
Chapter 4 – Medical Leaves of Absence

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Section I: Sick Leave

Purpose

The purpose of this policy is to provide employees with paid leave for time away from work for personal illness or injury, medical appointments that cannot be scheduled outside work hours, or for the illness or injury of a family member.

Scope

This policy applies to full-time and part-time employees who are not in temporary or emergency positions. Part-time status is working half-time hours or greater.

A. Americans With Disabilities Act

The Americans with Disabilities Act requires consideration of accommodations for qualified employees who have disabilities. Such accommodation may be in the form of intermittent sick leave. Further policy regarding ADA will be covered in **Chapter 1**.

B. Accruing Sick Leave

1. Rate

Employees earn paid sick leave on a pay period basis as follows:

- a. A full-time employee earns sick leave at the rate of 1.25 days a month.
- b. A part-time employee earns sick leave at a proportionate rate: e.g., an employee working half-time would earn ½ day of sick leave monthly and an employee working three quarters time would earn ¾ day a month.
- c. For LDSS that do not have monthly pay periods, sick leave is accrued each pay period in an amount proportionate to that earned on a monthly basis: e.g., for LDSS with a semi-monthly pay period, the rate would be ½ day for each pay period for full time employees (for half-time employees the rate would be ¼ day).

Examples:

40 Hour Workweek (8 Hours per Day)

Monthly Accrual Rate in Days	Monthly Accrual Rate in Hours	Bi-Monthly Accrual Rate in Hours
1.25	10.00	5.00

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37.5 Hour Workweek (7.5 Hours per Day)

Monthly Accrual Rate in Days	Monthly Accrual Rate in Hours	Bi-Monthly Accrual Rate in Hours
1.25	9.375	4.6875

35 Hour Workweek (7 Hours per Day)

Monthly Accrual Rate in Days	Monthly Accrual Rate in Hours	Bi-Monthly Accrual Rate in Hours
1.25	8.75	4.375

2. Accrual

Sick leave does not accrue until the end of the pay period in which it is earned and may not be used until the first day of the following pay period.

3. Effect of Leave without Pay on Accrual

If an employee is on leave without pay at any time during the pay period, no sick leave is earned for that pay period.

4. Carrying Over

There is no limit to the amount of sick leave that is permitted to be carried over to the next year.

C. Use of Sick Leave

1. Use

Sick leave cannot be used until it is accrued. There is no borrowing against future accruals.

2. Reasons for Use

Sick leave may be used for either personal or family reasons.

a. Employee's Own Use of Sick Leave

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Unless the LDSS has set a limitation, an employee may use the full amount of accrued sick leave for the employee's own care as follows:

- (1) When medically necessary and the employee is unable to perform the essential functions of the position;
- (2) Pregnancy and child-birth related medical conditions;
- (3) Medically documented chronic conditions;
- (4) Medical appointments that cannot be scheduled outside of work hours (regularly scheduled, routine appointments should be scheduled outside of work hours, when possible);
or
- (5) Family and Medical Leave Act leave.

b. Use of Sick Leave for Family Purposes

Unless the LDSS has established different limits, as approved by the local board and the LDSS, an employee may use accrued sick leave for the care of family members as follows:

- (1) Circumstances in which sick leave may be used for family:
 - (a) When a family member has a medical condition that requires the employee to assist in the family member's care or in transporting the family member;
 - (b) The death of a family member;
 - (c) Family and Medical Leave Act leave.
- (2) A family member (whether the relationship is by birth, adoption, foster care, or marriage) includes parents, stepparents, spouse, children, stepchildren, siblings, grandparents, grandchildren and any relative by blood or marriage who resides in the employee's home.
- (3) During a calendar year, an employee may use up to eight days of Sick Leave for family sick leave.

D. Notice and Approval

1. Advanced Notice

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If an employee has a medical condition that necessitates an absence from work, the employee must notify the supervisor on the leave request form as soon as the absence is foreseeable. Medical conditions that have foreseeable absences include but are not limited to elective and non emergency surgery, regular or routine medical appointments, pregnancy, and childbirth.

