

## *FMLA UPDATE*

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DATE: February 2, 1998 PERSL 1341

TO: Personnel Directors/Designees  
Labor Relations Directors/Designees

FROM: Katherine L. Megarry  
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RE: FMLA UPDATE -- recent issues.

During the course of our efforts to coordinate the State's FMLA policy (7/97) with the final federal regulations of 1/95, we came across a variety of issues that we are highlighting below. Please read the following update thoroughly and contact your labor relations representative with questions.

1. Need for increased agency compliance and consistency: As our collective experience with the FMLA has grown, we have seen an increase in the number of FMLA complaints filed. This situation highlights the need for agencies to comply consistently with the law and with State policy. A variety of problems have arisen where employees within the same agency have been treated differently under the law and/or where individual agencies have developed policies in conflict with State policy. Now that the regulations and policy are finalized, your agency may want to consider providing additional training to supervisors regarding their FMLA responsibilities.
2. Availability of 24 weeks of leave for birth/adoption of a child (to be handled in same way as any other qualifying condition). As you may remember, when the FMLA law and the State policy were initially developed, it appeared that an employee would not be allowed to "stack" two different 12-week leaves together for the purpose of the birth/adoption of a child. Over the years, this interpretation has changed. Because the State operates on a fixed (fiscal) year system, it is possible that two 12-week leaves could occur (i.e. one each fiscal year), provided both leaves are taken within the first year of the birth/adoption date.

This change in interpretation may mean that some employees were incorrectly denied the ability to “stack” their FMLA leaves for the birth/adoption of a child. If these employees took additional unpaid birth/adoption leave beyond the 12 weeks of FMLA-qualifying leave, they may be eligible for a refund of the Employer’s portion of any health and dental insurance premium costs that they incurred. Employees would only be eligible for such refund if (1) additional unpaid leave was taken within the first year of the child’s birth/adoption, but in a new fiscal year; (2) the employee remained eligible (1250 hour standard) in the second fiscal year; and (3) the employee actually continued their insurance during the period of unpaid leave. If you determine that you have an employee eligible for a refund, your DDIR should compute and process such refund.

3. Determining 1250 hours of FMLA eligibility -- when can you “re-check”? We have recently received an interpretation from the Dept of Labor that, once an employee has been approved for intermittent leave for a specific qualifying condition, they are approved for up to 12 weeks of intermittent time in that fiscal year for that condition. We are not to re-check the 1250 hour eligibility criterion each time the employee is absent, provided the employee’s health condition remains the same. The theory behind this interpretation is the following: if an employee is approved for 12 weeks of leave in a row, we do not re-check his/her 1250 hour eligibility during the leave. Thus, if an employee is approved for 12 weeks of intermittent leave, we also should not re-check. You should, however, re-check the 1250 hour eligibility standard for each new qualifying condition.
4. Reminder: Employers do not have to agree to intermittent parenthood leave. The federal law requires the granting of intermittent FMLA-qualifying leaves, if medically necessary, for serious health conditions. The law does not, however, require that intermittent leave be granted for the birth/adoption of a child. While agencies are free to approve such leave, be aware that you are not required to do so. Because employees are eligible for this type of leave for the entire first year of their child’s life, several agencies have chosen to deny requests for intermittent parenthood leave and/or to enforce the 30-day notice requirements of the law and policy.
5. Reminder: Use of vacation time while on FMLA-qualifying leave is at employee’s option. We have learned from the Dept of Labor that, once an employee has exhausted any required sick leave, they may use their vacation in any manner they wish, as long as they are still FMLA-qualified. Once their FMLA-qualification is over, we revert to our traditional policies on use of vacation.
6. Reminder: FMLA postings should be posted/re-posted. A copy of the official FMLA posting was provided to you with the 7/97 State FMLA policy. This posting should be posted prominently on each floor of each work location.

7. Medical Certification must be collected via Certification of Health Care Provider form. FMLA case law and the finalized regulations make it clear that it is the medical practitioners, and not H.R. staff or supervisors, who are to make the determinations of “serious health condition”. The regulations are also very clear that this determination must be made via the Certification of Health Care Provider form attached to the FMLA policy.
8. Certification Form to be returned to H.R. office. Although a supervisor may distribute the Certification Form to the employee, it is recommended that the form be returned to the H.R. office and not to the individual supervisor. This is because many doctors inadvertently write the employee’s confidential medical diagnosis on the Certification Form.
9. If the Certification Form is returned indicating “serious health condition”, Employer must accept that information or secure a 2nd opinion from a Health Care Provider. The Employer may choose the Health Care Provider for the 2nd opinion, but may not choose a provider with whom the Employer does frequent business.
10. Collecting of insurance premiums from employees who do not return for at least 30 calendar days. If you are having difficulty collecting these premiums, please contact your representative at the Attorney General’s office.
11. Final regulations available. If you would like a copy of the actual federal regulations, they are available via the Department of Labor’s phone number (202/219-8412) or Website (<http://www.dol.gov>).
12. FMLA information available on SEMA4 Online Help. The State’s FMLA policy (as well as the Certification of Health Care Provider form and the required FMLA Posting) will be available via the next version of SEMA4 Online Help.
13. Policy, Forms and Postings also available on DOER’s Website. Please note the Internet addresses for the following materials:

State FMLA policy = <http://www.doer.state.mn.us/sv00016.htm>

Frequently asked questions = <http://www.doer.state.mn.us/sv00020.htm>

State Sick Leave policy = <http://www.doer.state.mn.us/sv00015.htm>

Certification of Health Care Provider form = <http://www.doer.state.mn.us/sv0004.htm>

cc: Cindy Lukas, SEMA4  
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