sharing toward the cost of their health plan.
- Once the employee is on family medical leave *without pay* for an entire calendar month, the employee will need to self pay any supplemental coverage (dependent health care, dental, supplemental life, AD&D, and disability benefits) directly to the Employees Retirement System (ERS will bill the employee). If the employee does not self-pay premiums for supplemental coverage, then the employee's coverage will be reduced to the basic self only medical with no other coverage.
- Family medical leave is considered a Qualifying Life Event and the employee may make changes to their current insurance coverage within 30 days of the leave event.
- Upon return from family medical leave the employee may make coverage changes within 30 days of the return date.

Return from FMLA

The employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.

- The employee must be restored to same position or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.
- If an employee is offered an equivalent position and chooses to decline the position, the employee waives any rights to reinstatement.
- An employee who believes that a position offered is not an equivalent position is entitled to file a grievance with the Vice President for Human Resources under the UHD Grievance Policy, PS 02.B.01.

Should an employee need more than twelve weeks, it is at the department's discretion to grant further leave without pay. The employee is not entitled to job protection and the state will not contribute any portion of the health premium beyond the 12-week period guaranteed under FMLA. The employee may use any remaining sick leave and vacation leave still available at the end of the twelve weeks if

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the employee is still in need of medical leave. The state will continue to contribute any portion of the health premium for the duration of the paid leave of absence; however, the leave is not considered job protected leave.

SECTION 2

Employee Procedural Requirements

Employee Notices

All requests for leave (both paid and unpaid) must be addressed to the employee's supervisor. In addition, the Benefits Office should be advised of any leave request that may be FMLA eligible leave.

- Foreseeable Leave – The request must be submitted on the appropriate forms at least 30 days in advance of the scheduled leave to the Benefits Office.
- Unforeseeable Leave – The employee must request leave within 5 days of the need for leave. The request may be verbal. However, the employee must provide to the Benefits Office the application and physician's statement, if possible, within 15 days of the employer's written notice of FMLA leave.
- If the application and/or physician's statement submitted are determined to be incomplete, the employee will be notified in writing as to the deficiencies or what additional information is needed and the employee will have 7 days from the date of notice to correct the deficiencies

It is the employee's responsibility to obtain the physician statement. Any cost incurred in obtaining the physician statement is an expense to the employee.

Failure to provide the completed physician's statement and/or the UHD application for FMLA leave will result in the termination of the FMLA leave and possible loss of benefits.

Applying for FMLA

The employee must request FMLA and provide the University of Houston Downtown Family and Medical Leave/Parental Leave Request Form including Certification of Health Care Provider to the Benefits Coordinator. The Benefits Coordinator will then issue a written statement to the supervisor verifying that the illness is an eligible medical condition for FMLA leave.

The following information must be noted on the forms:

1. The health care provider must certify that one of the following conditions exists:
 - If the leave is requested based on the serious health condition of the employee, that the employee is unable to perform the function of his or her position
 - If the request is based on the serious health condition of the child, parent, or spouse of the employee, that the employee is needed to provide care to the child, parent, or spouse; or
 - That the employee or the employee's spouse is expecting the birth of a child
2. The medical certification must also include the following information:
 - The date on which the serious health condition commenced
 - The probable duration of the condition
 - The approximate medical facts regarding the condition for which the current need for leave exists; and
 - An estimate of the time needed to care for the individual involved, if the request is based on the serious health condition of the child, parent, or spouse of the employee
3. To request intermittent leave or leave on a reduced leave schedule, the employee must provide the following information from the health care provider:
 - A statement of medical necessity for his or her intermittent leave or reduced leave schedule
 - The expected duration of the reduced leave; and
 - A listing of the dates of his or her planned medical treatment and the duration of the treatment
4. To request intermittent leave or leave on a reduced leave schedule, based on the serious health condition of the child, parent or spouse of the employee, the employee must provide the following information from the health care provider:
 - A statement from the employee certifying the relationship of the child, parent, or spouse to the employee;
 - A statement attesting to the necessity of intermittent leave or reduced leave schedule for the employee to provide care or to assist in the person's recovery; and
 - An estimate of the expected duration and schedule of his or her intermittent or reduced leave schedule

Requests for parental leave must be submitted on the same application used to apply for family and medical leave and shall be accompanied by a written statement form certified by the health care provider. "Request for Parental Leave" should be noted on the top of the application form.