2. Notice and Approval Required at All Times

For absences that are not foreseeable, or for emergency situations, the employee must provide notice as soon as practicable. **Until notice is provided and the request is approved, the time will count as leave without pay.**

E. Verification of Need for Sick Leave

1. Verification of Need May Be Required

Upon the request of the LDSS, the employee must provide verification to establish the use of sick leave. The use of sick leave will not be approved until requested verification is provided.

2. Types of Verification

The following types of verification will be deemed sufficient:

- a. FMLA health care provider certification;
- b. Statement from the medical provider that because of the medical condition the employee cannot perform the essential functions of the position, the medical facts that support this conclusion, and the estimated period of time that the employee will be absent from work; or
- c. Evidence that there was a medical appointment that could not have been scheduled during non-work hours.

3. Re-Verification

If an employee is absent for an extended period of time or on a reoccurring basis, the LDSS may request, and the employee must submit, additional verification for the need for the absence. Continued use of sick leave can be conditioned on providing the requested verification.

F. Treatment of Sick Leave upon Change in Status

1. Payment at Termination

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- a. An employee must have worked continuously for the same LDSS for five years or longer to be entitled to a payment for accrued sick leave at termination or death.
- b. When employment is terminated, the employee may be paid for accrued sick leave in a lump sum up to the maximum allowable amount. The amount of payment is the lesser of 25% of the accrued leave or the maximum payout amount as determined by the local Board and approved by VDSS.
- c. For the purpose of unemployment compensation such leave payment will be allocated as wages for the equivalent daily/weekly periods as the employee would have received had employment continued.

2. Payment at Death

In the case of death, payment shall be made to the executor of the estate. If no executor has been qualified by a court, and if sixty days have lapsed, payment for accrued sick leave, if less than \$15,000, will be made to the surviving spouse and if no surviving spouse, then to the next of kin as provided in § 64.1-132.3 of the *Code of Virginia*.

3. Right to Repurchase

An employee, who is rehired by the same LDSS within twelve (12) months from the date of a layoff or an employee who is reinstated by a grievance panel, may have the sick leave balances restored by paying the amount of any payout received at termination for accrued sick leave.

4. Leaves of Absence are Not Terminations

Educational leave, FMLA leave, military leave, and other forms of extended leave are not considered terminations for the purposes of receiving payment for accrued sick leave.

G. Transfer of Leave

As an inducement to accept an offer of employment, an LDSS may offer to credit an employee with some or all of the sick leave balances that would be uncompensated when the employee resigns from employment with another LDSS or the Virginia Department of Social Services. An employee may only be credited with sick leave if there is no break in service.

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H. Change in Employment Status

If the status of an employee is changed from temporary to probationary, regular, or restricted, sick leave credits shall be given for the period of temporary salaried employment. In addition, that period shall also be considered part of the total service in determining the rate at which the allowance for annual leave shall accrue in the new status.

I. Employee Accountability

1. The employee is responsible for knowing the amount of sick leave balances that should have been accrued.
2. An employee will be required to reimburse the LDSS for leave taken if there was not sufficient accrued leave to cover the time taken. Reimbursement may be in the form of monetary reimbursement or charging the time to other accrued paid leave. LDSS may work out a repayment plan with the employee.
3. If an employee is on leave without pay at any time during the pay period, no sick leave is earned for that pay period.
4. No matter how urgent the need for the leave may be, the LDSS has no authority to grant paid leave when there is not sufficient accrued leave.

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Section II: Family and Medical Leave Act (FMLA)

Purpose

This policy sets forth the requirements for obtaining leave under the Family and Medical Leave Act.

More detailed information regarding the Family and Medical Leave Act (FMLA) can be found at the Department of Labor (DOL) FMLA website <http://www.dol.gov/whd/fmla/index.htm>.

Scope

This policy applies to all employees who meet the eligibility criteria.

