

CF OPERATING PROCEDURE
NO. 60-40, Chapter 10

STATE OF FLORIDA
DEPARTMENT OF
CHILDREN AND FAMILIES
TALLAHASSEE, May 9, 2019

Human Resources

FAMILY AND MEDICAL LEAVE ACT

10-1. Purpose. This operating procedure provides uniform guidelines for the request and approval of leave as it relates to the federal Family and Medical Leave Act (FMLA).

10-2. Scope. This operating procedure applies to all employees of the Department of Children and Families.

10-3. References.

- a. Section 101(a)(13)(B) of Title 10, United States Code (U.S.C.).
- b. Section 110.219, Florida Statutes (F.S.).
- c. Section 110.221, F.S.
- d. 29 Code of Federal Regulations (C.F.R.) Sections 825.100 – 825.803, Family and Medical Leave Act of 1993.
- e. Chapter 60L-34, Florida Administrative Code (F.A.C.).
- f. CFOP 60-55, Chapter 1, Standards of Conduct and Standards for Disciplinary Action for Department Employees.
- g. U. S. Department of Labor, Wage and Hour Division (WHD) Publication 1420, Employee Rights and Responsibilities Under the Family and Medical Leave Act (found at <http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>).
- h. 29 C.F.R. Part 1630.
- i. 42 United States Code (U.S.C.) 12101 et seq., as amended.

10-4. Definitions. For the purposes of this operating procedure, the following definitions shall apply:

a. Son or Daughter. A biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under the age of 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence.

b. Active Duty. Duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to: Section 688 of Title 10 of the U.S.C.; Section 12301(a) of Title 10 of the U.S.C.; Sections 12302 of Title 10 of the U.S.C.; Section 12304 of Title 10 of the U.S.C.; Section 12305 of Title 10 of the U.S.C.; Section 12406 of Title 10 of the U.S.C.; or Chapter 15 of Title 10 of the U.S.C.; or any other provision of law during a war or during an emergency declared by the President or Congress so long as it is in support of a contingency operation. See also 29 C.F.R. Part 825.126(b)(2).

This operating procedure supersedes CFOP 60-40, Chapter 10, dated November 7, 2011.

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c. Covered Military Member. The employee's spouse, son, daughter, or parent who is on active duty or called to active duty status. See also 29 C.F.R. Part 825.127(a).

d. Covered Servicemember.

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, therapy or is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

e. Covered Veteran. An individual who was a member of the Armed Forces (including member of the National Guard or Reserves) and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See also 29 C.F.R. Part 825.127(b)(2).

f. Certification of Fitness to Return to Duty. A document completed by the employee's health care provider that states the employee can resume work and can perform the essential functions of the job.

g. Equivalent Position. A position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It involves the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

h. Next of Kin of a Covered Servicemember. The nearest blood relative other than the covered servicemember's spouse, parent, son or daughter, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. See also 29 C.F.R. Part 825.127(d)(3).

i. Parent. A biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee as a son or daughter as defined. This term does not include parents "in law."

j. Physical or Mental Disability. A physical or mental impairment that substantially limits one or more of the major life activities of an individual.

k. Serious Health Condition. An illness, injury, impairment, physical or mental condition that involves inpatient care as defined in Part 825.114 or continuing treatment by a health care provider as defined in Part 825.115. 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. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this operating procedure are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of Part 825.113 are met.

I. Serious Injury or Illness.

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(a) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or,

(b) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or,

(c) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or,

(d) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. See *also* §825.127(c).

m. Spouse. A husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or,

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

10-5. General.

a. The Department shall have the authority and responsibility to designate qualifying leave, including Workers' Compensation, as FMLA for eligible Department employees. An employee cannot waive their prospective rights under FMLA.

b. An employee may be eligible for FMLA if the following criteria is met:

(1) Has been employed for a least twelve (12) months; and,

(2) Has worked at least 1250 hours during the 12-month period immediately preceding the commencement of the leave and is employed at a worksite where 50 or more employees are

employed by the employer within 75 miles of that worksite. (See 29 C.F.R. Part 825.105(b) regarding employees who work outside the U.S.)