The employee is responsible for submitting both required forms to their supervisor at least 30 days in advance of the leave.

To request leave based on the adoption or placement of a child, copies of the legal orders of the adoption or placement is required.

Employee Reporting & Return Requirements

- The employee is required to report to the supervisor periodically (at least once per week) during the leave on the status of his/her leave. As an alternative, a representative may report for the employee. Failure to report periodically during the leave may result in the suspension of the family and medical leave.
- The employee must report to the supervisor if he/she will be unable to return to work at the end of the leave period and provide an acceptable reason for the delay. Failure to return to work from an approved leave of absence by the intended date and to provide an acceptable reason will be considered abandonment by the employee of his/her job.
- The employee must provide physician's re-certification for every 30 days of leave.
- Upon return to work, an employee who has been on approved leave for more than three days based on the employee's serious health condition (i.e. childbirth) will be required to present to the supervisor a doctor's release certifying fitness to return to work. This requirement does not apply to the father or adoptive/foster parent taking parental leave.

A request to return to duty with restrictions will be considered on a case-by-case basis, based on the needs of the department and the essential functions of the job.

SECTION 3

Administrative Procedural Requirements

Employer Notices

Communication of provisions of FMLA to employees is provided:

- The Office of Human Resources posts notices describing the provision of the Family and Medical Leave Act in locations available to all eligible employees (see attachment).
- All employees are sent notices describing FMLA on an annual basis
- The UHD FMLA policy statement is published on the HR web page.
- When an employee notifies the supervisor of the need for leave qualifying as family and medical leave, the employee will be provided with a summary of employees' rights and requirements under FMLA. This summary is included as part of the family and medical leave application form.
- It is the employer's responsibility to notify the employee in a timely manner that an approved leave will be considered FMLA and charged against the twelve weeks of eligible FMLA leave. If the employer fails to notify the employee in a timely manner, then the FMLA leave may not be made retroactive but will begin only with the date of notification to the employee.

Medical Certification

- If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider.
- An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act.

- If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. The third opinion shall be final and binding.
- For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request re-certification in less than the minimum period specified on the certification as necessary for such leave (including treatment).
- Upon return, a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave is required. No additional information may be acquired and clarification may be requested only for the serious health condition for which FMLA was taken.
- If an employee fails to provide a requested fitness-for-duty certification to return to work, the employer may delay restoration until the employee submits the certification.
- An employer is not entitled to certification of fitness to return to duty when the employee takes intermittent leave, since fitness for duty is addressed in the initial certification for leave.

Employment Restoration

The university may decline to restore an employee on family medical leave to his/her original equivalent position under the circumstances listed below:

- If an employee's position is scheduled for elimination as a part of an approved reduction in force (RIF) plan, the employee's family and medical leave rights (including rights to restoration of employment) end on the scheduled termination date.
- If misconduct by the employee, which constitutes grounds for termination, occurs or is discovered, the employee is subject to termination, even if the employee is on family and medical leave at the time of the misconduct or the discovery of misconduct.
- If an employee is scheduled for termination for any other reason prior to notification of family and medical leave and has received written notice of the termination, the employee's family and medical leave rights end on the previously scheduled termination date.
- If the employee is among the 10 percent highest paid employed ("key employee") by a component within the University of Houston System and determination is made by the President that restoring employment to the employee would result in substantial economic injury to the university, the employee's right to restoration of employment may end at the close of the family and medical leave period. At the time an employee in this category applies for family and medical leave, the employee must be notified that he/she may be ineligible for reinstatement.