A. Definitions

1. Child (Son or Daughter)
A biological, adopted, foster child, stepchild, legal ward, or a child of a person standing in place of the parent. The child must either be under age 18 or be age 18 or older and incapable of self-care because of a mental or physical disability.
2. Employment Benefits
All benefits provided or made available to employees including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational leave, and pensions.
3. Equivalent Position
One with the same pay, benefits and working conditions (shift and schedule) and the same or substantially similar duties, conditions, privileges, and status which require equivalent skill, effort, responsibility and authority
4. Covered Servicemember
A member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

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5. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) is a federally mandated program that was signed into law on February 5, 1993 and amended by the National Defense Authorization Act for Fiscal Year 2008 and 2010. Enforcement actions under FMLA can be brought by either the United States Department of Labor or individual employees. FMLA provides eligible employees with twelve (12) weeks of job protected leave for the serious health condition of the employee or the employee's family member or for adoption, placement, or the birth of a child, or up to 26 weeks of unpaid leave to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the service member.

6. Family Member

Child, spouse or parent.

7. Health Care Provider

(a) The Act defines "health care provider" as:

- (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; or
- (2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others "capable of providing health care services" include only the following categories of medical professionals as they perform services within the scope of their practice as defined under state law:

- (1) 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);
- (2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants;
- (3) 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

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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;

- (4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
 - (5) 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.
- (c) The phrase “authorized to practice in the State” as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

8. Incapacity

Inability to work, attend school, perform other regular daily activities due to a serious health condition.

9. Intermittent Leave

A leave schedule permitting the employee to take leave periodically for a few hours a day (less than eight hours), or for a few days, on an as-needed basis. Such leave includes time taken for medical appointments or treatments.

10. Key Employees

Employees who are among the highest paid 10% of the LDSS workforce.

11. Parent

Biological parent or individual who stood in place of the parent of the employee and was charged with the duties and responsibilities of the parent.

12. Qualifying Exigency

A reason for taking FMLA leave, arising out of the fact that the employee's spouse, son, daughter or parent is on active duty in the Armed Forces, or has been notified of an impending call or order to active duty in the National

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Guard or Reserves. Qualifying exigencies fall into eight categories: 1) short-notice deployment, 2) military events and activities, 3) childcare and school related activities, 4) financial and legal arrangements, 5) counseling, 6) rest and recuperation, 7) post-deployment activities, and 8) additional activities which arise out of active duty, or call to active duty, provided that the employee and agency agree.

13. Reduced Schedule

A work schedule less than the usual number of hours worked per workweek or per workday.

14. Serious Health Condition

An illness, injury, impairment or physical or mental condition that involves inpatient care or either:

- a. A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:
 1. Treatment two or more times within 30 days by or under the supervision of a health care provider the first of which must occur within seven days of the first day of incapacity; or
 2. One treatment by a health care provider, within the first seven days of incapacity, with a continuing regimen of treatment; or
- b. Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or
- c. Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visit to a health care provider at least twice a year, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or
- d. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or
- e. Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity

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of more than three days if not treated.

15. Spouse

Husband or wife as recognized under the laws of the Commonwealth for the purpose of marriage.

16. Twelve Month Period

For the purpose of calculating FMLA leave, an LDSS may use a calendar, fiscal year, another fixed 12-month period, or a rolling 12-month period looking back from the date the leave is requested. The whole agency must use the same methodology when calculating Family Medical Leave Act leave.

B. Eligibility Requirements

To be eligible to take Family Medical Leave Act leave, the following criteria must be met by full time and part time employees:

1. The employee must have been employed by the LDSS for a total of at least 12 consecutive or non-consecutive months in the past seven years.
2. For the 12 months immediately proceeding the first day of the requested leave, the employee must have worked at least 1,250 hours as hours worked (paid leave is not counted).
 - a. Employees returning from military service who request Family and Medical Leave upon return to work must have the portion of the year they were on military leave, engaged in military activity or while deployed added to the time they worked for the employer during the year to determine if they meet the 1250 hour requirement in the determination of their eligibility for Family and Medical Leave under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).
3. Twelve weeks of FMLA leave must not have been used in the current 12 month period.
4. For part time employees, the amount of FMLA leave will be equivalent to twelve times their normal workweek, not to exceed 12 weeks.