NOTE: *To be considered as eligible, employment in this 12-month period must have been within an Agency under the State Personnel System.*

c. An eligible employee may take up to 12 weeks (480 hours) in any 12-month period. The Department will calculate the 12-month period measured from the date the employee's first FMLA leave begins for any of the following qualifying reasons:

- (1) The birth of a child or placement of a child for adoption or foster care;
- (2) To bond with a child (leave must be taken within 1 year of the child's birth or placement);
- (3) To care for the employee's spouse, child, or parent who has a qualifying serious health condition; all other family relationships are excluded (grandparents, brothers, sisters, and grandchildren);
- (4) For the employee's own qualifying serious health condition that makes the employee unable to perform the employee's job;
- (5) For qualifying exigencies related to the foreign deployment of a military member who is the employee's spouse, child, or parent.

d. An eligible employee who is a covered service member's spouse, child, parent or next of kin may also take up to 26 weeks of FMLA leave in a single 12-month period to care for the servicemember with a serious injury or illness.

e. An eligible employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations.

NOTE: *Workers' compensation leave will count against FMLA leave entitlement if the employee's absence is due to a qualifying serious health condition.*

10-6. Process for Requesting Leave.

a. Employee Responsibilities. An employee must:

(1) Provide the Department at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable. If 30 days notice is not practicable (for example, because of a lack of knowledge of approximately when the leave will be required to begin, a change in circumstances, or a medical emergency), notice must be given as soon as practicable. It should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. If an employee fails to notify the Department of the need for family, medical, or military family leave in accordance with this operating procedure, any qualifying absence may still be designated as FMLA and count against the employee's entitlement.

(2) Complete the Employee Leave Request (form CF 756, available in DCF Forms) and return it to the supervisor.

(3) Provide appropriate certification from the treating health care provider to support the need for family, medical or military family leave. See paragraph 10-6c(1)(b) of this operating procedure for the list of medical certification forms.

(a) Employees do not have to share a medical diagnosis but must provide enough information to the employer so the employer can determine if the leave qualifies for FMLA protection.

(b) The Department can require a certification or periodic recertification supporting the need for leave. If the Department determines that the certification is incomplete, an employee will be provided a written notice indicating what additional information is required.

(c) The frequency of periodic recertification will be determined by information provided in the certification used for approval of leave.

(4) Return required documentation in a timely manner. Failure to do so may result in the FMLA leave request being delayed or denied and may subject the employee to disciplinary action as provided in CFOP 60-55, Chapter 1.

(5) If required upon return to work, provide a Certification of Fitness to Return to Duty (form CF 758, available in DCF Forms) to the Human Resource Service Center (HRSC) prior to or on the date of return.

(6) Notify the supervisor when utilizing FMLA leave for intermittent absences.

(a) Employee must follow the attendance procedures set by their work area. If the employee's attendance is not in accordance with the medical certification provided, the supervisor should contact the HRSC for review/clarification of anticipated time out of the office.

(b) The HRSC may request updated medical documentation if absences are not consistent with the estimated frequency or duration provided on the certification form.

(c) If absences not consistent with the estimated frequency or duration provided on the certification form and if updated information is not provided to justify the absences, disciplinary action could be taken.

b. Supervisor Responsibilities. Once an employee requests FMLA leave or the supervisor learns that an employee's leave may be for a reason that qualifies under FMLA to include illness/injury from a Workers' Compensation claim, the supervisor must:

(1) Notify the HRSC of the employee's request for leave immediately but no later than 24 hours.

(2) Assist in the collection and return of all completed forms to the HRSC. All medical documents are confidential.

(3) Ensure that the employee's timesheet is submitted accurately and approved timely at the end of each pay period. Time out of the office under the FMLA should be coded as FMLA regardless of the leave type used (i.e., sick, annual or special compensatory).

(4) Assist Human Resources in the tracking of intermittent leave usage each pay period.

(5) Ensure that the use of FMLA is consistent with the frequency and duration provided on the certification.

(6) Notify Human Resources within 24 hours of the employee's return to work or need for additional leave time.

c. Human Resources Responsibilities.

(1) Within five (5) business days, the HRSC will provide the following to the employee in writing:

(a) Employee Rights and Responsibilities.

(b) Appropriate Medical Certification Form.

1. FMLA Certification of Health Care Provider for Employee's Serious Health Condition, form WH-380-E;

2. FMLA Certification of Health Care Provider for Family Member's Serious Health Condition, form WH-380-F;

3. FMLA Certification of Qualifying Exigency for Military Leave, form WH-384;

4. FMLA Certification for Serious Injury or Illness of Covered Servicemember – for Military Family Leave, form WH-385; or,

5. FMLA Certification for Serious Injury or Illness of a Veteran for Wage and Hour Division Military Caregiver Leave, form WH-385V.