- If the leave needs to extend beyond the approved FMLA leave period or beyond 12 weeks, the employee must apply in writing to the department for additional leave prior to the expiration of the approved FMLA leave.
 - * If the original FMLA leave was for less than the full 12 weeks available, then the employee may be granted additional FMLA leave but limited to a cumulative total of 12 weeks.
 - * Employees who still have accrued sick and vacation leave beyond the 12 weeks of FMLA may remain on such if the medical leave needs to extend beyond the 12 weeks of FMLA leave.
 - * Employees who have exhausted all accrued sick and vacation leave should contact the Benefits Office to discuss other possibilities such as sick leave pool and extended sick leave.
 - * Employees who have exhausted all paid leaves must apply in writing for leave without pay under the State of Texas leave policy

Record-keeping and On-Going Administration

It is the responsibility of the department to confirm:

- Provide the Office of Human Resources (HR) Department with all records and supporting documents related to the leave including approved FMLA applications, Personnel Action Requests (ePARs) for leave of absence and return from leave, time sheets, work schedules for reduced and intermittent leaves.
- Contact HR to discuss leave options available, accrued sick and vacation balances, policies regarding modifications to work schedule, etc. during the initial leave approval process prior to a final agreement on a leave between the department and the employee
- Notify HR when the employee returns to work, resigns, or is terminated following an approved FMLA leave.

It is the responsibility of the Office of Human Resources to:

- Verify if the employee meets eligibility requirements
- Advise the employee of their right to apply for FMLA
- Respond to the employees request for FMLA (sample letter attached) through direct action or referral of employees to the Benefits Office

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- Approve FMLA leave and advise the employee that a leave will be FMLA and counted against their twelve (12) weeks of FMLA leave.
- Maintain records of all family and medical leave taken by the employee for as long as the employee is employed by the university and for at least three years from the end of the fiscal year past the employee's termination. Medical records are to be maintained in separate confidential files and are not to be integrated into personnel files.
- Provide the employee and/or department with information on FMLA leave and other leave programs upon request.
- Process applications for other paid leaves and benefits including sick leave pool, extended sick leave, short-term disability, long-term disability, and disability retirement.
- Advise the department when the employee is approved for sick leave pool or disability so that a PAR may be prepared if necessary.
- Notify ERS of FMLA or leave without pay status on unpaid leave and advise employee of premiums due for group insurance coverage. ERS will send the billing notices for premiums due upon receipt of the notification that the employee is on leave without pay.

SECTION 4

Other Leaves & Pay

Short-Term & Long-Term Disability

Short-Term & Long-Term Disability provides you with a monthly benefit if you become disabled and unable to work. It does not provide you with job-protected time away from work:

- You must enroll in short-term or long-term insurance during your first 31 days of employment or during summer enrollment. If you enroll during summer enrollment, you must go through evidence of insurability.
- Short-term and long-term disabilities run concurrently with FMLA. If you are enrolled and qualify for the disability benefit, you will need to apply after a 30-day waiting period (90-day waiting period for long-term).
- Benefits will be reduced by income you receive from other group coverages, such as Social Security disability, Worker's Compensation, or your disability retirement plan benefits.
- While being paid through the disability plan and on family medical leave, the employee will still need to self-pay any supplemental coverage directly to ERS.
- Approval for FMLA does not guarantee approval for short-term and/or long-term disability benefits. Both pay based on the health status of the employee only and do not cover dependents.

Sick Leave Pool

The sick leave pool provides a source of additional sick leave in the event of a catastrophic illness of the employee or the employee's immediate family that causes the employee to exhaust all accrued sick leave and other leave balances. All regular employees may voluntarily transfer sick leave from their accrued balances to the UH system sick leave pool and apply for benefits from the pool.

- If the employee is seeking permission to withdraw time because of a catastrophic illness or injury, the employee must provide the pool administrator with a written statement from the licensed practitioner.
- There is a 30-day waiting period to apply for the sick leave pool.