C. Qualifying Reasons

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Eligible employees may take up to 12 weeks of unpaid Family Medical Leave Act leave per leave year for the following reasons:

1. For Family Member's Care

- a. The birth of a child (to be taken within 12 months of the child's birth);
- b. The placement of a child with the employee for adoption or foster care (to be taken within 12 months following date of placement);
- c. Serious health condition of a spouse, son, daughter or parent who is unable to care for him or herself.

2. For Employee's Care

A serious health condition that renders the employee unable to perform any one of the essential functions of his or her position.

3. Qualifying Exigency

A qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is an active duty military member of the National Guard or Reserves, or has been notified of an impending call or order to active duty in support of a contingency operation.

D. Restrictions on Usage

1. Parental Leave

- a. Leave taken for the birth or placement of a child must be used within the 12 months following the birth/placement.
- b. If both parents work for the LDSS, they are limited to a combined total of 12 weeks of FMLA leave.

2. FMLA leave is Not Cumulative

Any unused leave cannot be carried over to the next 12-month period.

3. Short-Term Conditions

FMLA leave may not be used for short-term conditions for which treatment and recovery are brief.

4. Appointments with Health Care Provider

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Routine appointments with a health care provider should be scheduled whenever possible during non- work hours.

E. FMLA leave is unpaid.

1. FMLA leave is unpaid. The LDSS may require, or the employee may request, the use of paid leave concurrently with FMLA leave. Employees have the option of using paid leave, as appropriate under each particular leave policy, for absences covered under the Family and Medical Leave Act. An agency may designate such leave as Family and Medical Leave Act leave, if it meets the conditions set forth in this policy. See Form WH-382 entitled *Designation Notice (Family and Medical Leave Act)* found at <http://www.dol.gov/whd/forms/WH-382.pdf>.
2. **Although paid time off may be required by the LDSS or requested by the employee to be used at the same time as FMLA leave, this does not apply to compensatory time. If the use of compensatory time is approved, it does not count toward the 12 week entitlement of FMLA.**

F. Procedures Regarding Usage

1. Request from Employee
The Employee should submit a written request to his/her supervisor at least 30 calendar days in advance or as soon as practicable. (Notice may be given by a family member if employee is unable to provide notice.)
2. Notice of Eligibility and Rights & Responsibilities
The form *Notice of Eligibility and Rights & Responsibilities (WH-381)* found at <http://www.dol.gov/whd/forms/WH-381.pdf> must be given to the employee five (5) business days from the request for leave under FMLA. Once all of the required information requested on the form is completed, the Local Department of Social Services (LDSS) must inform the employee within five (5) business days whether or not the leave will be designated as FMLA leave and count towards the employee's leave entitlement. This determination must be provided using the *Designation Notice (WH-382)* found at <http://www.dol.gov/whd/forms/WH-382.pdf>.
3. Certification from Health Care Provider
A request for FML must be supported by either a *Certification of Health Care Provider for Employee's Serious Health Condition (WH-380-E)* or a *Certification of Health Care Provider for Family Member's Serious Health Condition (WH-380-F)* These forms can be located at

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<http://www.dol.gov/whd/forms/WH-380-E.pdf> and <http://www.dol.gov/whd/forms/WH-380-F.pdf>. Medical certification shall be obtained by the employee and returned to his/her agency within 15 calendar days of the request or when feasible or upon return to work from an absence that may qualify under the FMLA (absent extenuating circumstances). If an employee fails to provide certification, recertification, or clarification in a timely manner then the agency may deny FMLA leave until the required certification is provided.

4. Second and Third Health Care Provider Opinions

a. Second Opinion

In general, in any case in which the employer has reason to doubt the validity of the certification provided, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified on the *Certification of Health Care Provider for Employee's Serious Health Condition (WH-380-E)* or a *Certification of Health Care Provider for Family Member's Serious Health Condition (WH-380-F)*. The health care provider designated or approved shall not be employed on a regular basis by the employer.

b. Resolution of Conflicting Opinions – Third Opinion

In general, in any case in which the second opinion differs from the opinion in the original certification provided, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified.