(c) Notice of Eligibility.

1. If an employee is not eligible for FMLA, the HRSC will provide a reason for ineligibility. [The employee may request a Leave of Absence (LOA), which will be approved or disapproved by the delegated authority.]

2. Eligibility will be determined for each qualifying reason, even if it is in the same 12-month period as another request.

- All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

- If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (e.g., if the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(2) Within five (5) business days of receipt of the medical certification from the employee, the HRSC must complete the Designation Notice and provide a copy to the employee and supervisor. If the employee returns to work prior to the release date stated on the medical certification, or no return date is stated, a Certification of Fitness to Return to Duty (form CF 758, available in DCF

Forms) or medical release is required. The employee should be notified of this requirement at the onset of the FMLA request.

(3) The HRSC will notify the supervisor of the estimated frequency and duration of absences that may be listed on the medical documentation.

(4) The HRSC will monitor and track the number of hours being used for FMLA.

10-7. Relationship to Paid Leave.

a. Generally, FMLA leave is unpaid leave; however, an eligible employee may choose to substitute accrued paid leave, providing the use of the paid leave complies with the applicable provisions of Chapter 60L-34, F.A.C., Attendance and Leave. The use of paid leave will run concurrent with FMLA leave.

b. If the employee is utilizing Leave Without Pay, the employee's approved leave period will then be considered authorized leave without pay.

c. An employee may apply for the Sick Leave Transfer Plan if their absence is due to their own medical condition. See CFOP-60-40, Chapter 4, Sick Leave Transfer Plan.

10-8. Benefits Coverage During Leave.

a. During a period of family or medical leave, an employee will be retained on the state health insurance plan under the same conditions that applied before the leave commenced.

b. To continue insurance coverage(s), the employee must timely pay the employee's portion of the insurance premiums which were previously paid via payroll deductions, if the employee is on Leave Without Pay. However, if the employee has sufficient personal leave balances that they wish to use, insurance premiums can still be covered via payroll deduction.

c. Failure of the employee to timely pay his/her portion of the insurance premiums may result in loss of coverage. If coverage is cancelled due to non-payment of premiums, all delinquent payments must be brought current in order for coverage to be reinstated.

d. An employee approved for FMLA leave has the option to decrease their health and/or any supplemental insurance election(s) or cancel their State Group Insurance.

10-9. Restoration to Employment. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

10-10. Failure to Return from Leave.

a. If the employee's original request for leave was less than twelve (12) weeks, the employee may submit a request for an extension to Human Resources; however, an extension cannot result in FMLA leave for more than the total allowable weeks. The request should be made as soon as the employee realizes that he/she will not be able to return at the expiration of the original approved leave period.

b. If the employee fails to return to work upon the expiration of an approved FMLA leave of absence, the employee may be subject to disciplinary action in accordance with CFOP 60-55, Chapter 1.

10-11. Enforcement.

a. Employees who have questions or concerns regarding the handling of their FMLA should contact the HRSC for assistance.

b. Employees may file a complaint with the U.S. Department of Labor, Wage and Hour Division, or may bring a private lawsuit against an employer.

c. The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

BY DIRECTION OF THE SECRETARY:

(Signed original copy on file)

SHELBY JEFFERSON
Acting Human Resources Director

SUMMARY OF REVISED, DELETED, OR ADDED MATERIAL

An investigation by the Department of Labor was concluded, which resulted in the following updates:

Definitions for Covered Service Member, Next of Kin, Parent, Serious Injury or Illness and Spouse have been updated to reflect alignment with 29 Code of Federal Regulations (C.F.R.) Sections 825.100 – 825.803.

Paragraph 10-5 has been expanded to include more detailed information pertaining to employee eligibility and designation of leave as outlined in the U.S. Department of Labor, Wage and Hour Division Publication 1420, Employee Rights and Responsibilities.

Paragraph 10-6 has been updated to better align with the U.S. Department of Labor, Wage and Hour Division Publication 1420, Employee Rights and Responsibilities as well as list revised Certification forms from the U.S. Department of Labor.

Paragraph 10-11 has been added at the request of the U.S. Department of Labor to assist employees in addressing concerns.

Previous paragraph 10-8, entitled “Relationship to Paid Leave,” has been moved to paragraph 10-7.

Previous paragraph 10-7 has been moved to paragraph 10-8 and information pertaining to insurance coverage and Leave Without Pay has been updated.