- An employee may apply in 30-day intervals for a total of 90 days.
- Employees on FMLA are eligible to apply to the sick leave pool provided all accumulated leave has been exhausted.

Extended Sick Leave

Extended sick leave may be available to long-term employees in good standing who have become disabled and have exhausted all accrued sick leave and other leave balances. This benefit may be awarded to provide continued income from the time all accumulated paid leave has been exhausted through the end of the waiting period for long-term disability benefits to begin. It is payable even if the employee is not enrolled in the long-term disability plan.

Extended sick leave is intended for employees who have become permanently and totally disabled and does not cover an employee in the event of a short-term illness.

The President of the University or his/her designee following approval by the department head must approve the granting of extended sick leave.

Leave Without Pay

- In accordance with the terms of UHD Policy Statement 02.A.13, regular benefits-eligible employees may be granted a leave of absence without pay for sufficient reason for a period not to exceed 12 months. Faculty who take leave of absence without pay for faculty developmental reasons may be granted leave for a period not to exceed 24 months.
- Except for disciplinary suspensions, active military duty, and workers' compensation situations, all applicable accrued paid leave balances (vacation, compensatory leave, and sick leave) must have been exhausted before the leave without pay period commences. The use of accrued sick leave is, however, restricted to those circumstances that would otherwise qualify the employee for sick leave under state law and university policies (PS 02.A.08).
- A leave of absence without pay implies intent from the employee to return to work and intent from the university to return the employee to work. Subject to fiscal constraints, the employing department is required to reinstate an employee to the former position or to one of equivalent requirements and compensation upon expiration of the leave.
- A leave of absence without pay of longer than 30 days (other than for military active duty, family and medical leave, parental leave, or workers' compensation) requires the approval of the dean or department head. Leaves without pay of 30 days or less may be granted with the approval of the employee's supervisor.

- The president may grant exceptions to these policy limitations for such reasons as interagency agreements or for other educational purposes.
- Except where specified otherwise, an employee will not accrue vacation, sick leave, or state service credit for any full calendar month (i.e., from the first day of a month through the last day of a month, inclusive) on leave without pay. An employee will accrue these credits if any part of a month is paid. Also, the university makes no retirement plan contributions while the employee is on leave without pay.
- Employees may continue group insurance while on leave without pay by making arrangements with the Benefits section of the Office of Human Resources to personally pay the total amount of the premium, including what would have been the state's contribution. When on family and medical leave, the state's health premium contribution continues, but the employee must pay the employee's share of the premium personally to ERS.
- While on leave without pay, the employee is not eligible for holiday pay.

Cobra

Under the provisions of Public Law No. 99-272, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), employees and covered dependents who lose health coverage due to a qualifying event (listed below) may continue their group health and dental coverages.

Employees may continue health and dental coverage for up to eighteen (18) months when one of the following qualifying events occurs:

- Termination of employment for reasons other than "gross misconduct" (as determined by UHS).
- Loss of group insurance eligibility due to reduction of FTE.

An additional eleven (11) months (for a total of 29 months) is available if the Social Security Administration certifies that the employee or a covered dependent was disabled on the date of the employee's qualifying event, provided ERS is notified before the end of the original 18- month period.

Dependents may continue health and dental coverage for up to thirty-six (36) months when one of the following qualifying events occurs:

- Death of employee covering the dependent;
- Divorce (or dependent is dropped in anticipation of divorce); or
- Loss of group insurance eligibility as a dependent (such as, child gets married, child turns age 25, or other than natural or adopted child moves out of the employee's household).

- The employee must complete and return the COBRA election form to the Employees Retirement System of Texas within 60 days of the “Date Coverage Terminated” or the “Date of Notice”, whichever is later.

Eligible employees will have insurance continuation throughout the end of the last month they are paid. ERS will notify the employee of COBRA.

If you have questions regarding your COBRA eligibility or the completion of the Termination/COBRA Election Form, please contact ERS at: (512) 867-7711 or toll-free 1-877-275-4377.