The opinion of the third health care provider concerning the information certified shall be considered to be final and shall be binding on the employer and the employee.

- (1) Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to FMLA benefits, including maintenance of group health benefits.
- (1)
 - (2) If the health care providers' certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave.

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- A. A copy of the second (and third) medical opinions must be provided to the employee if requested. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.
- B. When an employee is required to obtain a second (or third) opinion the LDSS must reimburse an employee or family member for any reasonable “out of pocket” travel expenses incurred to obtain these opinions.
- C. The LDSS may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinion except in very unusual circumstances.
- D. Without the written consent of the employee, the LDSS should not discuss with the health care provider the serious health condition of the employee or family member nor should the LDSS require more information than is requested on the certification form.

c. Approval of Leave

The LDSS must respond to an employee’s request for FMLA leave on the form entitled *Designation Notice (WH-382)*. Approval or denial of FMLA leave requests must be given within five (5) business days of receiving the request or within five (5) business days of receiving all of the required documentation from the employee. This form can be found at <http://www.dol.gov/whd/forms/WH-382.pdf>.

5. Provisional Designation of Leave

Without a request from an employee, the LDSS may designate provisional absences as FMLA leave if the LDSS has a reasonable basis that such leave qualifies. The LDSS may also designate provisional leave at the request of the employee pending submission of the health care provider’s certification. Such designation may be done even if the employee has been granted permission to use paid leave. Upon receipt of the medical certification, the LDSS must notify the employee of approval or denial on the form entitled *Designation Notice (WH-382)* found at <http://www.dol.gov/whd/forms/WH-382.pdf>.

6. Designating FMLA Leave Retroactively

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The agency may go back 5 business days from the date of designation, to include those 5 business days under FMLA.

G. Intention to Return to Work

The LDSS may require an employee to report periodically during the leave period on intention to return to work. This includes both Intermittent and full-time FMLA leave.

H. Intermittent Leave or Leave on a Reduced Schedule

1. Intermittent/Reduced Schedule Leave

When medically necessary, the employee may take FMLA leave intermittently or on a reduced work schedule. The amount of leave is limited to no more than 480 hours in a FMLA leave year for full time employees. The process for requesting intermittent or reduced schedule leave is the same as that for requesting full time leave.

2. Advanced Approval for Care of a Newborn or Recently Placed Child

Only if approval is granted in advance, may an employee take leave intermittently or have a reduced schedule to care for a newborn child, or a child that has been placed with the employee for adoption or foster care. (This does not apply if the leave is taken because of the serious health condition of the child.)

3. Reassignment During Intermittent Leave or Reduced Schedule Leave

An employee may be required to transfer temporarily during the period of intermittent or a reduced leave schedule to an available alternative position for which the employee is qualified and which better meets the LDSS's needs. Such alternative position must have equivalent pay and benefits but does not have to have equivalent duties.

I. FMLA Military Entitlements

Under the FMLA, there are military leave entitlements in the form of qualifying exigency leave and military caregiver leave for a covered service member.

1. Qualifying Exigency Leave

An employee may take family and medical leave for qualifying exigencies while his or her spouse, son, daughter, or parent who is member of the

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Armed Forces on active duty or a member of the National Guard or Reserves called to active duty status in support of a contingency operation.

Employees should submit a complete and sufficient “*Certification of Qualifying Exigency for Military Family Leave*” (Form WH-384) form to their supervisor.

The first time an employee requests leave because of a qualifying exigency, he or she must provide a copy of the covered military member’s active duty orders or other documentation issued by the military. This documentation must include the dates of the covered military member’s active duty service. This information need only be provided once. A copy of new active duty orders or other documentation issued by the military shall be provided if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty status of the same or a different covered military member. This form entitled: *Certification for Qualifying Exigency for Military Family Leave* can be found at <http://www.dol.gov/whd/forms/WH-384.pdf>.

2. Military Caregiver Leave

An eligible employee is entitled to receive up to 26 weeks of unpaid leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the servicemember. The single 12-month period commences the first day leave is taken to care for the covered service member and expires 12 months later.

Note: An eligible employee is entitled to a combined total of 26 weeks of unpaid leave during a single 12-month period. This includes 12 weeks of FMLA leave for any FMLA qualifying reason.

Example: An eligible employee may take 16 weeks of family and medical leave to care for a covered servicemember and 10 weeks of family and medical leave to care for a newborn child.

The employee should submit a completed “*Certification for Serious Injury or Illness of Covered Servicemember*” form (U.S. Department of Labor Form WH-385) to his/her supervisor. This form can be found at <http://www.dol.gov/whd/forms/WH-385.pdf>.

J. Effect on Employment Benefits

1. Health Care Coverage

- a. During any FMLA leave, the employee’s participation under any group health plan is continued on the same basis as coverage would

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have been provided had the employee been continuously employed during the leave period.

- b. Employees who are on leave under FMLA will pay the same portion of their health care premiums as they would if they were not on leave.
- c. The failure to timely make premium payments will terminate coverage under the same terms as if employees failed to pay premiums while employed.
- d. If an employee fails to return to work at the end of leave under FMLA, the LDSS may recover the LDSS share of premiums paid during the period of leave. However, there will be no recovery of premiums if the employee fails to return to work as a result of:
 - (1) the onset, recurrence, or continuation of serious health conditions that would have would have entitled the employee to the FMLA leave; or
 - (2) other circumstances beyond the employee's control.

2. Other Benefits

Employees on unpaid FMLA leave are entitled to the same benefits as employees on leave without pay.

LWOP is to be reported to the Virginia Retirement System (VRS). VRS employer contributions are based on creditable compensation earned by an employee each month. An employer may establish a minimum number of hours an employee must work to be eligible for the employer contribution. An employee's years of service may be affected by such absence.

K. Workers' Compensation and FMLA

When a Workers' Compensation injury causes an absence that would otherwise qualify under the FMLA, the two leaves may run concurrently and count towards FMLA leave.

L. Returning From Leave

1. Job Restoration

Upon returning from Family and Medical Leave Act leave, an employee is entitled to be reinstated to their original position, or an "equivalent

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position,” one with comparable duties, terms, conditions, compensation, and privileges of the employee’s previous position.

2. Key Employee

If an employee’s position is determined to be key (within the highest paid 10% of the salaried workforce in the LDSS), job restoration may be denied if the following procedures have been taken:

- a. The LDSS gives written notice to the key employee at the time the employee requests FMLA leave or as soon as practicable thereafter that the employee qualifies as a Key Employee. The notice must also state the potential consequences with respect to reinstatement and maintenance of health benefits if the employee is denied job restoration.
- b. If a determination is made that a substantial and grievous economic injury to the LDSS’s operations will result if the Key Employee is reinstated at the end of the leave, the LDSS shall notify the employee in writing of its determination and that it intends to deny job restoration.
 - (1) This notice must be given either in person or by certified mail.
 - (2) This notice must explain the basis for the finding that substantial and grievous economic injury will result.
 - (3) If leave has commenced, the Key Employee must be allowed a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.
 - (4) If a Key Employee does not return to work in response to the notice, the employee continues to be entitled to maintenance of health benefits during the remaining period of FMLA leave and the LDSS must continue payment of its share of health benefit premiums.
 - (5) A Key Employee’s rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to the position or the LDSS denies the reinstatement at the conclusion of the leave period.
- c. A Key Employee is entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the notice. At the time of the request, the LDSS must again determine whether there will be substantial and grievous

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economic injury if the employee is reinstated. If it is determined that substantial and grievous economic injury will result, the employee must be notified in writing, delivered in person or by certified mail of the denial of restoration.

- d. Although the employee may be denied job restoration, the employee remains on FMLA leave status for the requested period of leave and all benefits of FMLA continue until the end of the leave.

M. FMLA Records Management

Agencies must make, keep and preserve records pertaining to their obligations under FMLA. Records must be kept for at least three years and must include the information listed below:

- (1) Basic payroll and identifying employee data, including: name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.
- (2) Leave designated as FMLA, both paid and unpaid, and the dates employees took it. (If FMLA leave is taken in increments of less than a day, the hours must be noted.)
- (3) Copies of employee's notices of leave furnished to agency.
- (4) Any documents (including written and electronic records) describing employee benefits or agency policies and practices regarding the taking of paid and unpaid leaves.
- (5) Records of premium payments.
- (6) Records of any dispute between the agency and an employee regarding designation of leave as FMLA, including any written statement from the agency or employee of the reasons for the designation and for the disagreement.
- (7) Records and documents relating to medical certifications, re-certifications or medical histories of employees or employee's family members are to be maintained in separate files/records and treated as confidential medical records except:
- (8) Supervisors and managers may be informed regarding necessary restrictions on work duties and necessary accommodations.
- (9) First aid and safety personnel may be informed (when appropriate) if the

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employee's physical or medical condition might require emergency treatment.

- (10) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

N. Violations

An employee who believes that FMLA benefits have not been applied consistently with the provisions of this policy or the law may make a complaint to the Director and if not resolved may file a complaint with the U.S. Department of Labor, Wage and Hour Division. A non-probationary employee may also initiate a grievance.

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Section III: Leave Sharing

Purpose

The following are suggested procedures for the implementation of a leave sharing program for those LDSSs that elect to have such a program. An LDSS has the discretion to design a program that fits its needs.

Scope

This policy applies to employees in regular or restricted positions.

A. Eligibility

1. Exhaustion of Paid Leave Balances

An employee who desires to receive donated leave must have used all paid leave that is available for such absences (e.g., annual, sick, compensatory, special duty).

2. Family and Medical Leave Act Purposes

An employee who requests donated leave may only use such for a “serious health condition” of the employee, the employee’s immediate family member, or parental care, as defined in the Family and Medical Leave Act Policy. The fact that the employee may not otherwise qualify for FMLA leave (e.g., has exhausted the allowed 12-weeks or has not worked the 1250 hours in the past 12 months) is not disqualifying under this policy.

3. Certification of Health Care Provider

An employee is not eligible for donated leave until such time as the FMLA *Certification of Health Care Provider* form (Form WH-380*E or WH-380-F) establishes qualification for such leave. The employee will remain ineligible until the LDSS determines that the information on the form is sufficient to substantiate the need for the leave.

4. Disqualifying Absences

Employees in the following categories are ineligible for leave sharing donations:

- An employee who is on a disciplinary suspension;
- An employee who is absent because of an occupationally related illness or injury that falls within that definition under the Virginia Worker’s

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Compensation Act (whether or not benefits have been received under the Act),

- an employee who is absent because of an injury or illness that is deliberately self inflicted
- or an employee who is absent because of an injury or illness which has occurred while the employee was engaging in an unlawful act.

5. Waiting Period

An LDSS may require a waiting period to establish eligibility for leave share donations.

B. Requests / Approvals

Each LDSS participating in this program must develop a form by which an employee may request donated leave. The form should be designed so that when the employee is physically or mentally unable to make the leave request, an agent may make the request on behalf of the employee.

C. Status While on Donated Leave

An employee must be on leave without pay (LWOP) status in order to receive donated leave. Donated leave is intended to provide supplemental compensation only and does not place the employee on the equivalent of paid leave status. Accordingly, the LWOP policy benefit provisions apply to this leave period.

D. Discretionary Benefits

In developing a policy on leave sharing, an LDSS may provide greater benefits than those allowed under the LWOP policy. These augmented benefits may include

1. Health Benefits

The LDSS may pay out of local funds its portion of the health care premium for up to 12 months inclusive of the health care premium payments required under FMLA.

2. Payroll Deductions

Federal and state withholding payments will be deducted from the compensation that the employee receives due to leave sharing.

Voluntary payroll deductions may continue while an employee is receiving leave share donations provided that the compensation that the employee receives is sufficient to cover the deductions. If the compensation received

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through leave share donations is insufficient to cover such voluntary deductions, participation in the programs will be terminated unless the employee makes arrangements for timely payments.

3. Group Life Insurance

If local funds are available the LDSS may permit employees receiving leave share donations to continue to be covered under the LDSS's group life insurance policy for up to two years.

E. Leave Bank Requirements

Each LDSS that provides a leave sharing program has discretion to structure the program based on its needs. However, annual leave is the only leave that may be donated to the leave bank.

1. Annual Leave Donations

Annual leave may be donated in the following ways:

- a. Annual leave that will be lost if not used by the end of the year;
- b. Annual leave that is within the maximum accrual amount;
- c. A fixed amount per donation or per year per employee; and/or
- d. No limitations on amount or timing of donated leave.

2. Establishing a Leave Bank

There are three types of leave banks that may be established:

- a. A non-designated leave bank which permits donating to a pool to be used by any eligible employee;
- b. Donation to a designated employee of the LDSS; or
- c. A combination of the above.

3. Returning Leave Donation

If the leave bank established is one in which leave is designated for an employee and the amount of donated leave is in excess of the amount needed to cover the employee's absence, the excess leave will be returned to the donor(s) in: (1) reverse order of the receipt of donations; or (2) a pro-rata amount per donor.

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4. Reclaiming Leave

Leave given by a donor may be reclaimed by the donor only if the donation has not yet been processed.

F. Penalties for Abuse

If abuse of this policy is found, the employee will be required to repay the cost of all donated leave at the salary rate in effect at the time the employee was placed on leave without pay. Additionally, the employee may be disciplined in accordance with provisions of the VDSS Standards of Conduct.

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Section IV: Virginia Workers' Compensation

Purpose

The purpose of this policy is to advise employees of benefits that may be available to them under the Virginia Workers' Compensation Act (WCA). Employees may be eligible for benefits under the Act if they sustain a compensable injury by accident, suffer from an occupational disease or a compensable ordinary disease of life.

Scope

This policy applies to all employees.

A. Definitions

1. Injury

A physical injury by accident both arising out of and in the course of employment.

2. Occupational Disease

A disease arising out of and in the course of employment, but, unless otherwise provided by the WCA. It is not an ordinary disease of life to which the general public is exposed outside of employment.

3. Permanent Partial Disability

A permanent loss to the body that was caused by an injury or occupational disease that does not result in the employee's total incapacity. An example of a permanent partial disability is the loss of, or partial loss of, a finger.

4. Pre-Injury Average Weekly Wage

The injured employee's actual wages during the 52 week period preceding the date of injury, divided by 52.

5. Workers' Compensation Leave

A type of leave from employment which results from an employee's incapacity to work and which has been determined to have resulted from an injury or occupational disease such that the employee is entitled to benefits required by the WCA.

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B. Benefits to Which an Employee May be Entitled

Once an employee has a compensable injury or illness, the following benefits may be available:

1. Wage Replacement

An employee who suffers an injury or occupational disease may be entitled to wage loss benefits, as set forth under the WCA, if the employee is temporarily unable to return to regular employment and suffers a wage loss as a result of that disability.

2. Medical Benefits

Under the WCA, an employee may be entitled to lifetime medical benefits for treatment that is reasonable, necessary and causally related to the work related injury or disease as set forth and authorized under the WCA.

3. Permanent Partial Disability Benefits

An employee may be entitled to compensation for permanent loss of use of a “scheduled” body part as set forth under the WCA.

C. Responsibilities of an Injured Employee

1. Once an injury has occurred, the employee must notify the employer immediately. The LDSS, not the employee, is to complete the accident report.
2. The employee must choose a treating physician from a panel of at least three physicians which will be provided by the LDSS.
3. If the employee is released to “light duty work,” he or she must accept “light duty work” if offered by the LDSS.
4. If “light duty” employment is not offered by the LDSS, the employee must seek his own employment within his light duty restrictions.